84-7737

To be Argued by:
GEORGE SASSOWER, Esq.
10 minutes

CUIT COURT OF APPEALS
THE SECOND CIRCUIT

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AN RAFFE, individually and on
alf of PUCCINI CLOTHES, LTD.,

Plaintiffs-Appellants,

-against-

IBANK, N.A., and JEROME H. BARR,
ividually, and as executors of the
ate of MILTON KAUFMAN; KREINDLER &
KIN, P.C.; LEE FELTMAN; FELTMAN,
ESH, & MAJOR; ARUTT, NACHAMIE,
JAMIN, LIPKIN & KIRSCHNER, P.C.;
IBA & POKART, P.C.; EUGENE DANN;
ERT SORRENTINO; ROBERT ABRAMS,
Attorney General of the State of
York; JOHN V. LINDSAY; and SUPREME
RT OF THE STATE OF NEW YORK, COUNTY
NEW YORK,

Defendants-Respondents.

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APPELLANT'S REPLY BRIEF

B P/S

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CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

File No. 84-7737

Plaintiffs-Appellant,

-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,

Defendants-Respondents.

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PLAINTIFF'S REPLY BRIEF

TABLE OF CONTENTS

CASES and AUTHORITIES

PLAINTIFF'S REPLY BRIEF

PREFATORY STATEMENT

1a. In this continuing state and federal litigation, despite the lack of any pre-trial disclosure, the evidence of massive fraud, deceit, and corruption continues to surface (Universal v. Root, 328 U.S. 575; Hazel-Atlas v. Hartford, 322 U.S. 238).

b. Nevertheless, without judicial dispensation from this Court, counsel essentially limits his submission to those matters which were before the District Court and supportable by the Record on Appeal.

2a. Thus far, the District Court has not made any determinations on defendants' fee requests, some of herculian dimensions.

b. This appeal is being pressed by plaintiff and his attorney, without prejudice to their rights to appeal from such fee awards, when and if made.

3. Expressly reserved is plaintiff's rights to vacate and/or modify, pursuant to Rule 60(b), CPLR 5015, or by independent action, in this Court, as well as the Court below or the state courts.

POINT I

THE RES JUDICATA DEFENDANTS' HAVING PERPETRATED A "HOAX" ON THE DISTRICT COURT, ARE NOW MAKING A SIMILAR ATTEMPT ON THIS COURT

1a. The *res judicata* defendants, *sub silentio* admit, they perpetrated a successful "hoax" on the District Court by there contending that various pre-1984 state opinions, decisions, and interim orders precluded this action, and by now totally failing to justify such contention in their "Joint Brief" to this Court.

b. Clearly, the pre-1984 opinions, decisions, and interim orders of the state tribunal, cited by the District Court, are not entitled to claim preclusion consideration in either the state or federal court.

c. Patently, the pre-1984 opinions, decisions, and interim orders of the state tribunal, cited by the District Court, do not preclude contrary opinions, decisions, and interim orders based upon *subsequently* discovered facts, particularly where, as here, fraud upon the court is involved.

2a. Puccini Clothes, Ltd. ["Puccini"], a plaintiff in this action, is the legally helpless ward of the state court, controlled by a perfidious and corrupt Receiver, is a "person" within the meaning of the XIV Amendment and 42 USC §1983 (Antieau, Federal Civil Rights Acts [2d Ed.], §53, p. 96).

b. This legally helpless eunuch was never a party in the state court in such a manner that claim or issue preclusion could be urged or contended in the state court, a concept which seemed to have completely evaded the District Court.

3. Obviously recognizing their "hoax" has been exposed, the res judicata defendants, in their "Joint Brief" (pp. 4-5), make reference to matters which admittedly are not in the Record, with the false and misleading statement (p. 5):

> "In each of the aforementioned actions, a judgment was entered adversely to Raffe (A4-6)."

The fraud and deception upon the District Court having been exposed, the res judicata defendants have substituted another variety in this Court. We briefly meet the new challenge.

a. Based upon 1984 disclosures, Raffe moved to vacate the 1980 judgment since his right of full indemnification against Puccini (Barr v. Raffe, 97 A.D.2d 696, 468 N.Y.S.2d 332 [1st Dept.]) had been destroyed.

On March 12, 1984, Mr. Justice RICHARD S. LANE, based upon three (3) recently discovered check payments made in 1980, the state court, sua sponte concluded that Barr and Citibank had taken the money as individuals, not as executors, giving rise to a cause of action against them individually (A261).

