85-7471

To be Argued by
GEORGE SASSOWER, Esq
15 minutes

CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

---x

HYMAN RAFFE, individually and on behalf of PUCCINI CLOTHES, LTD.,
Plaintiffs-Appellants,
GEORGE SASSOWER, Esq.; A.R. FUELS, INC., and MADISON HEAT CORPORATION,
Appellants,

File No. 85-7471

-against-

CITIBANK, N.A., and JEROME H. BARR, individually, and as executors of the Estate of MILTON KAUFMAN; KREINDLER & RELKIN, P.C.,
Defendants-Respondents,

and

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; and SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,
Defendants.

---x

APPELLANTS' BRIEF

GEORGE SASSOWER, Esq.
Plaintiffs-Appellants
2125 Mill Avenue,
Brooklyn, N.Y. 11234
(718) 444-3403

I N D E X

TABLE OF CASES and AUTHORITIES

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APPELLANTS' BRIEF

PRELIMINARY STATEMENT

1a. This was a contrived, jurisdictionally defective, civil contempt proceeding, commenced by Notice of Motion returnable May 24, 1985 (A7); terminating into an Order, per Hon. Eugene H. Nickerson, dated June 7, 1985; holding appellants, Hyman Raffe, George Sassower, Esq., A.R. Fuels, Inc., and Madison

Heat Corporation in non-summary civil and criminal contempt, with provisions for incarceration and continuing penal fines, all without any trial or hearing (A2).

b. There was no written decision by the District Court below.

2a. Examined chronologically inverse, it becomes clear that this entire proceeding was a sham, since presently, despite full payment of the judgments, the appellees still insist on examining the appellants and other witnesses in order to stay incarceration and the continuing fines, under the Order appealed from!

b. Examined chronologically inverse, it further clear that this entire proceeding was a sham, without subject matter jurisdiction, as the appellees concealed from the District Court, as well as this Court, from the commencement of this proceeding to the present time, that they had restrained the assets of the judgement debtors, which made contempt a proscribed and prohibited remedy (CPLR §5104; Judiciary Law §753[3]).

c. This proceeding proliferates with appellees' overt deceit, in the District Court, as well as in this Court, as an examination of the proceedings reveal.

d. Appellants' request for sanctions (Rule 43[d]), is without prejudice to any action for damages for such deceit (Judiciary Law §487), as well as for the constitutional and tortious interference with appellants' persons and property.

3a. This supplementary proceeding in federal court, bottomed on New York law (Rule 69 of the Federal Rules of Civil Procedure), is based on a judgment secured by appellees against appellants Hyman Raffe ["Raffe"] and George Sassower, Esq. ["Sassower"] in the sum of $18,669.17 [one-half against each].

b. The appeal from such award [#85-7251] has been consolidated with the instant appeal, by judicial directive.

c. Most of the defendants have agreed to wait until the outcome of this consolidated appeal for payment. Appellees, without prior notice of warning chose not to, but without request or demand served subpoenas duces tecum on the appellants.

d. There is no evidence that had the appellees made request for payment prior to the disposition on appeal, that it would have been refused.

4a. To repeat -- The factual presentation will reveal that although full payment was made to satisfy the judgments involved in this proceeding, the appellees insisted upon, and do insist, upon harassing appellants by having them, members of their family, and business associates, submit to examinations in supplementary proceedings.

b. The irresistible conclusion is that appellees, not appellants, are contemptuous, and misusing the judicial machinery!

QUESTIONS PRESENTED

1Q. Can subject matter jurisdiction in contempt be imposed on the court by deceitfully not disclosing that appellants' property had been made the subject of execution restraints (CPLR §5104; Judiciary Law §753[3])?

A. The question was not answered by the District Court.

2Q. Where the proceedings seek incarceration, fines, and penalties, do the appellees' owe an obligation to the courts to set forth the essential operative facts truthfully and with crystal clarity?

A. The result arrived at by the District Court, as well as this Court, reveal the boldness of appellees' deceit.

3Q. Where there is no competent proof that appellants defaulted at any time, could appellants be convicted for civil <u>and</u> criminal contempt without a hearing or trial?

A. Impliedly, the Court below held in the affirmative.

4Q. Where it is conceded that it was the appellees, not appellants, who defaulted, could appellants be convicted for civil <u>and</u> criminal contempt, without a hearing or trial?

A Impliedly, the Court below held in the affirmative.

5Q. May a "civil contempt" proceedings be transmogrified into "civil <u>and</u> criminal contempt" <u>at its final stage</u>, without notice, warning, or hearing?

A Impliedly, the Court below held in the affirmative.

6Q. Does the court have subject matter jurisdiction in contempt when twice the amount of the monies due has been restrained and levied upon by the U.S. Marshal, at the behest of appellees?

A. Impliedly, the Court below held in the affirmative.

7Q. Does the court have subject matter jurisdiction once the amount due and owing <u>has been paid</u> to a United States Marshal, pursuant to restraint and levy?

