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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 17

-----X
JOSEPH RAKOFSKY,

Plaintiff,

-against-

Index No.
105573/11

WASHINGTON POST COMPANY, ET AL.,

Defendants.
-----X

Transcript of Motion Proceedings
New York Supreme Court
111 Centre Street
New York, New York 10007
April 8, 2013

B E F O R E:

HON. SHLOMO S. HAGLER, Justice of the Supreme Court

A P P E A R A N C E S:

GOLDSMITH & ASSOCIATES, PLLC
Attorneys for the Plaintiff
350 Broadway, 10th Floor
New York, New York 10013
BY: MATTHEW H. GOLDSMITH, ESQ.

THE TURKEWITZ LAW FIRM
Attorneys for Defendants (Local Counsel)
ERIC TURKEWITZ, SCOTT GREENFIELD
CAROLYN ELEFANT, MARK BENNETT, ERIC L.
MAYER, NATHANIEL BURNEY, JOSH KING,
JEFF GAMSO, GORGE M. WALLACE,
"TARRANT84", BRIAN L. TANNENBAUM,
COLIN SAMUELS, JOHN DOE #1, ANTONIN I.
PRIBETIC, ELIE MYSTEL, DAVID C. WELLS,
16 INDIVIDUALS
228 East 45th Street, 17th Floor
New York, New York 10017
BY: ERIC TURKEWITZ, ESQ.

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A P P E A R A N C E S: (continued)

RANDAZZA LEGAL GROUP
Attorneys for Defendants (Pro Hac Vice Counsel)
ERIC TURKEWITZ, SCOTT GREENFIELD
CAROLYN ELEFANT, MARK BENNETT, ERIC L.
MAYER, NATHANIEL BURNEY, JOSH KING,
JEFF GAMSO, GORGE M. WALLACE,
"TARRANT84", BRIAN L. TANNENBAUM,
COLIN SAMUELS, JOHN DOE #1, ANTONIN I.
PRIBETIC, ELIE MYSTEL, DAVID C. WELLS,
16 INDIVIDUALS
6525 West Warm Springs Road
Las Vegas, Nevada 89118
BY: MARC JOHN RANDAZZA, ESQ.

* * * * *

LAURA L. LUDOVICO
Senior Court Reporter
60 Centre Street - Room 420
New York, New York 10007

Proceedings

1 THE COURT: Good morning. Welcome.

2 MR. TURKEWITZ: Good morning.

3 MR. GOLDSMITH: Good morning.

4 MR. RANDAZZA: Good morning.

5 THE COURT: This is Motion Sequence No. 20 in a
6 very voluminous pack of motions that have been submitted to
7 me a while ago.

8 I finally have read the tens of thousands of
9 pages that you were kind enough to submit to me. I will be
10 rendering a decision shortly on the underlying 20 or so
11 motions that you have submitted to me earlier. This is the
12 20th motion. It's the, for lack of a better word,
13 Turkewitz 35 Defendants that was talked about in the
14 earlier motion, and it was broken up into three different
15 parts, and this is the 35 Defendants that are making a
16 motion for sanctions and fees.

17 And then we have a cross-motion as well by
18 Mr. Rakofsky against Mr. Randazza.

19 MR. RANDAZZA: Against me, Your Honor.

20 THE COURT: That's what I thought. I wasn't sure.
21 I read the motion on Friday just to refresh my
22 recollection.

23 So, Counsel, you can argue the motion.

24 MR. RANDAZZA: Your Honor, may it please you.

25 You know, every lawyer thinks that their case is
26

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2 the most important one in the world, so I'd probably have
3 an ego problem and a client problem if I didn't think this
4 case was very important. But really, objectively, it is.

5 This case is not just about the 35 Defendants
6 here, but it's at its core about the freedom of the press.
7 What we had here was an example of attorney misconduct
8 pointed out by a judge on the record.

9 THE COURT: I don't think it was attorney
10 misconduct. I think you misquoted because this is a case
11 of a young attorney that bit off too much than he could
12 chew.

13 MR. RANDAZZA: I'm getting to --

14 THE COURT: That's really the sum up.

15 MR. RANDAZZA: I am getting to that.

16 THE COURT: I don't see anything from a Bar
17 Association or a screening panel that has found him to be
18 sanctioned or violated a rule.

19 MR. RANDAZZA: In fact, we have seen the
20 opposite, Your Honor.

21 THE COURT: Because the papers that I read, I
22 believe there was -- someone referred the matter to the
23 disciplinary committee in Washington, DC.

24 MR. RANDAZZA: Correct. And they said --

25 THE COURT: They said there was no violation of
26 any rules of that jurisdiction. However, they did use the

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2 word, it was a close call, and that should be a wake-up
3 call to all attorneys that bite off more than they can
4 chew. To take a case right out of law school on a murder
5 trial is not maybe the best thing. That's basically a hail
6 Mary, either you shoot the ball into the end zone or you
7 fail and fall on your face, which is a very apt analogy or
8 a metaphor of what transpired here.

9 So there is no, as far as I know, any
10 disciplinary committee that has found him to be in
11 violation of any ethical obligation.

12 MR. RANDAZZA: Yes, Your Honor, but the word that
13 the judge used was incompetence.

14 THE COURT: Okay. I understand that, but there
15 was a different word that you used.

16 MR. RANDAZZA: Yes.

17 THE COURT: I would rather you use --

18 MR. RANDAZZA: I withdraw that.

19 THE COURT: -- the words that the judge had used
20 in the case. I think he said that it was below
21 expectations of any attorney should have in a case. And
22 also, he used different words, but I don't want to get into
23 those words, the words are in the record. But I will let
24 you continue.

