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

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JOSEPH RAKOFSKY and RAKOFSKY LAW FIRM, P.C.,

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY, et al.,

Defendants.

New York County
Index No. 105573/2011

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AFFIRMATION IN OPPOSITION TO PLAINTIFFS' MOTION PURSUANT TO CPLR 5704(a) ON BEHALF OF DEFENDANT REUTERS AMERICA, LLC.

Mark A. Weissman, an attorney admitted to practice in New York hereby affirms under penalty of perjury:

1. I am a Member of the Firm of Herzfeld & Rubin, P.C., attorneys for Defendants Reuters America, LLC[1] ("Reuters") and Dan Slater. I make this affirmation in opposition to the application by Plaintiffs pursuant to CPLR 5704(a) for partial relief from the Stay in this action ordered by the Honorable Justice Emily Jane Goodman. Justice Goodman correctly characterized Plaintiffs' proposed Order to Show Cause as "incomprehensible" and declined to sign it. Plaintiffs have established no basis herein for the relief requested in this application and it should therefore be denied in its entirety.

2. By way of background, this is an action for defamation against numerous news agencies and Internet journalists, including Reuters and its reporter, Dan Slater. This matter stems from the publication by the Washington Post of an article concerning a mistrial declared in

[1] Reuters America, LLC was incorrectly identified in the Complaint as "Thomson Reuters."

a Washington D.C. murder case in which Rakofsky – only about one year out of law school at the time– was acting as lead defense counsel. In its article, the Washington Post had accurately reported statements made by the sitting judge, on the record and in open court, concerning Rakofsky's lack of abilities and competence with respect to his performance at trial, as well as "ethical issues."

3. Rakofsky alleges that Reuters and Slater defamed him and his law firm by publishing a succinct summary of the Washington Post article on a legal news aggregation website maintained by Reuters called "News & Insights," which also "hyperlinked" to the Washington Post story on the Internet. Rakofsky claims that Reuters' summarization of the Washington Post article, including repetition of the judge's criticism of Rakofsky, constituted libel and misappropriation of his name and likeness.

4. The Washington Post article was allegedly first published on April 1, 2011. Reuters published its summary piece of the Washington Post story on April 4, 2011. Rakofsky commenced this action on May 11, 2011 and served Reuters with the *original* Complaint on May 12, 2011. The original Complaint asserted only two causes of action against Reuters and Slater– namely, defamation and misappropriation. Reuters was never served with any amended complaint containing additional causes of action (which such amended complaint was apparently not filed until May 16, 2011), nor was I, as counsel for Reuters, informed of the existence of any amended complaint until after Reuters served its motion to dismiss, despite my having personally spoken to Rakofsky's counsel before Reuters' motion was served.

5. On June 22, 2011, Reuters (and Slater) served a Motion to Dismiss the complaint pursuant to CPLR 3211. It must be noted that Reuters' motion was not based on "technical" or curable pleading deficiencies, as Rakofsky seems to suggest (Rakofsky Aff. ¶ 48). Instead,

Reuters' motion was based *inter alia* on the absolute defense for defamation under Section 74 of New York Civil Rights Law (New York's "Fair Report Privilege" statute) and the "wire service" defense- i.e., well-settled principles of substantive New York law and the First Amendment. Specifically, Reuters demonstrated that its report was a fair and substantially accurate summary of the Washington DC criminal proceedings and, therefore, Reuters was absolutely immune from liability under Section 74. In addition, since the Reuters report was based entirely on reporting by the Washington Post – an established, highly reputable news organization, upon which Reuters was entitled to rely, Reuters established the "wire service" defense under Karaduman v. Newsday, Inc., 51 N.Y. 2d 531 (1980) and its progeny, as an additional defense as a matter of law. Simply put, Reuters' motion to dismiss not only showed that Rakofsky failed to plead a cause of action against Reuters – it demonstrated conclusively that he *cannot* state a claim, as a matter of law.

6. The original return date for Reuters' motion was set for July 15, 2011. Numerous other defendants also served motions to dismiss under CPLR 3211 on similar substantive grounds at or around the same time as Reuters.

