SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

ROY DEN HOLLANDER, Plaintiff-Appellant, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants-Appellees.	:	New York County Ind. No. 152656/2014 Hon. Jennifer Schecter

MEMORANDUM OF DEFENDANTS TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED IN SUPPORT OF MOTION TO DISMISS THE APPEAL AND FOR A STAY

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Defendants Tory Shepherd, Advertiser Newspapers Pty Ltd. ("Advertiser Newspapers" or "*The Advertiser*"), Amy McNeilage, and Fairfax Media Publications Pty Limited ("Fairfax Media" or "*The Herald*"), by and through their undersigned attorneys, submit this memorandum of law in support of their motion to dismiss the appeal or in the alternative a motion to strike Plaintiff-Appellant Roy Den Hollander's ("Plaintiff" or "Hollander") brief and appendix and for a stay pending resolution of this motion pursuant to Rule 5528 and Section 2105 of the New York Civil Practice Law and Rules and Sections 600.2, 600.10, 600.11, and 600.12 of this Court's Rules.

PRELIMINARY STATEMENT

Plaintiff's appeal should be dismissed because it is based on an appendix that includes documents not in the record below or in the record but altered by Plaintiff and fails to include nearly all of the evidence relied on by Defendants. Alternatively, the brief and the appendix on which it is based should be stricken from the record. To prevent undue burden to Defendants, Defendants respectfully request that the Court stay this appeal pending resolution of this motion or adjourn it to the September Term.

Here, Plaintiff appeals from a judgment dismissing a defamation lawsuit for lack of personal jurisdiction over two Australian newspapers and two Australian reporters. Defendants' articles mentioned that Hollander, an anti-feminist men's rights "advocate," was to be a lecturer in a men's rights course. Plaintiff sought damages in a New York court for the publication of these articles in Australia. The court below (Hon. Jennifer Schecter) found that "defendants have very minimal, attenuated New York contacts" and dismissed the suit on jurisdictional grounds. Affidavit of Katherine M. Bolger ("Bolger Aff."), Ex. 1 at 7 (Jan. 8, 2016 Decision and Order).

Before this Court, Plaintiff, a lawyer who has been warned by the Second Circuit of his Rule 11 responsibilities, has filed an appendix that is incomplete and inaccurate. First, the appendix, which is certified by Plaintiff as true and accurate, includes documents that were never filed in the court below. Second, the appendix includes documents that were filed in the court below but that Plaintiff has edited on appeal. Third, the appendix includes an index that is both argumentative and violates the Court's rules. Fourth, the appendix fails to include, as it must, necessary exhibits on which Plaintiff should have reasonably assumed Defendants would rely. Neither Defendants nor this Court should be required to entertain this appeal on a record whose authenticity cannot be credited. Plaintiff's appeal should be dismissed, or alternatively, his brief and appendix stricken from the record.

BACKGROUND

A. The Defendants

Advertiser Newspapers is an Australian-based corporation that publishes *The Advertiser*, a newspaper that focuses on news related to South Australia. Bolger Aff., Ex. 2 (Cameron Affidavit ¶¶ 3, 6, 7). Tory Shepherd, at all times relevant to this suit, was the Political Editor for *The Advertiser* and is a citizen of Australia who has never been to the State of New York. *Id.*, Ex. 3 (Shepherd Affidavit ¶¶ 1, 2, 16). Defendant Fairfax Media is also an Australian-based corporation that publishes *The Sydney Morning Herald* based out of Sydney, Australia. *Id.*, Ex. 4 (Coleman Affidavit ¶¶ 2, 3, 6). At all times relevant to this suit, Amy McNeilage was a reporter for *The Herald* and a citizen of Australia who has never been to the State of New York. *Id*, Ex. 5 (McNeilage Affidavit ¶¶ 1, 2, 9).

B. Plaintiff Roy Den Hollander

Plaintiff is a self-professed "anti-feminist" who believes that the "feminist" movement is a plot to "eliminate[] the rights that the members of a distinct group, such as men, are entitled

to." *Id.*, Ex. 6 (FAC ¶¶ 67, 79). Hollander is convinced that this erosion of men's rights by feminists who he calls, among other things, "witches," *id.* ¶ 14, means that one of the only "remaining sources of power" for men is the right to bear arms, which gives men "a fighting chance against unjust state violence," *id.* ¶ 79. Otherwise, Hollander hypothesizes, men will be "reduced" to living "in protective hamlets surrounded by armed guards and barbed wire where females can safely pick out their pleasure for the night and where females' fears remain entombed." Bolger Aff., Ex. 7 at ECF p.6.