25 MR. RANDAZZA: Thank you.

26 Your Honor, it is true that this is at its

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2 inception a rookie mistake, and we began this dispute
3 certainly with some compassion for that fact. We attempted
4 to resolve this with him with that in mind, providing even
5 the opportunity for redemption, and that's all in our
6 papers, and I don't want to rehash what you've already had
7 to read, but as this case has gone on, it has certainly
8 displayed something more.

9 As you have identified, you have tens of
10 thousands of pages. For our part in that, we have, out of
11 necessity, had to provide you with that in order to defend
12 ourselves. But I think what we've seen in this case is
13 each time Your Honor and your predecessor has given
14 instructions to Mr. Rakofsky to show him the door, to show
15 him the light at the end of the tunnel, it has really
16 resulted with what I cannot describe as anything less than
17 a pathological response, thus amping up the costs, amping
18 up the amount of papers before this Court.

19 And really, this case is about two years old now,
20 which it should never have been filed in the first place,
21 and we have tens of thousands of pages for you to go
22 through, hundreds of thousands of dollars in fees expended
23 in order to defend ourselves, and for what? Because these
24 parties have reported on matters of public concern by
25 reporting fairly and accurately what a judge said in open
26 Court, which is reflected in the record.

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2 So your decision on this motion is going to
3 create an incentive in one direction or another; either it
4 is going to say to anybody who might be in Mr. Rakofsky's
5 position in the future that there is no consequence for
6 filing a blatant slap-suit in order to silence fair
7 criticisms of your conduct. And as attorneys, if I do
8 something today that is incompetent or unseemly, I would
9 hope that my fellow members of the Bar would criticize me
10 for it. I would hope that they would --

11 THE COURT: Do you represent Bannination
12 because --

13 MR. RANDAZZA: Yes, Your Honor.

14 THE COURT: -- I read some comments there that
15 didn't seem fair to me.

16 MR. RANDAZZA: Well, Bannination did not make
17 those comments, Your Honor.

18 THE COURT: I understand that.

19 So let's talk turkey in terms of what would
20 transpire. I read all of the comments and all of the
21 alleged words that were used to depict Mr. Rakofsky, and
22 quite frankly, I was shocked at the comments that were
23 displayed, pornography --

24 MR. RANDAZZA: Yes, but Your Honor --

25 THE COURT: -- Racism.

26 MR. RANDAZZA: -- I do not represent the people

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2 who made those comments, nor do we endorse them.

3 THE COURT: I understand that, but I just don't
4 want the record to be incomplete with certainly uncalled
5 for and beyond the pale comments that were made against
6 Mr. Rakofsky or any other person in this world. It would
7 not be appropriate. The other 34, nonetheless, are
8 different, but that one is a special one that I noticed and
9 the one that has given me the most trouble.

10 MR. RANDAZZA: Well, Your Honor, if we can
11 address Bannination individually.

12 THE COURT: The other 34 were either opinions or
13 fair reporting, the way I see it thus far.

14 MR. RANDAZZA: Bannination, however, is no more
15 responsible for the words on that board than say Craig's
16 List rants and raves is, and they actually -- even though
17 the comments on Bannination are certainly ones that I find
18 indefensible that I don't have any desire to defend, and I
19 don't defend the people who made them, I represent the
20 message board, they have a special position in this case,
21 as they are protected under 47 USC §230.

22 THE COURT: Correct. And who is "Tarrant84"?

23 MR. RANDAZZA: That is a commenter on
24 Bannination, but I don't know that he made any of those
25 comments that you're referring to.

26 THE COURT: He was not making those comments?

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2 MR. RANDAZZA: No, Your Honor.

3 THE COURT: Because I wasn't sure if "Tarrant84"
4 had made those comments or not, I have to look again. What
5 were the comments on "Tarrant84"?

6 I guess the easiest way to deal with that is pull
7 out paragraph 185 or 65 to 67 that talks about the
8 comments, if you have the complaint. I'll look at it
9 again.

10 MR. RANDAZZA: Okay.

11 THE COURT: I wasn't sure if "Tarrant84" made
12 those comments or not, I don't think so. I think it was
13 just there.

14 MR. TURKEWITZ: I believe that's accurate, Your
15 Honor.

16 THE COURT: Okay. Let's move on and I will let
17 you finish. I'm sorry for interrupting you. I just want
18 the record to be complete, because as you see, I have a
19 large caseload today --

20 MR. RANDAZZA: Yes.

21 THE COURT: -- and a lot of people waiting.

22 MR. RANDAZZA: Correct.

23 THE COURT: -- and I don't mean to make short
24 drift of your arguments; I have read it, I'm considering it
25 and a decision will be rendered hopefully this month,
26 sometime in April.

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2 MR. RANDAZZA: Your Honor, with that I will give
3 the floor.

4 THE COURT: Okay. Mr. Goldsmith.

5 MR. GOLDSMITH: Your Honor, good morning.

6 THE COURT: Good morning.

7 MR. GOLDSMITH: First, I just want to put the
8 motion that is being made by the Defendants in perspective
9 here, making a sanctions motion against Mr. Rakofsky, yet
10 they are only --

11 THE COURT: Is it against Mr. Rakofsky and
12 Mr. Goldstein(sic) or just Mr. Rakofsky alone?

13 MR. GOLDSMITH: It's Goldsmith as well, yes.

14 THE COURT: I apologize. I'm sorry for getting
15 your name wrong.

16 MR. GOLDSMITH: That's fine.

17 Now, while they do this, and they make this
18 motion based on the fact that they allege the statements
19 were fair reporting, I want just the Court reviewing the
20 motion to note that really, they only discuss two
21 statements in their motion papers, despite the fact that in
22 the amended complaint the Turkewitz Defendants are accused
23 of publishing at least 19 defamatory statements. Now, it's
24 our position that these statements were defamatory and were
25 not fair reporting. And I would just like for the record
26 just to highlight some of them.