A. Impliedly, the Court below held in the affirmative.

8Q. Did the District Court have personal jurisdiction over the appellants, or any of them, in view of the patent deficiency in service, without a trial or hearing on the subject?

A. Impliedly, the Court below held in the affirmative?

9Q. Is there a "wilfull default" by appellants, when the appellees defaulted, then ex parte secured an Amended Interim Order, changing the return date, when appellant immediately notified both appellee and the Court that he was engaged in a state court trial on the new date set?

A. As a result of such absence, because of an actual trial engagement, appellants transmogrified a "civil contempt" proceeding into a "civil and criminal contempt" proceeding.

10Q. Can a "civil contempt" proceeding be transmogrified into a "civil and criminal contempt" proceeding, without any statutory or constitutional warning, by merely requesting "fines" on page 8 of the moving affidavit (A54).

A Impliedly, the District Court held in the affirmative.

11Q. Once it is recognized that "penal fines" are requested, must the District Court respect appellants' right not to incriminate himself (A66)?

A. The District Court disregarded the invocation of appellants constitutional privilege, and entered the Order being appealed.

12Q. Can an order of "civil and criminal contempt" provide that appellants must submit themselves to examination in supplementary proceedings, albeit full payment of the judgments having been made, in order to stay the provision for incarceration and the $4,000 per day penalty?

A Impliedly, the District Court held in the affirmative.

STATEMENT

1a. By Notice of Motion, returnable May 24, 1985 (A7), appellees moved to hold appellants in civil contempt for failure to honor a subpoena duces tecum on April 25, 1985.

b. The supporting affidavit did not disclose that appellees had in their possession a Dunn and Bradstreet report, dated August 9, 1984, that Raffe's assets were about $10,000,00 (A57), and a Bishop Service Report, dated June 22, 1983, revealed no unfavorable information, and "a man of substantial wealth ... a millionaire" (A59).

c. CPLR §5104 and Judiciary Law §753 [3] provide that contempt is not an available remedy when Article 52 remedies are available (Wides v. Wides, 96 A.D.2d 592, 465 N.Y.S.2d 285 [2d Dept.]).

2. At no time, to this date, did appellees disclose to the District Court <u>or</u> this Court, the Circuit Court of Appeals, that they had:

a. prior to May 15, 1985, served an information subpoena on American Express, requesting information with respect to Raffe's personal American Express Card Account (A33). Whether such needless intrusion into Raffe's personal affairs, purportedly based on a judgment of less than $10,000 with respect to one worth $10,000,000, is actionable, is not directly in issue, but is indicative of appellees' true motives in this proceeding.

b. prior to May 17, 1985, restrained, at Raffe's bank, twice the amount due from him (A34), and thereafter restrained his brokerage account (A44) (<u>Lugar v. Edmondson</u>, 457 U.S. 922; <u>Warren v. Delaney</u>, 98 A.D.2d 799, 469 N.Y.S.2d 975 [2d Dept.]).

c. prior to May 17, 1985, issued an execution to the United States Marshal. Acknowledging same, National Westminster Bank wrote to the U.S. Marshal and appellees that it would remit the amount necessary to satisfy Raffe's judgment in about 10 days (A22).

d. prior to May 28, 1985, restrained Sassower's certificate of deposit at National Westminster Bank (A36).

3a. Although all the subpoenas were not properly served <u>it was uncontroverted</u> that all the appellants were (A20):

> "ready, willing and able to submit to an examination at the place we [Sassower and Gerstein] were at, to wit., 60 Center Street, New York, New York, and Mr. Gerstein nor any other member of his firm requested such examination.
>
> In fact the day before, [Sassower] informed one of [Gerstein's] employees that if his firm desired such examination the following day at 60 Center Street he should advise [Sassower], or if he desired it any other day instead. [Sassower] never received any response, only the instant motion papers.
>
> [Sassower] must have spoken to Mr. Gerstein at least ten times since service of this motion, and he never requested such examination.
>
> Any convenient time that Mr. Gerstein desires this examination, if your deponent is available he will submit to such examination."

b. The aforesaid offer was made notwithstanding the fact that on their face, the record reveals Sassower's subpoena was not timely served [CPLR 5224(b)] (A14); nor properly served on Raffe [CPLR 2103 (b)(2)] (A18); nor tender made of any fees to A.R. Fuels or Madison Heat Corp. [CPLR 5224(b)] (A18).

4. In addition to the aforementioned, appellees issued and served subpoenas in supplementary proceedings on Joan Raffe, Raffe's wife (A31); James Carlin, Raffe's accountant; and Carlin & Lask (A32), Carlin's firm.