Spurred by these beliefs, Hollander has filed multiple civil suits alleging that various programs he believes favor women are unconstitutional or illegal. He has claimed in litigation that feminism is a religion, and, therefore, U.S. government funding of educational institutions with women's studies courses violates the Establishment Clause. *See id.*, Ex. 8 at ¶¶ 2-28. He has also claimed that "ladies' nights" at New York nightclubs impermissibly "discriminat[e] against men," *see id.*, Ex. 9 at 2, and that the Violence Against Women Act violates the Equal Protection Clause, *see id.*, Ex. 10 at 48-55. Plaintiff's complaints along these lines have been unsuccessful, *see, e.g.*, *Hollander v. Members of Bd. of Regents of Univ. of N.Y.*, 524 F. App'x 727, 730 (2d Cir. 2013) ("Before again invoking his feminism-as-religion thesis in support of an Establishment Clause claim, we expect [Plaintiff] to consider carefully whether his conduct passes muster under Rule 11."); *Hollander v. Inst. For Research On Women & Gender at Columbia Univ.*, 372 F. App'x 140, 141-42 (2d Cir. 2010).

C. The Publications at Issue

Plaintiff's lawsuit targets five articles published in two different Australian publications. On January 12, 2014, Shepherd wrote an article reporting that Plaintiff, a "self-professed 'anti-feminist lawyer,'" was one of the lecturers for a planned "men's rights" course at the University

of South Australia. FAC, Ex. C. As a follow up on January 14, Shepherd reported that the University had decided against approving the men's studies courses. *Id.*, Ex. E. On the same day, Shepherd also wrote a column related to men's rights, which never mentions Hollander. *Id.*, Ex. H. Finally, on June 18, Shepherd wrote a column discussing this litigation. *Id.*, Ex. F. All four Shepherd articles were published in *The Advertiser* in Adelaide, Australia.

McNeilage wrote just one article, which noted that the University had not approved several males studies courses, "some of which were to be taught by hardline anti-feminist advocates." *Id.*, Ex. D. The McNeilage article was published in the *Sydney Morning Herald.*

D. The Court's Decision and Order

On January 8, 2016, the court dismissed Hollander's lawsuit for a lack of personal jurisdiction. *See generally* Decision and Order. Because Plaintiff's claims all sounded in defamation, the court found that jurisdiction was governed by CPLR § 302(a)(1) of the long-arm statute, which required Plaintiff to show that each defendant "transact[ed] any business within the state" out of which the cause of action arose. *Id.* at 5. The court also recognized that this section of the long-arm statute is construed "more narrowly" in defamation-related cases. *Id.*

The court held that there was no jurisdiction over any defendant because their "very minimal," *id.* at 7, contacts in the record below were "not as significant as the few cases" finding jurisdiction in these kinds of cases, *id.* at 6. First, the court recognized "that placement of defamatory content on the internet and making it generally accessible" cannot subject Defendants to jurisdiction. *Id.* at 8. At any rate, as the court explained, "The only defamation-related contacts with New York were Shepherd's limited emails" and a phone call to Plaintiff. *Id.* at 7. Moreover, Shepherd never entered New York. *Id.* McNeilage "had no arguable contact whatsoever with New York." *Id.* The corporate Defendants too were not subject to jurisdiction

based on any relationships with other entities in New York, because the contacts Hollander alleged were not "substantially related to the defamat[ion]" claims. *Id.* at 9. For the same reason, there was no need for the court to order discovery on contacts that could not support jurisdiction in the first place. "In the end," the court found, "there is no authority for subjecting defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience." *Id.*

E. Plaintiff's Appeal

On February 2, 2016, Plaintiff filed a notice of appeal. Bolger Aff., Ex. 11. In his Pre-Argument Statement, Plaintiff asserts, without record support, that the court below relied on "perjurious affidavits by defendants-respondents that were suborn by their attorney." *Id.*, Ex. 12 at ¶ 11. Plaintiff had previously made the same unsupported allegations in the trial court, which the trial court did not credit.[1]

Thereafter, on March 9, 2016, Plaintiff filed proposed statements in lieu of transcripts and Defendants' objections to the same. *Id.*, Exs. 14-15. Prior to the court settling those statements, Plaintiff had the record below transferred to this Court. *Id.*, Ex. 16.