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2 In the Sixth Cause of Action there was an
3 allegation that there was a mistrial for ineffective
4 assistance of counsel. Another allegation the judge found
5 Rakofsky too dishonest to handle the case. These were not
6 findings; that Rakofsky is a lying piece of "S". There was
7 no allegations that Mr. Rakofsky had lied. The mistrial
8 was declared because of Mr. Rakofsky's blatant ineptitude.

9 Clearly, that is not a characterization within
10 the realm of a reasonable -- however the judge described
11 it. It also described him as grotesquely incompetent, that
12 his ethics came into play with deception when there were no
13 ethics that came into play with deception at all.

14 Additionally, there was an allegation that
15 Mr. Rakofsky solicited himself for the case. He did not.
16 The record is clear that Mr. Deaner contacted him. Again,
17 there are other statements as well that he broke ethical
18 rules, that a mistrial was declared because he was so bad
19 and that the performance was so bad that the judge had to
20 declare a mistrial. It's our position that these are not
21 fair reporting.

22 THE COURT: Let me stop you because I think the
23 error of your ways is this, the defamation is not the
24 mistrial. Just because there's a mistrial doesn't mean
25 you're defamed. It's the underlying causes, the underlying
26 statements that were made by the judge that are -- that may

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2 have been defamation if they were said in another context.
3 This was done in a judicial proceeding, so therefore, the
4 Fair Reporting Law comes into effect.

5 The statement by the judge that your client was
6 below expectation -- I don't remember the exact words. I
7 think he used below expectation -- did say that even if
8 there was a verdict in favor of the prosecution, he would
9 have set it aside based upon some Washington, DC -- some
10 procedural rule -- basically it would be -- which
11 essentially would be ineffective counsel. He did say all
12 of that. That is the alleged defamation.

13 It doesn't matter that he wasn't the cause of the
14 mistrial. The defamatory words were the words -- the
15 alleged words that you considered defamatory. They were
16 the ones stated by the judge. Just because they didn't
17 cause it -- just because Mr. Rakofsky allegedly did not
18 cause it, which we're not sure, let's assume you're right,
19 doesn't mean you have a cause of action. That is the error
20 of your ways.

21 MR. GOLDSMITH: In addition to those statements,
22 I would just -- like I just repeated before, the fact that
23 there were other characterizations of Mr. Rakofsky not
24 having to do with the trial about him being unethical and
25 about him using --

26 THE COURT: Yes, but the words -- I hate to say

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2 it, but I remember the judge using the word ethical. And
3 the word trick has a very negative connotation. That's the
4 best way I can describe it without being subjective about
5 it. If you look up the word trick and go to an old
6 Webster's Dictionary, a trick means to -- I have to look it
7 up again, but I would assume -- I shouldn't assume -- but
8 to make someone change their mind, or a lie. To trick
9 someone is to -- I don't have to tell everyone what the
10 word trick means because he used that word.

11 I know that he may have said it in a different
12 context, but the case law is very clear, the very words
13 that he used, lent the connotation to lying. And the judge
14 himself found that to be an ethical issue, and they
15 reported that. And then if everyone believed that to be
16 unethical, that's an opinion and that's protected by the
17 Constitution.

18 In this country we don't permit people to sue
19 someone based upon an opinion, especially when the Court
20 said that there's an ethical issue, and now that's public
21 comment. They can say it's unethical or ethical. That's
22 something that he brought upon himself, unfortunately, by
23 the poor choice of his words.

24 And the motion made by Mr. Bean, the
25 investigator, did state very categorically, and I read the
26 motion papers, which I had not done the last time when I

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2 had seen you, and he in bold in his report states that -- I
3 don't want to mischaracterize it, but my recollection was
4 that he refused -- he's not in the trickery business he
5 said, he's in the investigation business, and that would be
6 a crime to do what he asked him to do. That's essentially
7 what he said, and you have the quote.

8 So I can't see how you have a cause of action
9 against any of the Defendants, except possibly Bannination.
10 If that comment is one of them that you're seeking to -- I
11 have to review it, but it looks like Tarrant84 did not make
12 that comment, so that may be beside the point. But the
13 only one that I saw that was very problematic was the
14 Bannination comments that were explicitly defamatory.

15 MR. GOLDSMITH: And if I may just to discuss --
16 well, first, I just want to clarify just one issue and
17 not --

18 THE COURT: Then we're going to go on because I
19 don't really want to spend a long time. You'll get the
20 last chance. Let him finish because I interrupted him and
21 I want to give him a fair opportunity to respond because
22 you see where I'm going, and I am almost certain what I'm
23 going to do, and you hear the implication that you have no
24 cause of action, vis-a-vis all of the Defendants, except
25 possibly Bannination, but I have to look at that again. I
26 haven't reviewed the federal statute as to what this

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2 bulletin board -- what the state of the law is in New York.
3 I know there is federal cases that talk about what this
4 bulletin board is responsible for.

5 I also haven't got into the personal jurisdiction
6 defenses, whether or not that would survive or not. Does
7 this Court have long arm jurisdiction over the multiple
8 Defendants that are outside my jurisdiction from
9 Washington, DC to Texas to Kansas to Washington State to
10 Ohio to Florida, Colorado, California, even Canada? That's
11 all the parties, at least within the 35 Defendants that
12 we're discussing now. There are others outside of this as
13 well. And I'm not sure. That's a Zippo case. I have to
14 reread it again. There is two Federal Court cases that
15 talk about it. I want to review that. I'm not sure about
16 that issue.

17 But with regard to the causes of action that you
18 have asserted against almost every one of the Defendants is
19 either a fair reporting issue, republishing issue or its
20 opinion that is protected by our Constitution. And the
21 State Constitution is actually much broader than the
22 Federal Constitution.

