New York County Clerk's Index No. 152656/14

Court of Appeals

of the

State of New York

ROY DEN HOLLANDER,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Defendants-Respondents 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 opposition to the motion for leave to appeal by Plaintiff-Appellant Roy Den Hollander ("Plaintiff").

PRELIMINARY STATEMENT

This Court should deny Plaintiff's motion for leave to appeal. The First Department properly dismissed Plaintiff's appeal because Plaintiff failed to comply with an order of the First Department to cure the fundamentally flawed appendix on which he purported to base his appeal. Plaintiff now asks this Court to excuse his knowing disregard of the order. It should not do so. Plaintiff's motion is baseless, does not satisfy any grounds meriting appeal, and should promptly be denied.

QUESTION PRESENTED

Did the First Department properly dismiss Plaintiff's appeal after he failed to abide by its order requiring him to correct his initial, inadequate appendix?

The First Department answered this question: Yes.

BACKGROUND

A. The IAS Court's Decision and Order

This is an action for "injurious falsehood," defamation and related torts based on the publication of several articles in two Australian newspapers, *The Advertiser* and the *Sydney Morning Herald*. Notice of Motion for Leave to Appeal ("Mot. to Appeal") at 2-3. The articles were about a "men's rights" course taught at an Australian university, were researched and written in Australia by Australian reporters, published by Australian newspapers, to websites with Australian domain names, that targeted an Australian audience. *Id.*, Ex. A at 1-4, 7-8.

Defendants moved to dismiss the complaint on the grounds that the court lacked personal jurisdiction over the Defendants and, in the alternative, on the grounds that the Plaintiff failed to demonstrate that the allegedly defamatory statements were false and defamatory statements of fact (rather than of opinion) about the Plaintiff as required by New York law. *See generally id.*, Ex. A.

On January 8, 2016, the IAS court dismissed Plaintiff's lawsuit for a lack of personal jurisdiction. *See id.* The court held that there was no jurisdiction over any defendant because their "very minimal" contacts in the record were "not as significant as the few cases" finding jurisdiction in defamation-related matters. *Id.* at 6-7 (internal marks and citation omitted). "In the end," the court found, "there is no authority for subjecting [Australian] defendants to jurisdiction in New York

based on articles published outside New York for a non-New York audience." *Id.* at 9.

B. Plaintiff Files an Appeal in the First Department

On February 2, 2016, Plaintiff filed a notice of appeal. *Id.*, Ex. B. On March 15, 2016, Plaintiff served 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 complaint in the IAS court. *Id.*, Ex. C at 5, 8-10.

C. The First Motion to Dismiss

On April 1, 2016, Defendants brought a motion to dismiss the appeal or strike Plaintiff's brief and appendix because the appendix, which Plaintiff had certified as containing accurate copies of filings in the record below, was both under- and over-inclusive. *Id.*, Ex. C. First, the appendix contained materials not in the record below, including a document dated February 13, 2016, over a month *after* the trial court granted Defendants' motion to dismiss. A159-60. Next, the appendix included altered versions of some of the documents originally included in the record below. *Compare, e.g.*, *id.* at 241 ("Does Advertiser sell products in New York through agents?") *with* A100 ("Does Advertiser sell *its papers and other* products in New York through agents?"). And finally, Plaintiff omitted almost of all of the exhibits filed by Defendants in the IAS court on which Defendants were entitled to rely on appeal. Plaintiff, for example, excluded nearly

all of the exhibits attached to the Affirmation of Katherine M. Bolger that was submitted in support of Defendants' motion to dismiss the complaint. Mot. to Appeal, Ex. C at 9-10.

In opposition, Plaintiff admitted that he had omitted many of the "496 exhibit pages" attached to the Bolger affirmation, that his appendix contained documents not included in the record below and documents altered by him on appeal. *Id.*, Ex. D 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 a proper appendix. *Id.* at 1, 8.

D. Court's Order to Revise the Appendix

On May 3, 2016, the First Department ordered Plaintiff "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." *Id.*, Ex. E ("May Order").

E. The Revised (and Inadequate) Appendix

On July 8, 2016, Plaintiff served the supplemental appendix on Defendants. Rather than including "all exhibits" attached to the Bolger affirmation submitted in support of the Defendants' motion to dismiss as ordered to do, Plaintiff's new appendix included just four of the twenty-four exhibits originally attached to that

affirmation, *see* SA20-230. It also contained additional documents not attached to that affirmation and not in the record before the IAS court, *see, e.g.*, SA2-19.

F. The Second Motion to Dismiss

In response, on July 15, 2016, Defendants again filed a motion to dismiss the appeal. Bolger Aff., Ex. 2. There, Defendants noted that "[i]nstead of complying with [the court's] 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." Mot. to Appeal, Ex. F at 1. In response, Plaintiff argued, as he does here, that he complied with the court's order by filing only those exhibits attached to Defendants' motion to dismiss the appeal (rather than the motion to dismiss the amended complaint). *Id.*, Ex. G at 1-2.

G. The Order Dismissing the Appeal

On August 25, 2016, the First Department entered an order dismissing Plaintiff's appeal for failing to abide by the May Order, *see id.*, Ex. H (the "August Order"). The order read, in relevant part:

> [D]efendants-respondents having moved to dismiss the aforesaid appeal for plaintiff's violations of an order of this Court, entered May 3, 2016 (M-1708), directing plaintiff to file a supplemental appendix with certain requirements[;] Now, upon reading and filing the papers with respect to the motion . . . it is Ordered that the motion is granted and plaintiff's appeal is dismissed.