On March 15, 2016, Plaintiff served Defendants with his brief as well as the appendix. Plaintiff certified that he "personally compared" his appendix "with the originals on file in the office of the Clerk" and that he found them to be "true copies of those originals of the record on appeal." A192. This motion to dismiss the appeal follows.

ARGUMENT

Plaintiff's appendix is a collection of unauthenticated, altered, and entirely new documents not in the record below and is thus patently insufficient. The deficiencies permeate

[1] Plaintiff also accused Defendants, their counsel, or their agents of hacking into his computer. The court did not credit this allegation either. Bolger Aff., Ex. 13.

the appendix and cannot be corrected by merely striking discrete portions of the appendix. For this reason, Defendants respectfully request that the appeal be dismissed, or in the alternative, that Plaintiff's brief and the appendix on which it relies be stricken from the record, and for a stay pending the resolution of this motion. This relief is particularly justified in this case because Plaintiff, an attorney who has spent scores of pages making unfounded accusations that Defendants have submitted "perjurious affidavits," signed a knowingly false "certification" swearing that the intentionally incorrect appendix he submitted to this Court was an accurate reflection of the record below.

I.
THE APPENDIX IS PATENTLY INSUFFICIENT FOR THE PURPOSES OF PASSING ON THIS APPEAL

A. Standards Governing Appendices on Appeal

The appealing party has the burden of preparing an adequate appendix. *Robert B. Samuels, Inc. v. Cauldwell-Wingate Co., Inc.*, 262 A.D.2d 178, 178 (1st Dep't 1999). The Appellate Divisions are "not required to determine an appeal with . . . an appendix which [they] consider[] inadequate." *E.P. Reynolds, Inc. v. Nager Elec. Co.*, 17 N.Y.2d 51, 54 (1966); *see also Feigelson v. Allstate Ins. Co.*, 36 A.D.2d 929, 929 (1st Dep't 1971) (same). An appendix may be deemed inadequate where it contains an incomplete notice of appeal filed in the court below, *Copp v. Ramirez*, 62 A.D.3d 23, 27 (1st Dep't 2009), necessary evidence presented below, *Kenan v. Levine & Blit, PLLC*, 136 A.D.3d 554, 555 (1st Dep't 2016), or those parts of the record "'appellant reasonably assumes will be relied upon by the respondent,'" *Wittig v. Wittig*, 258 A.D.2d 883, 885 (4th Dep't 1999) (citations omitted). An appendix may also be inadequate where the appellant inaccurately describes necessary papers or proceedings below, *Copp*, 62 A.D.3d at 27-28, or fails to follow a court's rules relating to appendices, *Wittig*, 258 A.D.2d at 884-85; *accord Aguiar-Consolo v. City of N.Y.*, 113 A.D.3d 707, 708 (2d Dep't 2014)

("Since, under the circumstances presented here, the appendix is inadequate to enable this Court to render an informed decision on the merits, the appeals must be dismissed.").

Rule 5528 of the CPLR sets forth the required content of the appendix. The appendix must contain "such parts of the record on appeal as are necessary to consider the questions involved." CPLR Rule 5528(a)(5). This includes "those parts [of the record] the appellant reasonably assumes will be relied upon by the respondent." *Id.* Where counsel do not stipulate to authenticity of the record or appendix on appeal, counsel for the appellant must file a certification pursuant to CPLR § 2105 certifying that the appendix is accurate. *Id.*, Rule 5532. Any appellant who violates these rules may be subject to the imposition of costs or the dismissal of the suit. *See id.*, Rule 5528(e); *see also Kenan*, 136 A.D.3d at 554-55.

This Court has supplemented these requirements. An appendix "must contain all the testimony or averments upon which appellant relies or upon which appellant has reason to believe respondent will rely." 22 NYCRR § 600.10(c)(2). These "must not be misleading because of incompleteness or lack of surrounding context." *Id.* Moreover, the appendix must include "[c]opies of critical exhibits," which may be omitted only "upon stipulation of the attorneys for the parties." *Id.* In that case, a copy of a stipulation among counsel excluding exhibits shall be included in the appendix. *Id.* Once compiled, the appellant must prepare an "index of the record's contents, listing and describing each paper separately." *Id.* § 600.10(b)(1)(i) (as incorporated through § 600.10(c)(2)). The index relating to exhibits shall also "concisely indicate the contents or nature and date, if given of each exhibit and the pages in the record where it is reproduced and where it is admitted to evidence." *Id.* As with the CPLR, this Court's rules also require that the appellant's attorney "certify[] to the correctness of the

papers." *Id.* § 600.10(b)(1)(viii). Failure to abide by these rules "may result in rejection of the appendix or . . . the imposition of costs." *Id.* § 600.10(c)(1).