23 With regard to the Federal Constitution, there
24 were federal cases that came out that basically you can't
25 use opinion in order to defame people, but the State
26 Constitution is more broadly written and permits more

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2 freedom of press than the Federal Courts permit. So you're
3 in a state that is a very pro freedom of speech, freedom of
4 the press. Maybe in a different state you would fair
5 better, but under our state's statutory construction, there
6 is no way these comments are not opinion.

7 I may disagree with those opinions, you may
8 disagree with those opinions, but nonetheless, I make no
9 comment about those opinions. I don't know, I wasn't
10 there, I'm just seeing it secondhand after the fact, after
11 reading thousands of pages. I will let you comment. So I
12 don't see a cause of action.

13 MR. GOLDSMITH: I would just ask the Court just
14 to review since there were these at least 19 statements
15 that are being alleged against the Defendants. While there
16 are opinions -- while some are opinions, they are couched
17 in facts, which is our position is not a fair --

18 THE COURT: No, because in every single one of
19 those opinions there is a hyperlink, there's a reference to
20 the Washington Post and the judge's comments. So when you
21 do that, that takes it out of the fact because the facts
22 were presented and they are saying this is the comment and
23 opinion based upon the facts that were presented by that
24 particular court, which then goes back to the fair
25 reporting and goes back to the republishing. So I don't
26 see -- and even if not, I think it would be squarely

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2 opinion. I don't think the courts of the state would
3 permit you to cherrypick those statements. You have to
4 look at it based upon the context of how it was stated. In
5 the federal courts you may fair better, but under the state
6 law we are a context state, which means the comments made
7 you cannot cherrypick one single word.

8 If you look upon the whole circumstances, that
9 would give rise to whether or not it's defamatory or not,
10 and our state under the cases that I looked at, it was just
11 the Saxe decision that came out more recently, like last
12 year, I forgot the name of the case in the First
13 Department, that went through opinion testimony and it was
14 much, much worse than the information that was imparted in
15 our case and found it was opinion, and it was also based
16 upon a website and internet. He didn't go into the long
17 arm jurisdiction.

18 How do you justify negligence? That's what I
19 couldn't figure out. That's the one that bothered me the
20 most.

21 MR. GOLDSMITH: Well, the negligence issue was --

22 THE COURT: I will give you another two minutes
23 because I'm running out of time.

24 MR. GOLDSMITH: Okay. It was my understanding
25 that our intention was to withdraw the negligence claim. I
26 believe that there was a letter that we submitted.

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2 THE COURT: I did not see that letter. As a
3 matter of fact, it was the opposite. My recollection is I
4 received a letter saying that there were other cases in
5 other jurisdictions that permitted negligence and
6 therefore, you're keeping it.

7 Counsel, I invite you to on notice to the other
8 side to give me a copy of that letter because I have never
9 seen that letter. I have read every single piece of paper
10 that I know of in this case and I've never seen that
11 letter.

12 MR. GOLDSMITH: I believe that these letters did
13 state that if the Court felt that it was necessary to
14 withdraw the negligence, that we would, however, it was our
15 basis on the -- I guess on the case law that it did stand
16 legally, but it was our intention -- I mean, at this
17 point --

18 THE COURT: I have to tell you then that the way
19 you wrote it, it was very unclear because the import of
20 that letter to me was it's defensible and we're going to
21 keep it, I don't care. That's how I read it, but maybe I
22 have to reread the letter. I haven't read that letter
23 since -- I don't know -- when you sent it, I read it. I
24 think it was in February.

25 MR. GOLDSMITH: I think it was right after the
26 last oral argument, the second two motions.

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THE COURT: Right, the second part of it.

MR. GOLDSMITH: Yes. Right.

THE COURT: So the question is are you withdrawing the negligence -- I'm asking you directly now --

MR. GOLDSMITH: Yes, we are.

THE COURT: -- are you withdrawing your negligence claim?

MR. GOLDSMITH: Yes.

THE COURT: Okay. Now it's fair, we have it on the record.

MR. GOLDSMITH: Okay.

Now, I just want to discuss -- would the Court like me to address -- I know there is not much time -- the motion, cross-motion or the personal jurisdiction?

THE COURT: Whatever you would like to do.

MR. GOLDSMITH: Well, I mean, first, after these statements were published, the lawsuit ensued. At this point, as far as our cross-motion goes, the conduct by Mr. Randazza was reprehensible in this matter. He first contacted Mr. Rakofsky's former attorney Mr. Bourzye for an extension of time to file paperwork when he was not admitted pro hac vice.

On a telephone conversation on May 16th he screamed to Mr. Rakofsky to shut the F up. Afterwards it

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2 was learned that Mr. Randazza was seeking to practice pro
3 hac vice and because of the language he used and because of
4 the other circumstances, Mr. Rakofsky and his attorney
5 Mr. Bourzye decided to make a motion to oppose the
6 admission pro hac vice. This resulted in Mr. Randazza
7 threatening criminal prosecution against Mr. Bourzye,
8 extortion in the amount of \$5,000, and then a subsequent
9 request --

10 THE COURT: So his \$5,000 is extortion and your
11 \$5,000 is not extortion?

12 MR. GOLDSMITH: Well, this was an extortion
13 because he stated, if you pay \$5,000, then I will not
14 pursue this criminal --

15 THE COURT: Didn't you say the exact same thing
16 to him? Not him. I read a letter saying that if you want
17 to get out of this case give me \$5,000.

18 MR. GOLDSMITH: As far as a settlement.

19 THE COURT: So why can't he do that? Only one
20 side can ask for \$5,000?

21 MR. GOLDSMITH: Well, he was asking -- I mean,
22 this was a \$5,000 offer as part of a settlement agreement.
23 This was a 5,000 -- he was stating, if you don't pay me
24 \$5,000, we will criminally prosecute you for wiretapping.

