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.

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Defendants' Memo of Law Opposing Plaintiffs' Application for Appellate Intervention Pursuant to CPLR § 5704(a)

Index # 105573/11

Defendants' Memo of Law Opposing Plaintiffs' Application for Appellate Intervention Pursuant to CPLR § 5704(a)

The Defendants listed at the conclusion of this brief (Collectively, the "Defendants") oppose through counsel, Eric Turkewitz (local counsel) and Marc Randazza (pro hac vice), the application for appellate intervention filed by Plaintiffs Joseph Rakofsky and Rakofsky Law Firm ("RLF") (collectively, "Rakofsky" or the "Plaintiff").

Background of this Defamation Suit

The Plaintiffs' defamation action results from numerous news stories that plaintiff Joseph Rakofsky was incompetent as an attorney during a criminal trial and that he had an ethical problem. Asserting that people were mean to him on the Internet, Mr. Rakofsky sued them in the hope that the stories would be taken down. Instead, people wrote about the defamation lawsuit, magnifying the underlying commentary about his competence and ethics. Each attempt to amend the lawsuit brings yet another wave of negative commentary, the source of which are comments made about Mr. Rakofsky by a judge during a trial. And that, in turn, brings on yet another attempt to amend the lawsuit to add more parties.

On April 1st , 2011, the *Washington Post* published an unflattering article regarding

Rakofsky's attempt to defend a murder case in the District of Columbia.[1] Mr. Rakofsky, admitted *pro hac vice*, told the jury during a "rambling" opening that it was his first trial. D.C. Superior Court Judge William Jackson expressed dismay at the defense being provided, to the defendant's detriment, and declared a mistrial after three days.

Judge Jackson said, according to the *Post*, that he was "astonished" at Mr. Rakofsky's performance and at his "not having a good grasp of legal procedures." He also said that Mr. Rakofsky's performance in the trial was "below what any reasonable person would expect in a murder trial." And further, Judge Jackson added that Mr. Rakofsky did not have "a good grasp of legal procedures of what was, and was not, allowed to be admitted in trial, to the detriment of (the defendant)."

Judge Jackson also showed displeasure at Mr. Rakofsky's email to an investigator asking that the investigator "trick" a witness. According to the *Post*:

> **The filing included an e-mail that the investigator said was from Rakofsky, saying: "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting." The e-mail came from Rakofsky's e-mail account, which is registered to Rakofsky Law Firm in Freehold, N.J.[2]**

Mr. Rakofsky was admitted to practice law in New Jersey on April 29, 2010.[3] Soon after, it was learned, he opened numerous law offices and advertised his services in New Jersey, New York, Connecticut and Washington D.C. under the name of his professional corporation, Rakofsky Law

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[1] Keith Alexander, *D.C. Superior Court judge declares mistrial over attorney's competence in murder case*, Washington Post (Apr. 1, 2011), *available at* http://www.washingtonpost.com/wp-srv/metro/crime/letter100610.pdf (*last accessed* May 27, 2011).
[2] *Id.*; Exhibit A.
[3] Since September 26, 2011, Joseph Rakofsky has been ineligible to practice law in New Jersey. http://www.judiciary.state.nj.us/notices/2011/n110927e.pdf (*last accessed* Jan. 26, 2012).

Firm, P.C. He did this despite not being licensed in New York, Connecticut or Washington D.C.[4]

The newly admitted Mr. Rakofsky gave vivid descriptions of his experience on his many websites. One of his websites we found <whitecollarlawdc.com>, displays a phone number with a New York area code – despite being admitted in neither D.C. nor New York. Mr. Rakofsky asserted that he could provide a better defense than anyone else could provide, despite his lack of experience:[5]

> **Charged with Murder?**
>
> **If you or a loved one has been charged with Homicide, you need a lawyer who will spend every second of his time concentrating on you and on how to protect you. You need a lawyer who will protect you when the Government is attacking you and trying to make you appear guilty. You need a lawyer who will take your hand and help you walk through this extremely difficult process.**
>
> **We, the lawyers at the Rakofsky Law Firm, *are the only people* who can protect you in this way.** (emphasis added)

A number of journalists wrote about Mr. Rakofsky, beginning with the *Washington Post* (another defendant, along with its writers). The *Post* had relied, in part, on the documented in-court statements of Judge Jackson. Other media outlets then reviewed the *Post* article and other publicly available information (some of it found on Mr. Rakofsky's own websites, which have since disappeared) and offered candid and First Amendment protected opinions on his competence, ethics, and attorney marketing. The fact that he opened several offices outside of New Jersey did not escape the attention of writers.

The *Post* also published a follow-up article on April 9, 2011, describing how Mr. Rakofsky managed to land a murder case just one week after being admitted to practice law, by trolling for

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[4] While Joseph Rakofsky has passed the New York Bar Exam, his admission is currently pending character and fitness review.