5a. Despite the aforementioned undisputed facts, Michael J. Gerstein, Esq. ["Gerstein"] in his supporting affidavit on this motion, stated (A11):

> "Sassower, Raffe, Madison Heat Corp. and A.R. Fuels Inc., respectively, failed to appear as required on April 25, 1985 and accordingly have wholly failed and neglected to comply with the provisions of the subpoenas duces tecum and are now in default.
>
> This default is wilful and intentional and has impaired and impeded the collection of the judgment. The conduct of the judgment debtors was calculated to and actually did impede, impair and prejudice the rights and remedies of the judgment creditor.
>
> ... Their conduct (as well as the conduct of the fuel oil companies controlled and/or owned by Raffe) in ignoring process issued in connection with proceedings to enforce the aforesaid judgment is a continuation of their outrageous tactics and

> shows the most flagrant contempt for and disregard of, this Court. Only by such an award of additional attorneys' fees can Sassower and Raffe be dissuaded from further disregard of their obligations. Accordingly, it is requested that the movants be awarded the additional attorneys' fees incurred with regard to the enforcement of this judgment including fees incurred in the instant motion."

b. The proceedings against Madison Heat and A.R. Fuels were clearly improper (Long Island Trust v. Rosenberg, 82 A.D.2d 591, 442 N.Y.S.2d 563 [2d Dept.]).

c. Furthermore, Sassower's opposing affidavit pointed out (A19):

> "Insofar as HYMAN RAFFE is concerned, the motion by Kreindler & Relkin, P.C. is moot since they have restrained twice the amount due (Exhibit 'A' [A22])."

d. Exhibit "A", a letter from National Westminster Bank, dated June 17, 1985, with a copy to the U.S. Marshal and Kreindler & Relkin, P.C. which states that twice the amount due was restrained and levied upon and that it will remit in about 10 days to the U.S. Marshal.

6a. Thus, except for Mr. Gerstein's conclusory hyperbole, there was no jurisdictional predicate for contempt (CPLR §5104; §5225[b]).

Indeed, CPLR §5104 and Judiciary Law §753[3], specifically excludes "contempt" as a remedy in the situation at bar. It is only contemptuous:

> "to disobey an order for the payment of money in a case where, by law, execution cannot be awarded for the collection of such sum" (21 NY Jur.2d Contempt, §25., at p. 250).

b. On Friday, May 24, 1985, Mr. Gerstein, never mentioned the restraints that were placed on Raffe's and Sassower's assets. His Honor never delved into the issues, but merely designated his Courtroom as the place of the examination, which His Honor set as the next business day, to wit., Tuesday, May 28, 1985 at 4:00 p.m.

c. Sassower arranged his schedule accordingly.

d. Having heard about some of Mr. Gerstein's remarks to Judge Nickerson, on May 24, 1985, from counsel who was present on behalf of appellants, Sassower served and filed an additional affidavit of May 28, 1985, which reads as follows (A27):

> "1a. Respectfully requested is an opportunity to respond to the oral remarks made to this Court by Michael J. Gerstein, Esq., once a transcript of the proceedings of May 24, 1985 becomes available.
>
> b. The documents set alongside the remarks of Michael J. Gerstein, Esq., should leave no remaining doubt, as to the truth.
>
> 2a. In addition to restraining twice the amount due by Mr. Raffe, which appears, ipso facto, to be tortious (Lugar v. Edmondson, supra; Warren v. Delaney, supra); the subsequent service upon Mr. Raffe's wife, on May 25, 1985 (Exhibit "A" [A31]); his accountants, on May 21, 1985 (Exhibit "B" [A32]); and examination of Mr. Raffe's personal affairs (Exhibit "C" [A33]), are clearly tortious conduct.
>
> b. In any event, deponent contends once a judgment creditor restrains twice the amount of the indebtedness (Exhibit "D" [A34]), there can no longer be supplementary proceedings.
>
> c. This Court has been and is being abused by a proceedings which are null and void.
>
> d. To confirm such harassing tactics, the firm of Feltman, Karesh & Major, Esqs., also subpoened Sam Polur, Esq., (Exhibit "E" [A35]), after also restraining twice the amount of the indebtedness, and suit has been commenced because of such misconduct by that firm.

3a. Deponent finds nothing in the moving papers indicating anything "wilfull" in the so-called non-appearance.

The point is deponent was ready and willing to submit to an examination at the place that the Kreindler & Relkin, Esqs., were at, not at a place they were not.

b. In view of deponent's willingness to submit to such examination at 60 Center Street, if the Kreindler & Relkin firm believed they desired it at 500 5th Avenue, they should have advised deponent.

c. The same charade occurred with Mr. Polur who appeared at the Feltman offices, at the date and time set, and they refused to hold an examination, preferring to adjourn same, to which he objected.

Deponent is reasonably certain that had he appeared at 500 Fifth Avenue, the same charade that occurred with Mr. Polur would have been encountered.

d. Also unmentioned by the Kreindler firm is that they have attached a Certificate of Deposit which he holds in trust for his daughter (Exhibit "F" [A36]).

e. Any default was by the firm of Kreindler & Relkin, P.C., as evidenced by the many subsequent telephone calls wherein the subject was never even mentioned by Mr. Gerstein nor any member of the Kreindler firm."

7a. Without being consulted or given prior notice, Mr. Gerstein obtained, <u>ex parte</u>, an "Interim Order" (A24), which set the examination at 3:00 p.m., instead of 4:00 p.m., the time initially set by Judge Nickerson (A23).

b. Sassower, again re-arranged his schedule, in order to attend at 3:00 p.m.