25 THE COURT: You can criminally prosecute someone?
26 He was the prosecutor?

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2 MR. GOLDSMITH: He was saying he was going to
3 bring criminal prosecution for wiretapping against
4 Mr. Bourzye, which is why he eventually withdrew.

5 THE COURT: So you have standing to do that
6 now -- when was this -- two years later?

7 MR. GOLDSMITH: Yes, it was -- well, it was two
8 years. This is when he first sought --

9 THE COURT: So why didn't you bring this up two
10 years ago?

11 MR. GOLDSMITH: Well, it was discussed --

12 MR. RANDAZZA: He did, Your Honor. This actually
13 has been argued before your predecessor and twice --

14 THE COURT: You'll get a chance to respond.

15 So it was denied by the judge that was previously
16 on the bench?

17 MR. GOLDSMITH: Well, no, it was -- the issue as
18 to whether this conduct was frivolous was never decided by
19 the Court, it was only mentioned in the context of the
20 opposition of the pro hac vice.

21 THE COURT: You opposed the motion to -- strike
22 that. One of the grounds for opposing the motion by
23 Mr. Randazza to be admitted pro hac vice was that his
24 conduct was below the expectations of an attorney in New
25 York, for any choice of better words; is that correct?

26 MR. GOLDSMITH: Yes.

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THE COURT: And Judge Goodman denied your motion.

MR. GOLDSMITH: The motion was denied.

THE COURT: So wouldn't that be implied that if he's allowed to practice, then the conduct was not below, and therefore, it was not frivolous?

MR. GOLDSMITH: I mean, there was never a hearing on the issue. It was mentioned. It was never considered --

THE COURT: Did you appeal?

MR. GOLDSMITH: -- directly by the Court.

THE COURT: Did you appeal?

MR. GOLDSMITH: No.

THE COURT: That's not the law of the case.

MR. GOLDSMITH: Well, it's our position that this was a different standard for admission to pro hac vice than a motion for sanctions where we are alleging now bad faith.

THE COURT: Motion for sanctions is a higher one.

MR. GOLDSMITH: Yes.

THE COURT: I don't think I've ever sanctioned anyone on the many years I've been on the bench. It's very rare to sanction someone. It's a higher standard. There has to be no semblance of law or fact and it has to be completely frivolous, and that's the standard.

MR. GOLDSMITH: Well, this is what brings me to my next point, which is that the Defendant's motion for

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2 sanctions has no respect for what the standard is.
3 Instead, they list in their motion only two alleged
4 statements that they allege to be true and there is just
5 merely cutting and pasting from their motion to dismiss
6 into their sanctions argument without a discussion as to
7 whether or not the statements are allegedly warranting
8 sanctions.

9 Now, when the Defendants made this motion, I
10 mean, there was no full discussion about any of these
11 issues. And again, it was only on those two statements. A
12 motion for sanctions is to look at the entire action to
13 determine whether it is frivolous, and they chose two
14 statements out of the entire amended complaint, focused on
15 them, ignored the rest of the complaint and made no full
16 discussion over the sanctions issue.

17 THE COURT: Mr. Goldsmith, this is a close call.
18 I have to tell you that, and you probably can tell, I
19 didn't think there was much merit to this case at the very
20 beginning when I saw it. I have written on this before,
21 and the better approach was to let it die down and let it
22 go. It would have died down in a few days.

23 Unfortunately, for Mr. Rakofsky, this turned out
24 to be a very bad day, April 1st. April 1st is the fools
25 day, and it just happened that day and the internet picked
26 up on it. A few days later it would have been gone, but

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2 the cause of action actually stirred up the pot and the
3 comment that Mr. Rakofsky made thereafter stirred up the
4 pot, and it didn't make any sense.

5 I think you're mixing up the causes of action.
6 The problem is you can't have -- you have to be objective
7 about bringing these cases. I know it's hurtful, and I've
8 read some of the comments, and Mr. Rakofsky is correct, it
9 is hurtful, a lot of stuff they wrote about him. Whether
10 it's fair reporting is a different story. Whether it's
11 proper opinion or not, I understand that, but you're
12 basically splitting hairs on this cause of action.

13 The only thing you're really saying is that he
14 did not cause the mistrial, it was Mr. Deaner, it was his
15 request, rather than the Judge sua sponte doing that. I
16 understand that. But all the allegations and all the
17 statements of defamations all go to comments that were made
18 by the judge, and that's a legal principle of fair
19 reporting, and it was all fair reporting.

20 Unfortunately, Mr. Rakofsky did something that he
21 probably shouldn't have done his first trial, and I think
22 he probably realizes that now, and he's probably a better
23 lawyer now than he was a few years ago. He picked up a
24 case that was a very difficult case to try and couldn't
25 handle it. And the Washington DC Bar basically said he
26 tried his hardest, and I think he did.

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2 I don't think anyone is saying he didn't try his
3 hardest for his client. And the judge found his
4 performance to be below expectations of an attorney on a
5 Murder One trial. It may have been good for a misdemeanor
6 trial where there is a petit larceny where you shoplifted
7 some toothpaste, but it's not. It wasn't good enough for
8 someone that may spend 25 years in jail, and that's what
9 the judge said.

10 I'm not trying to be mean here. I understand the
11 problem, and quite frankly, I usually forgive attorneys
12 when they make mistakes. I'm not the type of judge that
13 lambastes attorneys. I speak very low and very calmly, and
14 that's my own personality. The other judge lambasted him
15 for his performance, and it's kind of obvious.