[5] http://ivi3.com/whitecollarlawdc.com/vc.html, (archived site, last viewed May 26, 2011).

clients in New York City.[6] The story's lede:

> **Henrietta Watson stood inside the downtown Manhattan courthouse waiting for one of her grandsons to be released from jail. A young lawyer approached and asked if he could help.**
>
> **Watson and her husband declined. But the couple told the lawyer about another grandson in Washington, who was charged in the fatal shooting of a Virginia man. That case interested the lawyer, who gave Watson his card and introduced himself as Joseph Rakofsky, Watson said.**

Mr. Rakofsky brought this suit against the *Post*, the American Bar Association, Thomson Reuters and many dozens of individuals from around the United States and Canada that had commented on these subjects, as well as anyone Mr. Rakofsky thought might employ these journalists and pundits.[7] Many of these defendants are law bloggers and their law firms.

The essence of Mr. Rakofsky's claim is his belief that Judge Jackson and the prosecutor conspired to form a "blatant alliance" "that resulted in virtually all of Judge Jackson's rulings being in favor of the Government".[8] Mr. Rakofsky also alleges that Judge Jackson "uttered several statements in open court that slandered Rakofsky's knowledge of courtroom procedures,"[9] and that Judge Jackson's "anger may have been prompted by the diligence and zeal with which Rakofsky conducted his defense."

In addition to stating that Judge Jackson defamed him from the bench, Mr. Rakofsky also claims that Judge Jackson never declared him to be incompetent, and merely declared a mistrial due to a conflict with the defendant over what questions to ask at trial.[10] The transcript, however, says otherwise (Exh. D).

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[6] Keith Alexander, *Woman pays $7,700 to grandson's attorney who was later removed for inexperience,* Washington Post (Apr. 9, 2011); Amended Complaint ¶87
[7] Exhibit B, Summons and Complaint; Exhibit C, Amended Complaint.
[8] Exhibit C ¶109, see also ¶118.
[9] Exhibit C ¶119.
[10] Exhibit C ¶172.

A review of the transcript[11] lays bare Judge Jackson's opinion on Mr. Rakofsky's competence, and reinforces the prior commentary. He said:

> **If there had been a conviction in this case, based on what I had seen so far, I would have granted a motion for a new trial under 23.110.**[12]

Judge Jackson was explicit about Rakofsky's lack of competence in presenting a defense:

> **I[t] became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment.**[13]

With respect to his missive to an investigator to "trick" a witness, Mr. Rakofsky claims in the Amended Complaint that the tricky missive was "hastily typed" on a mobile device, and that the investigator "knew only too well" that "trick" was actually shorthand for something else.[14]

After explaining what he meant to say in the email, Mr. Rakofsky then disavowed it, claiming that "no such email was ever written" by him.[15] The email, published online by the *Post*, is Exhibit A.

Mr. Rakofsky goes on to accuse the same investigator in the murder case of lying to the Court about him, and trying to blackmail him.[16] From these claims Mr. Rakofsky then proceeds to assert that the *Post* and others are liable for repeating the news from the trial and offering opinions on the many subjects raised by the story.

The suit was instantly branded as *Rakofsky v. Internet* due to its significant reach and attempts to purge the Internet of unflattering stories about Mr. Rakofsky that stemmed from the trial and his marketing efforts. But, rather than silencing the critics and bullying defendants to remove

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[11] Exhibit D, transcript, p. 4, *U.S. v. Deaner*, criminal action 2008-CFI-30325, April 1, 2011.
[12] D.C.Code § 23-110, post-trial motion to vacate, set aside, or correct the sentence.
[13] Exhibit D, transcript, p. 5
[14] Exhibit C, ¶120
[15] Exhibit C, ¶139
[16] Exhibit C, ¶¶120, 122, 127

their posts in fear of the lawsuit as Rakofsky had hoped (and as often happens in other circumstances),[17] it had the opposite effect, akin to throwing gasoline on a fire: criticism soared.

The commentary became increasingly scathing, not only shining a brighter light on the problems Mr. Rakofsky had at the initial murder trial and the comments from the bench, but also for bringing a suit regarding opinions he should know are well protected by the First Amendment, as well as bringing suit against a multitude of out of state entities over which this Court lacks long-arm jurisdiction. Many pundits asserted that bringing such a suit was further proof of Mr. Rakofsky's incompetence, and they further highlighted his misleading marketing and ethical failings. And that was before they even saw the transcript with Judge Jackson's comment that "I[t] became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment." (Exh. D)

After this second wave of criticism came out, Mr. Rakofsky amended his complaint to sue *additional* people, this time adding those who were critical of bringing this suit.[18] He also added a claim for intentional infliction of emotional distress in a bid to avoid the fact that this Court does not have long-arm jurisdiction for defamation claims over the vast majority of the defendants. The amendment of the claim, predictably, brought a third wave of commentary and ridicule.