8a. On Tuesday, May 28, 1985, at 3:00 o'clock in the afternoon, it was Mr. Gerstein, his firm, Kreindler & Relkin, P.C., and the appellees that defaulted, not appellant.

b. Sassower appeared at Judge Nickerson's courtroom at precisely 3:00 p.m., waited until 3:22 p.m., and with no one appearing from the Kreindler & Relkin, P.C. firm, left the courthouse.

During such 22 minute stay, Sassower spoke to Judge Nickerson's male and female law secretaries in the courtroom, and the time he departed is confirmed by the Clerk's Time Clock, when he filed a related affidavit with the Clerk of the Court (A27).

c. In Sassower's affidavit of May 29, 1985, he stated (A41):

> "b. His Honor can confirm with his law secretaries that they saw your deponent in the courtroom at 3:15 p.m.; and one of the trial attorneys before His Honor [to His Honor's left], can verify that he saw your deponent in the Courtroom, according to the Court's wall clock, at 3:01 p.m.
>
> 3a. To make sure that your deponent was in the correct place, your deponent asked His Honor's female law secretary, if indeed he was in the correct place, since your deponent did not have such Order available at the time.

b. His Honor's law secretary stated to your deponent that it was his 'responsibility to make sure that he was in the correct place'.

c. After verifying that deponent was indeed in the correct place, and extending that logic to Mr. Gerstein that it was also his 'responsibility to make sure that he was in the correct place at the correct time', your deponent left.

d. At such conversation at about 3:15 p.m. there was no indication by either of His Honor's law secretaries that they had seen Mr. Gerstein that day or heard from him.

d. Deponent left the courtroom at 4:20 p.m. and was in the Clerk's Office at 4:22 p.m., where he filed his affidavit (A27).
. . .

4. Left also for another day is the needless trouble and difficulty in changing deponent's plans so that he could be in His Honor's court at 4:00 p.m., and then changing it once more, so that it could be 3:00 p.m.

5a. Annexed hereto is still another restraining subpoena, dated May 22, 1985, against Mr. Raffe's assets (A22).

9a. Thereafter, after Mr. Gerstein defaulted, he, ex parte, saw Judge Nickerson and had the "Interim Order" amended, changing the date and time of the examination to Thursday, May 30, 1985, at 10:00 a.m. (A38).

b. Except for the physical change, there was no reason set forth or record made of what took place, or what was said, ex parte, to affect such change.

c. Nevertheless, with unmitigated gall, there followed a barrage of criticism from appellees faulting Sassower for (1) not waiting longer; (2) not telephoning Kreindler & Relkin, P.C. so that Sassower would have learned that Gerstein would be late; and (3) for not seeing some privately retained "phantom" stenographer (A49).

d. Evaded is the question as to why Gerstein did not telephone Sassower's office or the Court with the advise that he would be late; or why he was late; or who or where was his "phantom" stenographer, who allegedly was present, but not seen.

10a. Again without proper service of the "Amended Interim Order" on any appellant, Sassower submitted an affidavit of May 29, 1985, which stated (A40):

> "1a. This affidavit is not intended as an acknowledgment that your deponent was properly served with any Order directing his appearance on May 30, 1985, at 10:00 a.m.
>
> b. It is intended to advise the Court that your deponent told Michael J. Gerstein, Esq., at about 1:00 o'clock this afternoon that he was actually engaged on trial tomorrow [peremptorally against all sides], and would be unable to physically attend His Honor's Court.
>
> c. Left for another day was Mr. Gerstein's response.

b. In a Brief served about two years ago upon the Kreindler & Relkin firm, deponent stated:

> Creditors are entitled to no more than full payment (Honeyman v. Jacobs, 306 U.S. 539, 544-545, 59 S.Ct. 702, 704, 83 L.Ed. 672, 676) and may not complain when 'they get no more than that' (Gelfert v. National City Bank, 313 U.S. 221, 233, 61 S.Ct. 898, 903, 85 L.Ed. 1299, 1304).' "

b. This affidavit of actual engagement was before the Court on May 30, 1985, and indeed Sassower went to trial that day in state court.

11a. Based upon such trial engagement elsewhere, on Monday, June 3, 1985, Mr. Gerstein secured an "Order to Show Cause why Hyman Raffe, George Sassower, A.R. Fuels, Inc., and Madison Heat Corporation Should Not Be Held In Contempt."; (a) which acknowleged Gerstein's failure to timely appear on May 28, 1985; (b) omitted anything about Sassower's prior trial engagement in a state court, and thus according to Gerstein, Sassower's default was "wilful and intentional" (A50); (c) and still never advised the court of the U.S. Marshal's restraints and levy.

b. Instead, with more conclusory, but baseless hyperbole, Gerstein stated (A50):

