

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

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ROY DEN HOLLANDER,

Plaintiff-Appellant,

-against-

TORY SHEPHERD, ADVERTISER NEWSPAPERS
PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA
PUBLICATIONS PTY LIMITED,

Defendants-Appellees.
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:
: New York County
: Ind. No. 152656/2014
: Hon. Jennifer Schecter
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**MEMORANDUM OF DEFENDANTS TORY SHEPHERD,
ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE,
FAIRFAX MEDIA PUBLICATIONS PTY LIMITED IN SUPPORT
OF MOTION TO DISMISS THE APPEAL**

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Defendants Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, and Fairfax Media Publications Pty Limited (together, “Defendants”), by and through their undersigned attorneys, submit this memorandum of law in support of their motion to dismiss the appeal of Plaintiff-Appellant Roy Den Hollander (“Plaintiff” or “Hollander”) 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.

This appeal should be dismissed outright. Plaintiff knowingly disregarded this Court’s May 3, 2016 order requiring that he remedy his original and inadequate appendix by filing the exhibits attached to the Affirmation of Katherine M. Bolger in support of Defendants’ motion to dismiss the First Amended Complaint. Instead of complying with this order, Plaintiff filed just four of the required twenty-four exhibits, along with additional exhibits of his own on which he apparently intends to rely. It is time to apply the doctrine of enough is enough and dismiss this appeal outright.

BACKGROUND¹

A. The IAS Court’s Decision and Order

On January 8, 2016, the IAS court dismissed Hollander’s defamation lawsuit against four Australian defendants for a lack of personal jurisdiction. *See generally* Affirmation of Katherine M. Bolger (“Bolger Aff.”), Ex 1. 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 (internal marks and citation omitted). The court also

¹ Additional factual background is set out in further detail in Defendants’ first motion to dismiss the appeal, filed with this Court on April 1, 2016. Affirmation of Katherine M. Bolger, Ex. 4 at 2-5.

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” contacts in the record below were “not as significant as the few cases” finding jurisdiction in these kinds of cases. *Id.* at 6-7 (internal marks and citation omitted). “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.* at 9.

B. Procedural History in This Court

On February 2, 2016, Plaintiff filed a notice of appeal. Bolger Aff., Ex. 2. A month later, on March 15, 2016, Plaintiff served Defendants with his brief as well as the appendix on appeal, which largely omitted the exhibits on which Defendants relied in support of their motion to dismiss the First Amended Complaint. *See generally* Appendix.

On April 1, 2016, Defendants brought a motion to dismiss the appeal or strike Plaintiff’s brief and appendix because the appendix, certified as containing accurate copies of filings in the record below, “include[d] materials not in the record below while excluding papers upon which the Appellees may reasonably rely.” Bolger Aff., Ex. 3. Those excluded papers were the “twenty-four exhibits” attached to the Affirmation of Katherine M. Bolger and “submitted in support of Defendants’ motion to dismiss” the complaint in the supreme court. *Id.*, Ex. 4 at 9.

In opposition, Plaintiff admitted that his appendix contained documents not in the record below and documents in the record below but altered by him on appeal and further admitted that it omitted many of the “496 exhibit pages” attached to the Bolger Affirmation submitted in support of the motion to dismiss below. *Id.*, Ex. 5 at 1-2, 9-12. Plaintiff nevertheless asserted

that the objections to the appendix were “nit-picking” and that he “could not afford” to print an appendix with Defendants’ exhibits and thus should be excused from doing so. *Id.*, Ex. 5 at 1, 8.

C. The Order

In light of Defendants’ motion to dismiss the appeal, on May 3, 2016, this Court ordered Plaintiff, by July 11, 2016, “to file a supplemental appendix, at his own expense, which shall include all exhibits attached to the Affirmation of Katherine M. Bolger submitted with defendants’ motion to dismiss,” in addition to striking a document from the appendix itself and taking judicial notice of four pages of the appendix. *Id.*, Ex. 6.

D. Plaintiff’s Supplemental Appendix

On the afternoon of July 8, Plaintiff served the supplemental appendix on Defendants’ counsel. *See generally* Supplemental Appendix (“SA”). Rather than including “all exhibits” attached to the Bolger Affirmation submitted in support of the Defendants’ motion to dismiss as ordered by this Court to do, Plaintiff’s supplemental appendix included (1) extraneous documents not attached to the Bolger Affirmation, *see* SA2-19, SA213-246, and (2) just four of the twenty-four exhibits originally attached to the Bolger Affirmation, *see* SA20-230.