Thereafter, fourteen (14) more such check disbursements made in 1980 to the Estate of Kaufman, were discovered by Raffe in 1984, but the state court adhered to the same determination.

The matter whether such 1984 disclosures warrants relief from the 1980 judgment under CPLR 5015 is before the Appellate Division, First Department (Barr v. Raffe, #667-690, Jan Term), and is being made the subject of an independent action as well (Weinstein-Korn-Miller, New York Civil Practice, ¶5015.13).

Even if the holding that Barr and Citibank unlawfully took the monies from Puccini a. individuals, not as executors, such holding supports this federal action on behalf of Puccini, rather than defeats it!

Are not the res judicata defendants now attempting to deceive this Court, as they deceived the District Court?

b. The only judgment or final order entered in the state proceeding bearing Index No. 1816/1980, was that of June 4, 1980, which placed the assets and affairs of Puccini in custodia legis, and prohibited everyone except the Receiver, Hon. John V. Lindsay, from handling its assets and affairs.

Notwithstanding this and another prohibitory state order, there followed about eighteen (18) months of unlawful dissipation of Puccini's assets!

How does this dissolution proceeding preclude this federal action?

Are not the res judicata defendants now attempting to deceive this Court, as they deceived the District Court?

c. With a conspiring and perfidious Receiver assuming the obligation of the appeal, the Appellate Division merely held the 1980 complaint, based upon 1980 facts:

> "on its face fails to state any valid or cognizable cause of action against the defendants. We pass on no other substantive issue". (Raffe v. Citibank, 90 A.D.2d 735, 456 N.Y.S.2d 987 [1st Dept.])

How does this holding preclude this federal action, or even another state action (175 East v. Hartford, 51 N.Y.2d 585, n. 1; De Ronda v. Greater Amsterdam, 91 A.D.2d 1088, 1089)?

Are not the res judicata defendants now attempting to deceive this Court, as they deceived the District Court?

d. The February 1983 judgment (Index No. 16792/80) was based upon the now confessed perjurious affidavit of Citibank, which vigorously denied any dissipation of Puccini's assets and especially by Barr and Citibank.

This perjurious affidavit was submitted with the knowledge beforehand that its perjurious nature would not be exposed by the Receiver, Lee Feltman, Esq. ["LF"]; his law firm, Feltman, Karesh, & Major, Esqs ["FK&M"]; or Arutt, Nachamie, Benjamin, Lipkin & Kirschner, P.C. ["ANBL&K"].

As a result thereof, Raffe recovered judgment over for full indemnification against Puccini and two-thirds contribution against the clients of ANBL&K.

It is more fully described in Plaintiff's Brief (pp. 30-33) "Judas in the Court -- Smoking Gun #3".

The procedural efforts being attempted by the res judicata defendants to obstruct the vacating of such judgment is presently before the Appellate Division (Barr v. Raffe, Feb. Term #   -   ).

An independent action is also being instituted to vacate such judgment (Weinstein, supra, ¶5015.13).

Are not the res judicata defendants now attempting to deceive this Court, as they did the District Court?

e. The state action bearing Index No. 15604/82, based on a 1982 complaint is headed for certain victory, for Raffe and his attorney, which action is primarily based on the "switching", "substituting" and "changing" of judicial papers.

It is more fully described in plaintiff's main brief (pp. 28-30) "The Resurrection -- Smoking Gun #2".

Are not the res judicata defendants now attempting to deceive this Court, as they did the District Court?

4. Plaintiff, pursuant to permission given by this Court, renews its application that the res judicata defendants, be compelled to set forth those judgment(s) or final order(s) on which they base their plea with a short concise statement of the manner upon which they make such assertion!

POINT II

SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED PUCCINI FOR THE MONIES UNLAWFULLY TAKEN FROM IT

The defendants, none of them, have made any attempt to justify the District Court's denial of summary judgment in favor of Puccini against those defendants who were the recipient of monies unlawfully taken from it after June 4, 1980.

It was in every sense of the word, larceny of judicially entrusted funds, documented and uncontroverted.

The statement of the District Court that such relief could "only by the court presiding over the Puccini bankrupcy [sic] proceedings" (A16).

POINT III

RASHBA & POKART -- THE FRAUD UPON THE COURT

1a. The judicial designation of Rashba & Pokart ["R&P"], in direct violation of the mandatory, non-discretionary provisions of 22 NYCRR §660.24, is, in the words of the rule "null and of no effect" [subd. "f"].