B. Hollander's Appendix Is Patently Insufficient

Hollander has violated the CPLR and this Court's rules in compiling his appendix in four ways.

1. Documents Not In The Record Below. First, Plaintiff's appendix is insufficient because it includes documents never presented to the district court below. For example, the appendix includes two unauthenticated documents relating to Plaintiff's alleged plans to teach the "men's rights" course. A95-98. Plaintiff also includes unauthenticated documents relating to alleged contacts that *The Herald* has with New York. A159-63. These documents, however, were never submitted to the trial court in response to Defendants' motion to dismiss. In fact, one of these documents is dated February 13, 2016, over a month *after* the trial court granted Defendants' motion to dismiss. A160.

The appendix also includes other documents not properly a part of the record on appeal. Plaintiff, for example, includes statements in lieu of a transcript, which he submitted to the trial court along with Defendants' objections. A182-91. Despite Defendants' objections to much of the substance of Plaintiff's statements, Plaintiff never waited for the trial court to settle the differences among the statements and objections. *People v. Roldan*, 96 A.D.2d 476, 477 (1st Dep't 1983) (remanding appeal for settlement of transcript). Thus, including those statements in the appendix and relying on them for factual support on appeal is improper. *See* Appellant's Brief at 7 (citing statement in lieu of transcript).

2. Documents In The Record Below, But Modified On Appeal. In addition, Plaintiff has also included modified versions of documents filed below. For example, Plaintiff included

what he called a "List of Perjuries and Omissions by Defendants" in his reply affidavit in support of a trial on personal jurisdiction.[2] Bolger Aff., Ex. 17. Plaintiff has included a similar list in his appendix. A100-08. In the appendix version, however, he has changed the title of the document and added additional content like the new introductory paragraph elaborating on the list. A100. He has also added to the list cross-references to other parts of the appendix and edited other parts of the list leaving no doubt that he has altered this document. *Compare, e.g.*, Bolger Aff., Ex 17 at 1 ("Does Advertiser sell products in New York through agents?") *with* A100 ("Does Advertiser sell *its papers and other* products in New York through agents?"). Additionally, several other documents, while similar in substance to those filed in the record below, appear to be in a different format from those filed in the trial court and related to this appeal. *See, e.g.*, A81-92, A99. As a result, it is simply impossible to tell whether the documents submitted in the appendix accurately represent the record before the court or were ever considered by the court.

3. Documents In The Record Below, But Omitted On Appeal. Hollander has also failed to include nearly all of the evidence on which Defendants relied on below. The Affirmation of Katherine M. Bolger, submitted in support of Defendants' motion to dismiss, for example, included twenty-four exhibits. Bolger Aff., Ex 18. Yet Plaintiff has omitted almost all of these exhibits from the appendix, choosing instead to include only the affidavits of Defendants (which he alleges, with no support, are perjurious) and an exhibit to one of those affidavits (which he also alleges, with no support, is fraudulent). Plaintiff's omission of exhibits that he reasonably should have believed Defendants would rely on violates this Court's Rules and the CPLR: "The omission from the appeal record . . . of much of the record before the Supreme Court . . . is not only in violation of the [CPLR] but is highly unprofessional . . . ." *2001 Real*

[2] The trial court did not credit these allegations and denied Plaintiff's request for additional discovery. Decision and Order at 9.

Estate v. Campeau Corp. (U.S.), Inc., 148 A.D.2d 315, 316 (1st Dep't 1989); *see also* CPLR Rule 5528(a)(5); 22 NYCRR § 600.10(c)(2).