16 I read a transcript, both the March 31st one and
17 the April 1st one, and there is no cause of action here.

18 MR. GOLDSMITH: Again, I would just -- I mean,
19 the connotation of how the Defendants characterize us is --
20 it's our position that Mr. Deaner made a motion to
21 withdraw -- made a motion to have new counsel.

22 THE COURT: I'm agreeing. If you're telling
23 me -- the record is not clear in my mind the reason why the
24 judge did it. It looks likes he had multiple reasons for
25 doing so, but I can't go into the mind of a judge. It's
26 not an unfair reading to say what you just said. It's not

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2 an unfair reading to say what the Washington Post said and
3 all the other blogs that picked it up later because you
4 can't tell what transpired because it's multiple days,
5 there's March 31st, there's April 1st.

6 Initially it was Mr. Rakofsky that went to the
7 judge because he said he had a conflict, but then later on
8 said he granted Mr. Deaner's motion. He did say that, the
9 judge on April 1st, which is the day after because the
10 judge refused to grant Mr. Rakofsky's motion on March 31st.

11 He only granted it because he wanted to give Mr. Deaner an
12 opportunity to dwell upon it because he would have to sit
13 in jail for I don't know how many months it would take for
14 the prosecution to start a new trial and to get defense
15 counsel that would be able to defend him.

16 So I have to tell you that I was looking at this
17 for many weeks already, thinking about it, and I'm not
18 completely decided yet. But my first reaction is still the
19 same reaction now, that the nuances that he's making is not
20 within the law, it is fair reporting on the whole, it is a
21 republishing and it is opinion. The only one that
22 disturbed me, as I told you, was the Bannination comments,
23 which was beyond the pale. Everything else is opinion. I
24 don't necessarily agree with those opinions. I'm not
25 characterizing those opinions, but nonetheless, they were
26 opinion.

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MR. GOLDSMITH: Just to clarify --

THE COURT: And it is a close call on the sanctions.

MR. GOLDSMITH: Just to clarify for the Court, one of the issues that was raised by Defendants as a mischaracterization, any discussion which was allegedly raising ethical issues all happened after the fact, after the motion for Mr. Rakofsky's replacement was granted.

THE COURT: No, that's not true.

MR. GOLDSMITH: Yes.

THE COURT: It's not true because he mentioned it and then he said it again. What happened was the judge said it, I think multiple times on granting the motion, but on the last time he said alternatively this and that and then he brought it up. But it doesn't really much matter if he did not declare a mistrial based upon his unethical conduct. The alleged unethical conduct is the defamation, not the cause of mistrial. That's the problem. You're splitting hairs.

It's the content of what the judge said that may give rise to the defamation. The defamation is he's unethical, not that there was a mistrial. As a matter of fact, quite frankly, Mr. Rakofsky said in his Facebook that it was a good thing that it was a mistrial. He said congratulations, look what I did, I got a mistrial. So

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2 that is not the defamation. A mistrial doesn't mean there
3 is a defamation. The defamation would be he is unethical,
4 he is incompetent or whatever other words that were used,
5 which is not my words, it's the judge's words and it's the
6 bloggers' words and the Washington Post's words. That's
7 not what you're getting. The mistrial is not defamation.
8 The defamation is the underlying conduct --

9 MR. GOLDSMITH: However, again --

10 THE COURT: -- the cause and effect.

11 And also, the case law is that you can't -- I
12 forgot the words that the Court used. Maybe you can remind
13 me, I forgot it. I think it was the Supreme Court or the
14 Court of Appeals. You can't use a laser-like -- I forgot
15 the words. But you can't just pick out a word here and say
16 that's defamation, you have to look at the context, and
17 look at the substantial portion of what was being said.
18 And I'm going to leave it at that. And you see where I'm
19 going.

20 MR. GOLDSMITH: I do. I just wanted to just
21 impress upon the Court that our -- Mr. Rakofsky's attorney,
22 once there are allegations that he has acted unethically,
23 that goes to the heart of his practice, and there was never
24 any discussion or --

25 THE COURT: Mr. Bean put in the affidavit, which
26 I read, and the judge said those words. So I agree that if

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2 there was -- if in an isolated context someone said,
3 Mr. Rakofsky, you're unethical and you should not practice
4 law because you did X, Y and Z, that's defamation, I agree,
5 but that's not what you're saying. What you're saying is,
6 is that since the judge didn't attribute the mistrial due
7 to unethical conduct, that's defamation.

8 What you're forgetting is it's the unethical
9 conduct would be defamation, not the attribution to the
10 mistrial. The cause and effect, that's what you're
11 missing, and that's the only thing that you're really
12 alleging because everything else was fair reporting,
13 everything else was a republishing issue or opinion.

14 You may not like what was said and I may disagree
15 or even some other people, I saw some on the same blogs
16 that you've showed me, that disagreed and said this was a
17 rookie mistake and let's give him a little slack. I saw
18 that too reported in the blogs. I saw one or two comments
19 that was not -- that was the minority opinion, don't get me
20 wrong, but I saw that as well, and that's an opinion. He
21 made a mistake, I make mistakes, you make mistakes, we all
22 make mistakes, some make bigger mistakes, some make smaller
23 mistakes.

24 MR. GOLDSMITH: One more issue I would just like
25 to discuss before --

26 THE COURT: I'm getting signals that I have to

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2 wrap this up, so one more minute.

3 MR. GOLDSMITH: Okay.

4 So, Your Honor, the other issue related to the
5 personal jurisdiction. Taking the Bannination website
6 itself, Bannination, I just want to explain to the Court
7 just quickly how this system is structured and why these
8 Defendants are brought together. Here we submitted
9 exhibits for the Court about why on the Bannination
10 website, just like these other websites, there are these
11 hyperlinks to other websites.