> "This (May 30, 1985) default is wilful and intentional and has impaired and impeded the collection of the judgment. The conduct of the judgment debtors and witnesses was calculated to and actually did impede, impair and prejudice the rights and remedies of the rights and remedies of the judgment creditor. ... Their conduct (as well as the conduct of the fuel oil companies controlled and/or owned by Raffe) in ignoring both the original subpoenas issued in connection with proceedings to enforce the aforesaid judgment, and also ignoring this Court's order of May 28th, is a continuation of their outrageous tactics of defiance, and shows the flagrant contempt for, and disregard of this Court."

c. Continuing, Mr. Gerstein, on page 8, of his affidavit, stated (A54):

> "Accordingly, it is requested that Raffe, Sassower, A.R. Fuels and Madison each be fined $1000 per day until they appear for deposition, plus all attorneys' fees incurred by Kaufman's Estate and my firm in enforcing this judgment. Upon information and belief, Raffe is a multi-millionaire, and A.R. Fuels & Madison have a net worth of millions of dollars (see credit reports annexed as Exhibit 'F' - A57-A62).

12a. Sassower, responded as follows (A63):

> "1a. This affidavit is made with respect to the Contempt Order to Show Cause, dated June 3, 1985; served in the late afternoon or evening of June 4, 1985; seen June 5, 1985; which requires personal service by June 6, 1985 'before 4:00 P.M.'.
>
> b. Mr. Gerstein has been advised that he may, if he desires, hand pick-up a copy of this affidavit this afternoon.

c. By reason of prior engagements and commitments, the aforementioned, including appearance on such short notice, is impossible, except on pains of irreparable harm to third parties.

d. Additionally, since the only issue before the Court is 'Contempt', which, as a matter of law, must be disposed of by a hearing, a personal appearance would be a waste of judicial time.

e. By the simple expedient of asking your deponent whether he will be available before making these short, non-emergency, two day applications, these problems can be avoided by Mr. Gerstein.

f. The record is clear, the intent is to harass because of deponent's evidence of the larceny, perjury, and general corruption of the Kreindler & Relkin, P.C. firm, as partially revealed in the Appellants' Brief appealing the judgment of His Honor which was served and filed yesterday in the Circuit Court of Appeals.

2a. In deponent's affidavit of May 29, 1985, he stated:

> 'This affidavit is not intended as an acknowledgment that your deponent was properly served with any Order directing his appearance on May 30, 1985, at 10:00 a.m.
>
> b. It is intended to advise the Court that your deponent told Michael J. Gerstein, Esq., at about 1:00 o'clock this afternoon that he was actually engaged on trial tomorrow [peremptorally against all sides], and would be unable to physically attend His Honor's Court. '

b. Indeed, deponent was on trial that day, and at about 4:00 p.m., the trial court, upon request of deponent's adversary, granted him a continuance.

c. Despite both oral notice and sworn affidavit, beforehand, of a prior trial engagement, Mr. Gerstein asserts in his present moving papers that deponent 'wilfully disregard[ed] an order of this court' [¶1, p.2].

d. For this and all other [false] statements and allegations made by Mr. Gerstein, deponent on his own behalf and on behalf of Mr. Raffe request a hearing pursuant to the applicable law, including Rule 43 of the Rules of the Southern and Eastern Districts.

3a. At such hearing deponent intends to call as witnesses, both law assistants to Hon. Eugene H. Nickerson, and deponent believes that they will confirm that in addition to Mr. Gerstein not being present neither was any stenographer, who he states he 'ordered" and 'was present at 3:00 P.M.'.

b. There are other matters which have come to deponent's attention, but since the file could not be located on June 4, 1985, he cannot, at this juncture, set forth whether additional reasons exist for the recusal of His Honor on such subject.

4a. Mr. Gerstein requests, in his moving affidavit, that (¶17, p. 8):

> 'Raffe, Sassower, A.R. Fuels and Madison each be fined $1000 per day until they appear for deposition, plus all attorneys' fees incurred by Kaufman's Estate and [his] firm in enforcing this judgment.'

b. In view of the apparent penal nature of this proceeding, deponent asserts the privileges contained in Amendment V of the United States Constitution.

c. Deponent also respectfully requests that any hearing include the claim of the deprivation of 'equal protection'.

5a. Annexed hereto is a copy of the backdated letter of Feltman, Karesh & Major, Esqs. to Samuel Polur, Esq. (Exhibit 'A' [A68]), which was unavailable at the time deponent executed a prior affidavit, in support of deponent's contention that the Feltman and Kreindler firms are abusing process and the courts for which suit has already been commenced.

b. Deponent reserves the right to supplement this affidavit on receipt of the minutes of May 30, 1985, which he is now ordering.

6. Nothing contained herein shall constitute an admission of jurisdiction in this matter.

WHEREFORE, it is respectfully prayed that the Kreindler & Relkin motion be set down for a hearing and then its motion be vacated and/or denied, with costs, including those provided in Rule 43[d]."

b. A letter dated June 6, 1985, accompanied Sassower's filed affidavit, which read as follows (A69):

"Honorable Sir:

Enclose please find ... our Opposing Affidavit.