4. Plaintiff's Deficient Index. Hollander has also improperly compiled his index. 22 NYCRR § 600.10(c)(2). First, Plaintiff's index does not indicate where the documents were submitted in the proceeding below. *See generally* Ai-iv. Making matters worse, rather than complying with this Court's rules prohibiting misleading descriptions of documents, Plaintiff has on several occasions chosen to mischaracterize documents below. 22 NYCRR § 600.10(c)(2). For example, he describes one exhibit submitted by Defendants as the "Forgery of the McNeilage article . . . ." Aii. That article is not only not a forgery; the trial court never found it to be a forgery. Moreover, he describes documents never before the trial court inaccurately. For example, Hollander describes unauthenticated printouts of websites as showing employment profiles of "correspondent[s]" for *The Herald*. *See* Aiii. In fact, those documents indicate only that those individuals had done freelance work for *The Herald*. A159-62. Plaintiff's argumentative index further undercuts the adequacy of the appendix.

C. The Appeal Should Be Dismissed, or, Alternatively, Plaintiff's Brief and Appendix Should Be Stricken

Hollander certified that he "personally compared" the documents in the appendix with originals in the record and that they were "true copies of those originals." A192. They are not and thus Plaintiff's appeal should be dismissed or his brief and appendix should be stricken.

This Court has not hesitated to dismiss appeals based on insufficient appendices. Just this year, in fact, this Court dismissed an appeal where the plaintiff had failed to submit the motion papers and a single evidentiary exhibit. *Kenan*, 136 A.D.3d at 555. Here, Plaintiff has failed to submit scores of documents submitted by Defendants below and added, without

explanation or notice, several others—not to mention altering other filings below. Simply, the appendix cannot be reasonably relied on. *Id.*

Even setting aside the nature of the documents themselves, this Court has also dismissed appeals where appellants have inaccurately represented the action below. For example, in *Copp v. Ramirez*, this Court dismissed an appeal in part because the notice of appeal did not "contain an accurate description" of the order dismissing the plaintiff's action. 62 A.D.3d at 27-28. Here, Plaintiff alleges in his Pre-Argument Statement (again, without record support) that the court's decision is based on perjurious affidavits. A2. He made that same argument to the trial court, but the court chose not to credit that allegation, choosing instead to rely on the affidavits submitted by ~~Defendants~~. A8-10. Along the same lines, Plaintiff's added gloss to several of the documents in the index makes the appendix argumentative and untrustworthy. For these reasons too, Plaintiff's appeal should be dismissed, or alternatively, his brief and appendix stricken.

II.
THIS COURT SHOULD STAY PROCEEDINGS PENDING RESOLUTION OF DEFENDANTS' MOTION TO DISMISS THE APPEAL

Pursuant to the Court's inherent power, Defendants respectfully request that this Court stay all proceedings in this appeal pending resolution of Defendants' motion or, alternatively, Defendants request that the appeal be adjourned to the September Term. "'[C]ourts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them.'" *Catalane v. Plaza 400 Owners Corp.*, 124 A.D.2d 478, 480 (1st Dep't 1986) (citations omitted). This inherent power should be exercised here to stay these proceedings and prevent the waste of judicial resources and the resources of the parties to this lawsuit.

Plaintiff—not Defendants—carries the responsibility of providing this Court with an adequate appendix. *Robert B. Samuels, Inc.*, 262 A.D.2d at 179. He has clearly failed to do so

for all the reasons explained above. Defendants have raised multiple, independent reasons as to why this appeal should be dismissed altogether in light of Plaintiff's deficient appendix. Indeed, because the authenticity of the entirety of the appendix is seriously in question, Defendants will have to create an entirely new appendix to defend this appeal. Thus, were Defendants forced to proceed while this motion is pending, they will incur much of the harm that they are attempting to avoid now. Moreover, a delay in the appeal will not prejudice Plaintiff nor could Plaintiff show otherwise as this lawsuit has already been pending for well over a year.

For these reasons, this appeal should be stayed pending the resolution of this motion. Alternatively, should the Court not grant Defendants a stay in this matter, Defendants respectfully request that the Court adjourn the appeal until the September Term to give Defendants enough time to prepare a proper appendix and brief in lieu of relying on Plaintiff's deficient appendix.

CONCLUSION

For each and all the foregoing reasons, Defendants respectfully request that this Court dismiss the appeal or, alternatively, strike from the record Plaintiff's opening brief and the appendix. Defendants further request a stay pending resolution of this motion. Alternatively, Defendants request that this appeal be adjourned for the September Term to provide them with sufficient time to prepare an adequate appendix.

Dated: April 1, 2016

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