The R&P appointment having been made in violation of the rule, to evade the prohibitory purpose of the rule, this Court should proclaim the appointment "null and of no effect", as a ministerial pronouncement set forth by the rule itself (Tango v. Tango, 61 N.Y.2d 34, 40-41).

b. The appointment being jurisdictionally defective (Ellentuck v. Klein, 570 F.2d 414, 424 [2d Cir]; LaPier v. Deyo, 100 A.D.2d 710; 32 NY Jur, Judges, §43, p. 394), which R&P's attorneys did not controvert in the District Court, nor do they controvert in this Court, it is a nullity even when the statute does not so provide.

Where the appointment is jurisdictionally defective, there is no immunity, absolute or otherwise (LaPier v. Deyo, supra), the R&P Brief (Point III, p. 13-14), to the contrary notwithstanding.

c. The issue not having been adjudicated in any state court by any judgment or final order, this Court is free to adjudicate the matter with the same force and effect as if made by the state court (cf. Ellentuck v. Klein, supra).

2. As a matter of law, even had there been full disclosure, a firm of accountants [R&P] may not be appointed to investigate its client [K&R], and those who "laundered" monies to it [ANBL&K], even if it were an unrelated transaction, which at bar, it was not (Scott v. The Brooklyn Hospital, 93 A.D.2d 577; Schmitt v. Kantor, 83 A.D.2d 862; Murphy v. Telesha, 67 A.D.2d 701; De Camp v. Good Samaritan Hospital, 66 A.D.2d 766).

3a. R&P was designated as investigatory accountants, admittedly based on the accusations that K&R and ANBL&K had dissipated Puccini's judicially entrusted assets.

b. Neither R&P, nor LF, nor FK&M, nor K&R, nor ANBL&K disclosed at the time of the appointment that K&R were the clients of R&P or that ANBL&K had unlawfully taken $10,000 from Puccini, "laundered" $6,200 through its account and paid same to R&P in payment of a bill to K&R.

Nor was such relationship thereafter volunteered by the defendants. It was plaintiff and his attorney, who forced the exposure!

c. Thus, under "color of law", with the pre-existing relationship concealed, investigatory accountants were appointed to investigate charges of larceny against its client and those who "laundered" monies to it!

d. Plaintiff does not know of any decision, in any jurisdiction, which would not invalidate such appointment as a "fraud upon the court" by reason of such concealment (Commonwealth Coatings v. Continental, 393 U.S. 145; International v. A/S Rosshavet, 638 F.2d 548 (2d Cir.), cert. den. 451 U..S. 1017).

In *Cohen v. Hechtman* (187 Misc. Rep. 994, 66 N.Y.S.2d 305 [Sup. N.Y]), the Court stated (995, 306):

> "Motion to remove receiver granted. The person appointed as receiver was heretofore convicted ... of the crime of criminally receiving stolen property ... . This fact was not disclosed to the court prior to or at the time the appointment was made and it should have been ... . One appointed or about to be appointed receiver is under an affirmative duty to inform the court of any matter which involves or concerns his reputation and integrity. Failure or omission to do so is a fraud on the court. .... No explanation is offered by the receiver for his failure and omission to apprise the court of his previous record nor has he seen fit to inform the court of the subject matter involved in the crime of which he was convicted and the extent of his connection therewith. He apparently labors under the delusory impression that mere expiation for the crime excused the obligation or necessity to inform the court of his previous record; that he paid his debt to society. In the circumstances, he is held to be an unfit person for the office of receiver and was ineligible and disqualified for appointment to such office and he is removed therefrom."

4. The Rashba Report of March 5, 1984, is, on its face, deceptive and a fraud upon the federal court, as well as the state court.

a. Nine (9) days before March 5, 1984, the Receiver swore in an affidavit to the District Court that R&P assured him that he had all of Puccini's financial books and records (A78). The R&P report reveals most of them are now missing (A185-186)!

Q. Since Puccini's books and records were exclusively in the custody and control of K&R, ANBL&K, or their clients, and the Receiver since June 4, 1980, why did not R&P telephone K&R and ANBL&K and inquire about the whereabouts of the balance of such books and records?

A. Because these co-conspirators do not wish to reveal the contents of such missing books and records!

Q. If R&P truly did not know where the $6,200 in 1980 came from in payment of its bill to K&R, would not an unsupported withdrawal, in favor of ANBL&K in the sum of $10,000 given them a sufficient clue to have at least telephoned K&R and ANBL&K and inquired?

A. R&P did not telephone K&R or ANBL&K to find out how they were paid the $6,200 in 1980 (if in fact it did not know), because it tried to conceal the fact that the payment was "laundered" and ANBL&K received $3,800 "ice" for such "laundering"!