This motion to dismiss the appeal follows.

ARGUMENT

Just two months ago, this Court gave Plaintiff a very simple order: file a supplemental appendix that included all of the exhibits to the Bolger Affirmation, which was submitted in support of Defendants’ motion to dismiss the First Amended Complaint below. This appeal should be dismissed because Plaintiff failed to abide by that order and because, as a result, his appendices on appeal remain inaccurate and incomplete.

First, the appeal should be dismissed for failure to comply with this Court's order. Defendants filed their original motion to dismiss the appeal, in part because Hollander "failed to include nearly all of the evidence on which Defendants relied below." Bolger Aff., Ex. 4 at 9. Specifically, he failed to include the "twenty-four exhibits" attached to the affirmation of Defendants' counsel in support of their motion to dismiss in the supreme court. *Id.* This failure, Defendants argued, violated the rule that the appellant include in the appendix those documents he "reasonably assumes will be relied upon by the respondent." *O'Rourke v. Long*, 41 N.Y.2d 219, 229 (citing CPLR 5528(a)(5)); *see also, e.g., Wittig v. Wittig*, 258 A.D.2d 883, 884-85 (4th Dep't 1999). Despite Hollander's arguments that the "496 exhibit pages" to the Bolger Affirmation were irrelevant, Bolger Aff., Ex. 5 at 1, this Court agreed with Defendants and ordered Hollander to file "all exhibits attached to the Affirmation of Katherine M. Bolger submitted with defendants' motion to dismiss." *Id.*, Ex. 6.

Rather than simply comply with this order, Hollander took the opportunity to lard up the record with additional exhibits on which *he* apparently intends to rely, *see* SA2-19, SA213-246, while filing just four of the exhibits originally attached to the Bolger Affirmation submitted in the supreme court, *see* SA20-230. No reasonable interpretation of this Court's order can support Hollander's conduct here. There is no question that he violated this Court's order. For that reason, Hollander's appeal should be dismissed. *Ramirez v. Smith*, 128 A.D.2d 511 (2d Dep't 1987) (granting leave to file supplemental appendix, and ordering dismissal should plaintiff fail to do so); *see also Termini v. Tronolone & Surgalla, P.C.*, 207 A.D.2d 1037 (4th Dep't 1994) (striking brief and dismissing appeal for failure to comply with the court's order); *Derderian v. Derderian*, 556 N.Y.S.2d 484 (1st Dep't 1990) (granting *sua sponte* leave to enter order dismissing appeal for failure to perfect appeal).

Second, the appeal should be dismissed because the record is incomplete. This Court has not hesitated to dismiss appeals based on incomplete appendices. Just this year, this Court dismissed an appeal where the plaintiff had failed to submit motion papers and a single exhibit filed below. *Kenan v. Levine & Blit, PLLC*, 136 A.D.3d 554, 555 (1st Dep't 2016). And in *Copp v. Ramirez*, this Court dismissed an appeal in part because the notice of appeal was not an "accurate description" of the order dismissing the case below. 62 A.D.3d 23, 27-28 (1st Dep't 2009). These results are not unique. See *Quezada v. Mensch Mgmt. Inc.*, 89 A.D.3d 647 (1st Dep't 2011) ("Dismissal of the appeal is warranted because Taveras failed to assemble a proper appellate record."); *Lynch v. Consol. Edison, Inc.*, 82 A.D.3d 442 (1st Dep't 2011) (same).

Here, the record on appeal remains incomplete, which provides another, independent basis for dismissal. All this Court required Hollander to do was file a supplemental appendix containing the exhibits on which *Defendants* relied below. Bolger Aff., Ex. 6. He did not do so. Thus, Hollander's appendices still contain a lopsided, incomplete, and often inaccurate view of the record below. Plaintiff simply does not have a right to prosecute an appeal based on appendices this Court has already found to be incomplete and which he has declined to correct.

CONCLUSION

For the above reasons, Defendants respectfully request that this Court dismiss the appeal.

Dated: July 15, 2016

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