A copy of such opposing affidavit was served personally at about 9:00 p.m. on Mr. Gerstein.

We have determined to remain silent on the issue and put Mr. Gerstein and his firm to their proof on the issue, as the best way to terminate this harrassment."

Respectfully,

GEORGE SASSOWER"

13a. Without any trial or hearing, on June 7, 1985, Judge Nickerson signed an "Order of Civil <u>and</u> Criminal Contempt" against Raffe, Sassower, Madison and A.R. Fuels (A2). The Order provided that:

b. Raffe, Sassower, A.R. and Madison were (1) each fined $1,000 per day each from June 7, 1985; (2) that they were to pay appellees' attorneys' fees; (3) the fines to continue at $1,000 per day for each appellant until they submitted to an examination in supplementary proceedings; (4) failure to appear by June 17, 1985 would subject them to arrest and incarceration at the Metropolitan Correctional Center (A5-A6).

14a. Appellants promptly filed their Notice of Appeal and applied to Judge Sifton, in Judge Nickerson's absence, for a stay, which was denied.

b. By this time, June 11, 1985, Sassower had received and gave Gerstein a copy of the check issued by National Westminster Bank to the United States Marshal in full satisfaction of Raffe's indebtedness (A76).

15a. Notwithstanding an "in hand" possession of a photostatic copy of the check issued to the United States Marshal in full payment of the judgment by Raffe, Gerstein commenced Contempt proceedings against his wife, Joan Raffe, his accountant, James Carlin, and James Carlin's firm, Carlin & Lask (A77).

b. Gerstein's moving affidavit again makes the conclusory, but unfounded, statement (A82):

> "The conduct of the witnesses was calculated to and actually did impede, impair and prejudice the rights and remedies of the judgment creditor."

c. Continuing, Mr. Gerstein states (A83):

> "Only by an award of attorneys' fees can Joan Raffe and Carlin be dissuaded from further disregard of their obligations. Accordingly, it is requested that the movants be awarded judgment against Joan Raffe, James Carlin and Carlin & Lask for the additional attorneys' fees incurred with regard to the enforcement of this judgment, including fees incurred in the instant motion."

16a. Still having his assets under restraint, Sassower borrowed the money necessary to pay the judgment against him, and sent a copy of the receipt of the U.S. Marshal to Kreindler & Relkin, P.C. (A88), with an affidavit annexed thereto (A86).

b. With actual knowledge of full payment, Gerstein opposed appellees motion for a stay in this Court with a filed affidavit which states (A95, A98):

> "All the contemnors need do to obtain a stay of the fines is to appear for deposition. Instead of simply appearing for deposition, the contemnors have launched their latest campaign by seeking a stay of the order, first from Judge Sifton and then from this court. Such a stay is thus entirely unnecessary, since it is contained within the terms of the very order they seek to stay, simply by the contemnors' appearance for deposition. ... Raffe is a multi-millionaire, who has apparently chosen to allow the fine to accrue rather simply appear for deposition. In the circumstances of his own personal wealth, as well as the wealth of his companies, A.R. Fuels and Madison Heat Corp. (A59-A62), the amount of the fine is clearly not excessive. There is no possible reason why the contemnors cannot simply appear for deposition. [emphasis in the original]
>
> 12a. Finally, we wish to advise the court that as of this writing, we have not been paid any portion of the underlying judgment." [emphasis supplied]

b. Obviously omitted by Gerstein is any indication or statement that the United States Marshal had the monies on appellees' behalf to satisfy their judgments, and such payments discharged the obligation of the appellants (CPLR §5209).

Appellants' Notice of Appeal, carried with it Gerstein's deceit to the Circuit Court of Appeal!

17a. One week <u>after</u> Mr. Gerstein had "in hand" the documentary evidence of full payment, he now returned to District Court and had Judge Sifton sign an Order to Show Cause (A107-A108):

> "why an order should not be made and entered imprisoning Hyman Raffe and George Sassower for criminal and civil contempt for failing to honor the order of Judge Nickerson dated June 7, 1985 finding them in contempt and imposing fines upon them until they appear for deposition, and directing the arrest of the contemnors by the United States Marshal and their confinement in the Metropolitan Correctional Center until their appearance for deposition, production of document and the payment of fines fixed in the order of June 7, 1985 ..."

b. Mr. Gerstein's supporting affidavit states (A113):

> "No payment on account of the underlying judgment of February 22, 1985 have been received by Movants. ... It is requested that the motion be made returnable before Judge Nickerson on the earliest convenient date."

c. Thus even after full payment, Mr. Gerstein insisted on examinations in supplementary proceedings of all parties and witnesses!

18a. On June 26, 1985, Gerstein wrote to Judge Nickerson stating that this imprisonment motion "returnable June 28th has been adjourned on <u>the consent of all parties</u> for two weeks to July 12th." [emphasis supplied] (A117).

b. Only by happenstance, and indirectly, did Sassower learn of such adjournment (A115), and he immediately (A119):

> "Demand [ed]... that within five days ...., Mr. Gerstein serve and file an affidavit setting forth when, where, and how, [Sassower] consented to any adjournment from June 28, 1985 to July 12, 1985."

c. Such demand has not been responded to, as of this date, July 8, 1985.