12 The Bannination website contains various links,
13 and we attached these to Mr. Turkewitz's own blog, where
14 these people -- on the Bannination website there is a
15 specific section discussing Mr. Rakofsky, and in that
16 section there are these links to these different Defendants
17 where they all share and basically state what we are
18 alleging are these defamatory statements.

19 THE COURT: So what you're arguing is that any
20 time that you put something on the web I have jurisdiction
21 anywhere in the world. That's what you're arguing.

22 MR. GOLDSMITH: No, we're saying that this is
23 a -- the reason why there is jurisdiction is because we're
24 alleging it was a defamatory statement, and the fact that
25 these Defendants all received a commercial interest -- had
26 a commercial interest in submitting these hyperlinks.

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2 THE COURT: I don't buy any of that stuff, I have
3 to tell you.

4 MR. GOLDSMITH: This was the case law we
5 submitted from the Second Circuit.

6 THE COURT: Most of what I read from the expert
7 you put in was incomprehensible, quite frankly.

8 MR. GOLDSMITH: Well, I mean, what the expert was
9 saying -- and the expert's testimony was not refuted by the
10 Defendants.

11 THE COURT: It was really incomprehensible.

12 MR. GOLDSMITH: The conclusion of the expert is
13 that there is this linked network of websites which are run
14 by the Defendants where they are all trying to achieve
15 commercial benefit.

16 THE COURT: I'll look at it again. I still
17 haven't made my mind up on the personal jurisdiction, long
18 arm jurisdiction issue.

19 With regard to the defamation issues, I think
20 I've made up my mind 99.9 percent, and I don't think I'll
21 change it. I will start to write the decision hopefully
22 tomorrow and try to get it out within a month.

23 One other issue while I have you. On default, I
24 couldn't figure out who you are seeking a default against.
25 You didn't say their names and you didn't tell me -- you
26 have a motion as well for a default judgment.

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MR. GOLDSMITH: Yes.

THE COURT: I could not figure out who you are seeking a default judgment against. You never told me their names.

MR. GOLDSMITH: I believe -- we will clarify that for the Court. I thought this was --

THE COURT: I understand that. I don't want to speak ex parte, but I could not make out from your motion who you're seeking a default from. You didn't put their names in. There's like 80 Defendants total in the second amended complaint, and there's 60 I think in the first amended complaint, and there's at least 50 -- my count was there's 55 Defendants that I have that made motions. That was my rough count, it may be more. I counted 55 or 56 and you did I think 61, so it left about five or six more. I think you had about 61. Do you know how many Defendants you had in your first complaint?

MR. GOLDSMITH: I don't know the exact number.

THE COURT: Okay. I don't want to speak ex parte.

MR. GOLDSMITH: Okay. Just a final issue with regard to the jurisdiction is that in the motion to dismiss by the Turkewitz Defendants, they explicitly stated that they were waiving any personal jurisdiction defenses in their affirmation papers.

THE COURT: I don't remember that too.

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2 MR. GOLDSMITH: I mean, I have it cited for the
3 Court.

4 THE COURT: You said they waived all personal
5 jurisdiction offenses?

6 MR. GOLDSMITH: They stated with regard to their
7 Defendants that they were waiving personal jurisdiction.

8 THE COURT: I just don't remember because it's
9 been so long ago. Okay, let's turn it over.

10 MR. TURKEWITZ: There were some that did. Other
11 states have stronger slap statutes, and basically the
12 attitude was that if Mr. Rakofsky wants to go sue them in
13 their home state, that they would welcome him there and
14 they would hit him with stronger slap sanctions because
15 they are stronger than the State of New York.

16 THE COURT: What I need you to do, not now, is
17 let me know who you waive personal jurisdiction for.

18 MR. TURKEWITZ: I believe it's in the transcript
19 from the first --

20 THE COURT: Can you just do me a favor --

21 MR. TURKEWITZ: Yes.

22 THE COURT: Write a letter to the Court, just to
23 make it simple for me.

24 MR. TURKEWITZ: Absolutely.

25 THE COURT: -- finding who you waive.

26 And you can tell me as well, and you can just cc

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2 each other?

3 MR. GOLDSMITH: Yes.

4 THE COURT: Because that's fair because I don't
5 remember that. I did remember you waiving on certain ones,
6 but I wasn't clear on which ones. At that point in time, I
7 was very new to the case, as you can tell, and I didn't
8 take copious notes on that and they look a little different
9 than what you said than the 35 that I see, so I want you to
10 match them up.

11 MR. TURKEWITZ: I will let Mr. Randazza.

12 THE COURT: Whoever has to do it. I don't want
13 to waste time now.

14 MR. GOLDSMITH: Okay. One final comment.

15 I actually came into the case at the same time
16 when Your Honor did. If you would just let Mr. Rakofsky
17 speak for about 30 seconds to address some points.

18 MR. RANDAZZA: By all means.

19 MR. TURKEWITZ: Under oath, Your Honor.

20 THE COURT: No, I'm not doing this under oath.

21 MR. RAKOFSKY: Good morning, Your Honor. I just
22 wanted to say, in my letter to you I wrote, there could
23 only be one proximate cause for the mistrial. That
24 proximate cause in the Washington, DC case was my motion to
25 withdraw and --

26 THE COURT: So what.

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MR. RAKOFSKY: Okay.

THE COURT: I'm agreeing with you. Let's say you're right, the underlying defamatory material is clearly the alleged incompetence, the unethical issues, just because it wasn't a mistrial -- you, yourself, had glorified the fact that you got a mistrial, so how could that be bad?

MR. RAKOFSKY: I'm not saying it's bad, Your Honor.

THE COURT: Okay. So then how could it be defamatory if it's not bad? What is your damages because there was a mistrial? There is no damages because there is a mistrial.

MR. RAKOFSKY: No one is saying that the mistrial -- stating that there was a mistrial was defamatory. The issue is saying that there was a mistrial because I was incompetent.