Q. Why did not R&P report the reasons for all the unlawful payments from Puccini's account to ANBL&K?

A. Because the unlawful payments from Puccini were made to ANBL&K for services not rendered for Puccini, but to others!

Q. Why did not R&P report clearly state that the seventeen (17) checks made payable to the clients of K&R were designated as "rent and utilities" for a period of seven months?

A. Because an up-front statement that approximately $6,500 was paid for "rent and utilities" over a period of seven (7) months would have clearly revealed that a "gross income of $512" was absurd, and in fact there was the unexplained disappearance of Puccini massive inventory while in defendants' control!

b. The Receiver swore that he gave R&P the judicially approved assignment of April 6, 1983 to it the following month, in May (A76).

R&P swore that he received it on November 10, 1983 (A91) -- six months later!

c. When the defendants are requesting summary judgment, the factual issue needs no resolution, only that an issue exists.

Nevertheless, to resolve any and all doubt demand is made that all the defendants bring to this Court, on oral argument, all Puccini's financial or financially related books and records, for this Court's inspection and disposition.

POINT IV

SUMMARY JUDGMENT IN FAVOR OF HON. JOHN V. LINDSAY WAS AND IS PREMATURE

1a. Neither plaintiff nor his attorney was privy to the event(s) and transaction(s) wherein Hon. John V. Lindsay ["JVL"] or a member of his law firm, Webster & Sheffield, Esqs. ["W&S"], gave or allowed the reins of authority to fall into the hands of K&R.

b. Hard earned reputations should not be blithely placed at the mercy of reckless and irresponsible pleading and accusations.

c. Nevertheless, there is a paucity in the papers submitted by JVL and W&S, both in the District Court and in their Brief to this Court, which seems to cry of a story not completely told.

d. Whether JVL and W&S were "duped" into relinquishing "color of law" in favor of K&R or their inaction was the result of a unilateral blunder of the first magnitude, is, at best, unclear and should be left undetermined until, at least, after pre-trial disclosure, which the District Court stayed.

e. In any event, in plaintiff's view, "color of law" attached on June 4, 1980 when Puccini's assets and affairs became custodia legis, and did not need the appointed receiver to qualify before §1983 was triggered.

POINT V

THE SUPREME COURT AND THE ATTORNEY GENERAL EVADE THE LEGAL ISSUES INVOLVED

1. The wholesale involvement of the State, the Supreme Court (and its justices), and the Attorney General in the Puccini matter cannot be blithely immunized under the aegis of XI Amendment and the (tort) doctrine of judicial immunity without a factual examination of the underlying transaction.

It was the Supreme Court and its justices who vested themselves with title and right of possession to Puccini's assets, and consequently, as a matter of law, fiduciary and constitutional responsibilities with respect to same.

Thus, the Attorney General seems to argue that a federal court could not compel him, the Supreme Court, and/or its justices from delivering to a federal forum Puccini's books and records so that it might prosecute its action therein.

Thus, the Attorney General seems to argue that a federal court could not compel the Supreme Court and its justices to render an account of Puccini's assets from the date it became custodia legis to the present time.

Such relief could be granted Puccini in the federal court against a receiver, who is merely the agent of the court, and consequently could be granted against Hon. Xavier C. Riccobono, the Administrative Judge of the Supreme Court of the State of New York, County of New York.

2. Dismissal is only warranted, if under all circumstances, no relief could be granted in favor of plaintiff against the Supreme Court, its justices, or the Attorney General, whether clearly requested in the complaint or not.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND SUMMARY JUDGMENT AWARDED PUCCINI FOR ASSETS UNLAWFULLY TAKEN FROM IT SINCE JUNE 4, 1980, WITH COSTS

December 31, 1984

Respectfully submitted,

GEORGE SASSOWER, Esq.
Attorney for appellant.

GEORGE SASSOWER, Esq., an attorney, admitted to practice law in the courts of the State of New York, does hereby affirm the following statement to be true under penalty of perjury:

On December 31, 1984, I served plaintiff's Reply Brief upon Hon. Robert Abrams; Kreindler & Relkin, P.C.; Feltman, Karesh & Major, P.C.; Arutt, Nachamie, Benjamin, Lipkin & Kirschner, P.C.; Webster & Sheffield, Esqs.; Schneck, Weltman, & Ives, Esqs.; D'Amato & Lynch, Esqs.; the attorneys for defendants, at their last known addresses by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: December 31, 1984

GEORGE SASSOWER