POINT I

THE DISTRICT COURT WAS WITHOUT SUBJECT MATTER OR PERSONAL JURISDICTION

1a. In all jurisdictions, including New York, imprisonment or penalties cannot be imposed for the non-payment or a judgment based upon mere debt.

b. Contempt, in particular, and any other draconian remedies should be "the least possible power adequate to the end proposed" (Anderson v. Dunn, 19 U.S. [Wheat.] 204, 231, 5 L.Ed. 242; United States v. Lumumba, 741 F.2d 12, 15 [2d Cir.]; Feingold v. Walworth, 238 N.Y. 446; Wilson v. Commissioner, 98 A.D.2d 666, 469 N.Y.S.2d 735 [1st Dept.]).

c. Such basic principles are reflected in <u>CPLR</u> §5104, which provides:

> "Any ... judgment ... not enforceable [by] article fifty-two ... may be enforced ... by punishing him for a contempt of the court."

<u>Judiciary Law</u> §753[3], provides contempt as a remedy:

> "... for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum ..."

d. The reported cases confirm the clear language of the statute that contempt is not available as a remedy where normal enforcement procedures exist (e.g.,<u>Wides v. Wides</u>, supra).

e. At bar, it is clear that the judgment was not only enforceable by a property execution (<u>CPLR</u> §5232), a turnover proceeding (<u>CPLR</u> §5225), and other Article 52 remedies, but indeed such action had been undertaken by Kreindler & Relkin, P.C., albeit concealed from the court by that firm.

f. *Every* affidavit or assertion by Gerstein, a partner in Kreindler & Relkin, P.C., in the District Court, as well as this Court, concealed the fact that an execution had been issued to the U.S. Marshal; that the U.S. Marshal had levied on appellants' property; that monies had been turned over to the U.S. Marshal pursuant to such levy; and similar facts.

g. *Every* affidavit or assertion by Gerstein, in the District Court, as well as this Court, stated *in haec verba*, or attempted to convey the impression that unless a contempt order was issued, collection procedures would be prejudiced and impaired, even after the monies to fully pay the judgment were in the hands of the U.S. Marshal.

In short -- there was no subject matter jurisdiction for this contempt proceeding, civil and/or criminal (*Holtzman v. Beatty*, 97 A.D.2d 79, 468 N.Y.S.2d 905 [2d Dept.]).

2a. On their face, the purported affidavits of service (A14, A18) do not reveal personal jurisdiction on either Raffe, Sassower, A.R. Fuels, Inc. or Madison Heat Corporation (CPLR 2103[b][2], 5224[b]).

b. Furthermore, it is settled law that insofar as third parties are concerned (A.R., Madison, Mrs. Raffe, and Carlin), contempt proceedings must be by a separate special proceedings (Long Island Trust v. Rosenberg, supra).

c. Despite the lack of personal jurisdiction, it is uncontroverted that Sassower was ready, willing, and able to submit to have his client submit to supplementary proceedings.

The day prior thereto Sassower suggested that it be held at the location where all were present during the entire day, to wit., 60 Center Street, New York. Sassower received no response. Thereafter, Sassower, never refused to submit to an examination in supplementary proceedings.

In short -- despite the lack of proper service, which Sassower continually asserted, he never refused to submit to an examination in supplementary proceedings, and on his own behalf, and on behalf of Raffe, never refused to disclose where and how they Kreindler & Relkin, P.C. could fully satisfy its judgment by execution, a matter which they already knew.

3. The subsequent events proved what Sassower suspected, to wit., Kreindler & Relkin, P.C. motives were ulterior. The contempt proceedings were nothing more than pretext.

POINT II

KREINDLER & RELKIN'S MOTIVES AND ACTIONS WERE NOT AIMED AT SATISFYING THE JUDGMENTS

1a. Had the motive of Kreindler & Relkin, P.C. been to satisfy its judgments, a mere telephone or letter request would have sufficed, particularly since they knew that Raffe was multi-millionaire and his credit record absolutely "clean" (A57-A62).

b. Instead of making a request or demand for payment, or making a levy on Raffe's account at National Westminster Bank, where it knew that Raffe had his primary banking association, it delved into his personal affairs by an Information Subpoena on American Express (A33).

c. With twice the amount of the judgment restrained, and payment promised to be made under such restraint, Mr. Gerstein insisted and still insists on examining Mr. Raffe, Mrs. Raffe, his accountant, and his accountant's firm (A77-A107).

d. In addition thereto, Kreindler & Relkin, P.C. then restrained Mr. Raffe's brokerage account (A44).

2a. In this court, the Circuit Court of Appeals, with actual knowledge that the U.S. Marshal held sufficient funds to satisfy the entire judgment, Mr. Gerstein deceived this Court, by stating (A98):

> "Finally, we wish to advise the court that as of this writing, we have not been paid any portion of the underlying judgment".

b. Even in its pending application for incarceration, Mr. Gerstein again and still attempts to deceive the District Court by stating (A113):

> "No payment on account of the underlying judgment of February 22, 1985 has been received by Movants."