THE COURT: But that's what the judge said.

MR. RAKOFSKY: That is not what the judge said, Your Honor, respectfully.

THE COURT: If the judge said you were below expectations of a lawyer that would try someone, I would not use the word incompetent, and I still don't. That's not the way I speak and I don't think it's appropriate to call a lawyer incompetent. I don't speak that way. I

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2 think it's inappropriate. I would say it the way the judge
3 said it, but is that a mischaracterization of what the
4 judge said? I don't know. Is that opinion? Of course,
5 it's an opinion based on what he said. Quite frankly, some
6 would say below expectations of what an attorney should be
7 in a murder trial, you could use that word. That's fair
8 reporting. I hate to say it.

9 MR. GOLDSMITH: Again, it's our position --

10 THE COURT: And quite frankly, Washington, DC
11 said it too. I meant the Bar, the Bar said the same thing.
12 It was a close call. They almost sanctioned him. They
13 said it's a -- I find this to be a rookie mistake.
14 Mr. Rakofsky made a mistake and he's human and the
15 Washington, DC Bar saw it. He was human, he made a
16 mistake, he tried his hardest. He didn't purposely try to
17 harm his client. He did his best. And I think reading the
18 transcript, I think even the judge realized that, and I
19 realized that.

20 MR. GOLDSMITH: Again, the allegations that we're
21 raising are the characterization that he was grotesquely
22 incompetent and that he was --

23 THE COURT: But that's an opinion. What does the
24 word grotesquely incompetent mean? I don't know what it
25 means.

26 MR. GOLDSMITH: Apparently, it's the ultimate --

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2 the lowest of incompetence of a level a person could be.

3 THE COURT: I don't know what the word means,
4 quite frankly, grotesquely incompetent. Either your
5 incompetent or you're not incompetent. You're 100 percent
6 incompetent, 99 percent incompetent, 98 percent
7 incompetent. I don't know what that means, grotesquely
8 incompetent. I would not use those words. I think it's a
9 poor choice of words, and no one should be characterized as
10 that. I agree with that, but is that defamatory? No,
11 that's an opinion.

12 MR. GOLDSMITH: I would just ask again just the
13 Court to review our --

14 THE COURT: I reviewed everything, and you see
15 that I know everything that's going on in this case. I
16 don't need you to tell me to review more. I know what to
17 review. I reviewed everything.

18 MR. GOLDSMITH: Okay.

19 THE COURT: And quite frankly, you should review
20 your letter because you did not tell me in your letter that
21 you were withdrawing the negligence claim.

22 MR. GOLDSMITH: We will resubmit that letter.
23 Well, I already withdrew the complaint.

24 THE COURT: You don't have to resubmit it, but
25 just to be fair, I read everything, I know exactly what you
26 said. As a matter of fact, you referred to different

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2 jurisdictions that allow a negligence claim. That was the
3 last part of the letter on the second page. I know
4 everything you wrote. I even know the letter that
5 Mr. Rakofsky wrote in the alleged sur reply showing me all
6 the Bannination problems, which I had seen before. You
7 don't have to tell me again, and bringing up a lot of
8 stuff. I read everything.

9 Everyone finished?

10 MR. TURKEWITZ: Two quick points, Your Honor.

11 THE COURT: Really quick.

12 MR. TURKEWITZ: Two quick points.

13 First, with respect to the pro hac vice motion,
14 there was, in fact, a hearing in front of Justice Goodman.
15 It was not done on the record. Mr. Rakofsky had his chance
16 to make his pitch, he lost, but then moved for
17 reconsideration, he lost again. He then brought an order
18 to show cause and he lost and he brought an order to show
19 cause in the Appellate Division and lost again.

20 THE COURT: I read it.

21 MR. TURKEWITZ: Okay. The other had to do with
22 at the very beginning you spoke about misconduct and
23 Mr. Goldsmith had made reference to comments about ethics
24 that were actually outside the confines of the trial
25 itself. I want to refer Your Honor to Exhibit J in my
26 papers, which refers to a variety of websites Mr. Rakofsky

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2 had where he was practicing law without a license in a
3 variety of states, including New York, Connecticut and
4 Washington, DC. He said he wanted to set the standard, for
5 example, for criminal defense in New York City where he is
6 not licensed. So anybody who made comments about ethics,
7 they were certainly based upon his own websites, is
8 entitled to do so.

9 In addition, some of the websites made references
10 to a wide variety of experience that he claimed to have,
11 but did not. Once again, that is fair commentary for
12 anybody who wants to write about deception or misconduct or
13 ethics.

14 THE COURT: It's all puffery. I read the website
15 that he had. It was all puffery that he wrote there, and
16 this is all opinion. Everything is opinion.

17 MR. TURKEWITZ: And the only other exhibit other
18 than Exhibit J was Exhibit M, which was the second
19 Washington Post article when Mr. Rakofsky was found,
20 according to the woman who had hired him, to be trolling
21 the courthouses in New York City where he got his lead into
22 the --

23 THE COURT: That's not defamatory anyhow. We
24 have lawyers that try to get clients all the time. That's
25 not defamatory.

26 MR. TURKEWITZ: But it is the basis for comments

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2 that Mr. Goldsmith was referencing that would make that --

3 THE COURT: You know how many lawyers look for
4 clients? That's not a crime. That's a good thing to try
5 to get a client. I don't consider that defamatory.
6 Without clients you can't get paid.

7 With that, I bid you adieu.

8 MR. TURKEWITZ: Thank you.

9 THE COURT: Please order the transcript if you
10 don't mind.

11 * * * * *

12 Certified to be a true and accurate record of the
13 within proceedings.

14 _____
15 Laura L. Ludovico
16 Senior Court Reporter
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