A notice of entry by Defendants was filed that same day, *id.*, and on September 2,

2016, Plaintiff served Defendants with his motion for leave to appeal from the August Order.

ARGUMENT

THIS CASE DOES NOT MERIT THIS COURT'S REVIEW

This Court should deny Plaintiff's motion for leave to appeal because Plaintiff has not demonstrated that this case merits this Court's review. Instead, he simply argues that the decision below was in error. This is insufficient as a matter of law to justify this Court's granting of leave.

Leave to appeal should be granted only "when required in the interest of substantial justice." N.Y. Const. Art. 6, § 3(b)(6). Such leave is granted only in rare cases and, usually, only when a case raises questions having the possibility of affecting the public as a whole rather than merely determining the rights between parties. 4 N.Y. Jur. 2d Appellate Review § 303 (citing *Sciolina v. Erie Preserving Co.*, 151 N.Y. 50, 54 (1896)). This Court reviews cases where "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR 500.22(b)(4). This Court generally does not review cases that merely challenge the outcome of a decision below or question the Appellate Division's exercise of its discretion. *Hayes v. Utica Mut. Ins. Co.*, 20 N.Y.2d 938, 938 (1967) (dismissing as a question of pure discretion motion for leave to appeal from order

dismissing an appeal for failure to perfect); N.Y. Court of Appeals Civ. Jurisdiction & Practice Outline III.B.1 (noting that questions of discretion are not proper questions for the Court's review).

Plaintiff has not met this high standard. This is not a case that affects an issue of public importance or that implicates issues of substantial justice. To the contrary, all that is at issue here is the First Department's ability to control its own docket in the face of the contemptuous disregard of its order. *See Hayes*, 20 N.Y.2d to 938; *Termini v. Tronolone & Surgalla, P.C.*, 207 A.D.2d 1037 (4th Dep't 1994) (dismissing appeal for failure to comply with court order). In the May Order, which denied Defendants' first motion to dismiss the appeal and allowed Plaintiff to supplement the appendix, the First Department presented Plaintiff the opportunity to correct his erroneous filing. Having given Plaintiff this lifeline, the First Department was well within its discretion to dismiss the appeal when Plaintiff simply chose to ignore it.

And Plaintiff's belated efforts to excuse his disregard of the May Order by claiming he did not properly understand it are unconvincing. As an initial matter, inadvertence or misunderstanding do not satisfy this Court's rules governing leave to appeal. 22 NYCRR 500.22(b)(4) (requiring, for example, novel issues of public importance). More fundamentally, however, Plaintiff's own briefing in the First Department shows that Plaintiff knew precisely what he would be required to do

were Defendants' motion granted: filing an appendix of the "496 exhibits pages" attached to Defendants' affirmation in support of their "motion to dismiss in the lower court." Mot. to Appeal, Ex. D at 1 (emphasis added). It was only after being ordered to do just that that he chose to reinterpret the order as requiring him only to file those few exhibits annexed to Defendants' affirmation in support of their motion to dismiss the appeal in the appellate division. *Id.*, Ex. E at 4.[1] Plaintiff perfectly understood the First Department Order; he just chose to disregard it. The First Department was well within its discretion to dismiss the appeal and, as a result, there is nothing about this decision that merits this Court's review.

In an effort to distract this Court from the fact that the dismissal was based on Plaintiff's failure to comply with a court order, Plaintiff claims that the First Department violated this Court's ruling in *E.P. Reynolds, Inc. v. Nager Elec. Co.*, 17 N.Y.2d 51 (1966), which concerned the propriety of affirming a lower court opinion on the merits due to an appellant's failure to file proper appendices. This argument is a red herring: the First Department did not dismiss this appeal because

[1] At any rate, Plaintiff's "misinterpretation" argument neither excuses nor explains his choice to include in the supplemental appendix exhibits that were not a part of *any* of Defendants' affirmations. This was impermissible under any reading of the May Order. *See* SA2-19, SA213-246.

of the existence of an inadequate appendix. Mot. to Appeal, Ex. H. It dismissed the appeal because Plaintiff failed to comply with the May Order. *Id.*[2]

In any event, even if the First Department dismissed the appeal because of Plaintiff's inadequate appendix, such an outcome would still be consistent with *Reynolds*. In that case, this Court made plain that the Appellate Division is "not required to determine an appeal with . . . an appendix which [they] consider[] inadequate." 17 N.Y.2d at 54; *see also Feigelson v. Allstate Ins. Co.*, 36 A.D.2d 929, 929 (1st Dep't 1971). As a result, the *Reynolds* court held, where a Plaintiff files an inadequate appendix, the court may order an appellant to supplement the appendix and may dismiss an appeal if he fails to do so. *Reynolds*, 17 N.Y.2d at 54-56; *see also* 10A Carmody-Wait N.Y. Practice 2d § 70:221 ("Submission of a materially inadequate appendix, particularly after a warning by the court, may constitute failure to perfect an appeal justifying dismissal of an appeal."). Here, the First Department did just that, first directing Plaintiff to submit a supplemental appendix, *see* Mot. to Appeal, Ex. E, and, second, dismissing the appeal after he violated the court's order, *id.*, Ex. H. Thus, even if the dismissal had been based on failure to file an adequate appendix, it would have been consistent with this Court's precedent. *Id.*

There is nothing about the decision below that merits this Court's review.

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[2] Plaintiff did not appeal the First Department's May Order. Mot. to Appeal at 6.

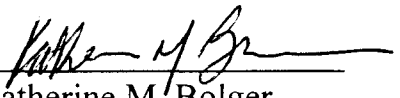
CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's motion for leave to appeal.

Dated: New York, NY
September 9, 2016

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 

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