3a. Albeit full payment in the hands of the U.S. Marshal, on behalf of Kreindler & Relkin, P.C., Mr. Gerstein insists the only way to prevent incarceration and the $4,000 per day penalty from accruing is for Raffe, Sassower, A.R. Fuels, Madison Heat, Mrs. Raffe, and his accountant to submit to examinations in supplementary proceedings (A98)!

Compliance was and is the satisfaction of the judgments (In re Marc Rich, 736 F.2d 864, 866 [2d Cir.], as Gerstein led the District Court to believe was the aim of this proceeding, not the passive submission to harassment, under aegis of judicial edict

b. Payment to a Sheriff or Marshal is payment to the creditor (CPLR §5204, §5225).

4a. A creditor can not complain when he get no more than full payment (Gelfer v. National City Bank, 313 U.S. 221, 233; Honeyman v. Jacobs, 306 U.S. 539, 544-545).

b. There is nothing in any post-judgment cases, not involving continued adverse possession of property, to justify restraint of more than twice the amount of a judgment, and in addition thereto, examination of a debtor, his wife, and his accountant (McCahey v. L.P. Investors, 593 F. Supp. 319 [EDNY]), under pains of incarceration and continued fines and penalties, as appellees now insist.

c. Appellees actions and motives to inquire into appellants personal affairs, after their judgments have been satisfied, are actionable (Lugar v. Edmondson, supra; Warren v. Delaney, supra).

POINT III

THE ONLY DEFAULT WAS BY MR. GERSTEIN AND KREINDLER & RELKIN, P.C.

1. It takes a remarkable imagination to realize that appellees are requesting that appellants should be incarcerated and fined $4,000 per day, when the only default committed was by appellees, not appellants!

2a. Despite the defective service, appellants offered to submit to supplementary proceedings on April 25, 1985 (A20).

b. On May 28, 1985, it was appellees who defaulted. Sassower was present at 3:00 p.m. and waited until 3:22 p.m., before he left (A27, A41).

Such presence is verifiable by the Court Clerk's Time Clock Stamp and the law secretaries for Judge Nickerson (A27, A41).

Mr. Gerstein does not even tender an excuse or an apology for his tardiness, which absent good cause is contemptuous (13 ALR4th 122).

c. Instead of penalizing Mr. Gerstein, Judge Nickerson, rewarded the raven and condemned the dove by *ex parte*, amending his Order, directed Sassower to return the date following receipt of said Amended Order (which did not set forth any warning for non-attendance [*Judiciary Law* §756; *Vail v. Quinlan*, 406 F. Supp. 951, reversed on abstention grounds, *Juidice v. Vail*, 430 U.S. 327; *People v. Parker*, 57 N.Y.2d 136, 454 N.Y.S.2d 967]).

There is a difference and distinction, legally and otherwise, between a "wilfull default" and an inability to return because of a previous trial engagement.

Both Mr. Gerstein and the Court were immediately advised of Sassower's other trial engagement.

d. Because Sassower was on trial in state court, what had been a "civil contempt" proceeding, without prior notice, was <u>sua sponte</u> unlawfully transmogrified into a "civil and criminal contempt" proceeding, with no regard for procedural due process (<u>Cook v. U.S.</u>, 267 U.S. 517; <u>Coe v. Armour Fertilizer</u>, 237 U.S. 413).

POINT IV

<u>THE ORDER APPEALED FROM IS A NULLITY</u>

1. A non-summary criminal contempt proceeding triggers the constitutional rights that accrue in all criminal proceedings (<u>Bloom v. Illinois</u>, 391 U.S. 194), including the right to confront his accusors.

2. Even at its "civil contempt" stage, appellants requested and should have been given a Rule 43 trial or hearing.

Absent a trial or hearing the Order appealed from is a nullity.

3. Furthermore, the District Court improperly imposed penal sanctions to compel a civil remedy. Incarceration and per diem fines until appellants submitted to examinations in supplementary proceedings, despite payment, was and is a nullity.

POINT V

A HEARING SHOULD BE ORDERED FOR THE PURPOSE OF IMPOSING SANCTIONS ON GERSTEIN AND KREINDLER & RELKIN, P.C.

1a. The conscious concealment from the District Court and this Court of their property restrains against appellants, the levy on the property restraint, and satisfaction of the judgments, mandates the imposition of sanctions.

b. Had such information been disclosed there would patently have been no jurisdiction in the court for contempt.

2. The overt deceit by Mr. Gerstein's statements that "we have not received any monies", when he knew the U.S. Marshal was in possession of same, to the extent of full satisfaction, was and is despicable and actionable.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED, AND SANCTIONS IMPOSED ON APPELLEES, AFTER THEY ARE AFFORDED A HEARING.

Dated: July 8, 1985

Respectfully submitted,

GEORGE SASSOWER, Esq.
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