7. Instead of responding to the motions to dismiss, Rakofsky asked Reuters for an extension of time to respond (to which I agreed on Reuters' behalf) and concurrently asked the trial court for leave to allow his counsel to withdraw from the case. Contrary to his assertion in Paragraph 37 of his Affidavit that he did not then seek an "immediate stay," Rakofsky in fact *specifically* requested in his affirmation filed in connection with that motion to withdraw that "all further proceedings be stayed for 30 days after the granting of this motion to enable Plaintiff to obtain new counsel in the event that he and his law firm wish to pursue this action." Both of Rakofsky's requests were then granted by Justice Goodman, including the Stay which was

ordered to expire on September 14, 2011 and the day after which the parties were ordered to appear before Justice Goodman.

8. Thus, in the more than *seven months* that have elapsed since Reuters and many other defendants served their motions to dismiss, neither Rakofsky nor his firm have ever served any opposition of any kind. Instead, Rakofsky and his former counsel engaged in dilatory tactics and extensive and wasteful motion practice, including: (i) repeated requests for extensions of time to respond, (ii) the withdrawal of Rakofsky's attorney (iii), the Stay itself, which, as noted, was requested by Rakofsky and which is the subject of this application, (iv) the three-ring circus surrounding Rakofsky's so-called "dispute" between he and his former counsel which, even if true, is completely irrelevant to this issues and parties in this case (Rakofsky Aff. ¶ 60-62); and (v) additional patently irrelevant and scurrilous charges.

9. Most significantly, after personally appearing and stipulating on September 15, 2011 before Justice Goodman in open court to both the continuation of the Stay so that he could obtain new counsel and a consolidated briefing schedule for all pending and future motions to dismiss ("notwithstanding the stay") (see Rakofsky Aff., Ex. 2), Rakofsky then began a bizarre campaign of filing improper ex-parte motions in violation of the Stay, *inter alia* for leave to amend the complaint and to add parties, among other frivolous requests, all done during the period when Rakofsky *could* have and *should* have instead been using that time (a) to identify a new lawyer to represent him, as he had assured Justice Goodman and the parties he would do and (b) to prepare his responses to the pending motions to dismiss.

10. Remarkably absent from Rakofsky's affidavit submitted with his application is any serious discussion of these events or the multitude of pending substantive and dispositive motions yet unanswered. Nor is there any hint in his papers as to whether, when or how he

proposes to respond to the pending dispositive motions. Instead, Rakofsky disingenuously asks this Court to allow *him* to "move forward," (Rakofsky Aff. ¶ 2) seeking partial, one-sided "relief" from the Stay which was ordered for *his* benefit. He does not seek to have the Stay lifted in its *entirety* and for all parties because, naturally, that would mean he would have to respond to the dispositive motions. Indeed, when some defendants requested from Justice Goodman that the parties proceed with the briefing schedule notwithstanding the Stay as previously *expressly stipulated*, Rakofsky was notably silent.

11. This application, along with the orders to show cause on which it is purportedly based, are nothing more than a transparent effort on Rakofsky's part to continue to avoid responding to the pending motions to dismiss and otherwise to tie his opponents' hands, while engaging in further pointless and wasteful motion practice.

12. Rakofsky's underlying request to amend his complaint should be rejected as a basis to lift the stay. Any proposed amendments to the Complaint to add additional causes of action would be futile and cannot defeat Reuters' motion to dismiss which, as noted, were not based on curable pleading defects, but on substantive law. Indeed, if any relief is to be granted at all by this Court, it should be that Rakofsky be ordered to respond to the dispositive motions *forthwith* and to serve any request to amend his pleadings as a cross motion so that Reuters may demonstrate the futility of any amendment in its Reply. This is consistent with the parties' September 15, 2011 Stipulation. Reuters should not be required to file a "substitute motion" to dismiss (Rakofsky Aff. ¶ 56) or otherwise to waste its resources responding to a new, yet still manifestly deficient, amended pleading, particularly where Rakofsky never bothered to serve Reuters with a first amended pleading at the outset.

13. For these reasons alone, Rakofsky's application should be denied. To the extent

this Court will consider his additional arguments in support of his application, they are groundless, if not "incomprehensible" as Justice Goodman ruled. First, Rakofsky claims that the Stay somehow prejudices him because the Stay expires "perilously close" to the expiration of a limitations period. (Rakofsky Aff. ¶ 5). This argument should be rejected for several reasons. First, although Rakofsky likely has no claim against any of the proposed additional defendants, the Stay does not prohibit Rakofsky from commencing a new action against any new defendant, to the extent he believes the limitations period is running out as to those defendants, or otherwise. Second, to the extent Rakofsky believes the Stay does prevent him from commencing a separate action against additional parties, the Stay currently expires on March 9, 2012 and even Rakofsky admits that the "first applicable" limitations period will not expire until April 1, 2012, at the earliest, which is over three weeks later. In any event, with respect to any new proposed defendant who allegedly published a defamatory article well after April 1, 2011, Rakofsky has not explained his basis for asserting that there is a limitations problem. The expiration of the limitations period is simply a non-issue.

14. Rakofsky also claims that the Stay should be partially lifted because this lawsuit supposedly has "utterly destroyed" his professional life and done "vast damage" to his "personal life" and "health" and that he "should not be required to wait and suffer further injury when [he] could and should move forward." (Rakofsky Aff. ¶2.) This specious argument as well as his claim of ongoing injury should also be rejected. First, it is *Rakofsky himself* – not the Defendants or the court which has caused all of the delay in this case, as well as any ongoing alleged injury. Second, Rakofsky does not and cannot show that "moving forward" with the case could somehow prevent any purported "further injury." "Moving forward," in this case, will mean that Rakofsky must first respond to the pending motions to dismiss. See, e.g. CPLR 3214(b).

Moreover, under well-settled First Amendment principles prohibiting prior restraints, no injunctive relief will be available to Rakofsky for his alleged reputational injuries. See Alexander v. United States, 509 U.S. 544, 550 (1993); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 722-23 (1931). Thus, Rakofsky's claims of ongoing injury will, to a virtual certainty, never be remedied by the case "moving forward" and such claims are, therefore, irrelevant to his application to lift the stay. In any event, if there is any "ongoing injury" at all caused by the Stay, it is to the First Amendment and to the defendants who have been forced to respond to Rakofsky's frivolous and dilatory conduct while awaiting a response to their motions to dismiss.

15. With respect to Rakofsky's request to amend the affidavits of service and cure technical defects and "irregularities," (Rakofsky Aff.¶¶66-74), Reuters objects to this characterization and to the request. The Court should reject this argument as a basis to lift the Stay. As noted above, Reuters was never served with any amended complaint containing additional causes of action (which such amended complaint was apparently not filed until May 16, 2011), nor was I, as counsel for Reuters, informed of the existence of any amended complaint until after Reuters had already served its motion to dismiss, despite my having personally spoken to Rakofsky's counsel before Reuters' motion was served. Defendant Dan Slater – who is a former reporter for Reuters was never served with any process whatsoever.

16. Moreover, Rakofsky filed a false Affidavit of Service stating that an "Amended Summons" and "Amended Complaint" were served on "Thomson Reuters" on May 12, 2011. This is a blatant falsehood because the "Amended Complaint" was not filed and did not exist until May *16*, 2011. In addition, Reuters did not become aware of this false filing until September 21, 2011 when Rakofsky finally shared his affidavits of service with defendants. Rakofsky's statements now that "no Defendant objected" or would be "prejudiced" (Rakofsky

Aff. ¶ 73) by his failure to comply with rules of civil procedure, including his late filing of an obviously false affidavit, is nothing short of outrageous.

17. For these reasons, Plaintiffs' application for partial relief from the Stay should be denied.

WHEREFORE, the Court should deny Plaintiffs' application in its entirety and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 27, 2012

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