The Order to Show Cause In the Court Below

Rakofsky seeks emergency relief from this Court because Supreme Court deemed his papers "incomprehensible" as part of a non-final order. This Court may dismiss Rakofsky's pending application on the same basis the Supreme Court did, as the papers continue to be largely incomprehensible. Rakofsky's submission fails to present a single valid, let alone

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[17] Timothy B. Lee, *Criticism and takedown: how review sites can defend free speech*, Ars Technica (June 1, 2011), http://arstechnica.com/tech-policy/news/2011/06/criticism-and-takedown-how-review-sites-can-defend-free-speech.ars (*last accessed* Jan. 28, 2012).
[18] Exhibit C.

persuasive, legal reason to accord him special relief. Simultaneously, the application materially misrepresents several important aspects of this case.

At this point, the Rakofsky has had more than a better part of a year to file and serve their Complaint, Summons, Amended Complaint and Amended Summons. As Rakofsky notes, a stay was entered in July 2011 that will dissolve March 9, 2012 – nearly a year after the complaint was filed. What Rakofsky does not inform this Court of, but which is critical to its analysis, is that Rakofsky himself initially requested the stay (Exh. E), and that Rakofsky agreed to a briefing schedule, which has now fallen by the wayside (Aff. of Eric Turkewitz ¶¶ 11-13).

In the midst of this procedural milieu are nearly 100 defendants – attorneys, journalists and working professionals targeted by Rakofsky. These defendants await vindication of their First Amendment rights in court. The defendants filing this brief have no objection to the stay being lifted (in fact, they wish it to be lifted) so long as it is lifted for all parties – but it cannot be done unilaterally. These defendants agreed, along with Mr. Rakofsky, to a briefing schedule.

After our motion to dismiss was served, and while waiting to file it, the briefing schedule was thrown out and the stay extended. These defendants wish to finally file their motion to dismiss (Turkewitz Aff. ¶¶ 14-16).

What the Defendants object to is allowing Rakofsky to unilaterally lift the stay so that he may file motion after motion, needlessly multiplying these proceedings, while the Defendants must sit on their hand and are restrained from vindicating their First Amendment rights. By seeking a limited lift of the stay, Rakofsky seeks to obtain an *ex parte* mulligan so that he may file, *inter alia*, a 300-page, 1200+ paragraph second amended complaint and discovery requests against non-parties such as Google, before the existing defendants can move to dismiss Rakofsky's extant First Amended Complaint.

Rakofsky's application for appellate relief reveals genuine surprise that the Defendants and the Supreme Court do not simply accede to his wishes – even if they are to their detriment. But the judicial system does cater to the desires of one party, and nor should it. In this case, fairness dictates telling Mr. Rakofsky "no," firmly and authoritatively. Just because Rakofsky desires an uncontested third bite at the proverbial apple of trying to sue and serve dozens of defendants in this action does not mean he deserves one. The pending application should be denied. If the stay is lifted, it must be lifted as to all parties, so the Defendants may finally file their Motion to Dismiss with the Court and terminate this litigation.

Legal Standards

New York Civil Practice Laws and Rules ("CPLR") § 5704(a) allows an appellate court to vacate or modify any order granted without notice to the adverse party, or grant its own relief, on condition that the sought relief has been "refused by any court or a judge thereof *from which an appeal would lie to such appellate division.*" (emphasis added). *See Page v. Watson*, 304 A.D.2d 382 (N.Y. Sup. Ct. App. Div. 1st Dept. 2003).

Argument

Under CPLR § 5704(a), an appeal must lie within an appellate division's jurisdiction in order for judicial relief to be appropriate, and Rakofsky has failed to demonstrate that. The district court's expressly non-final refusal to sign Rakfosky's papers is not such an appealable event (Exh. F at 2). The only aspect of Rakofsky's request for an order to show cause that could be appealable as it relates to the Defendants is Mr. Randazza's *pro hac vice* admission – yet, that is part and parcel of Rakofsky's denied order to show cause.

Despite initially requesting the stay, Rakofsky now has second thoughts. Our group of defendants concur that the stay is burdensome, and would like it lifted immediately so that we

may file our already-completed motion to dismiss. For that purpose, and only that purpose, the Defendants would accede to a termination of the stay, with a briefing schedule imposed that mimics the former, reasonable, briefing schedule. What Rakofsky seeks, however, is contrary to the purpose of the stay he sought. He sought the stay solely for the purpose of seeking new counsel to litigate the numerous motions to dismiss that would be filed upon the stay's dissolution. Rakofsky now seeks to effectively re-write the purpose of his stay (Exh. E) and unilaterally control its status. This Court should deny Rakofsky's desired relief.

I. Judge Goodman's Declination to Sign Rakofsky's "Incomprehensible" Papers Does Not Give Rise to Appellate Review.

Judge Goodman's order denying Rakofsky's proposed order was definitively non-final, yet he now seeks to invoke this Court's jurisdiction in reversing the Supreme Court's order. This is impermissible. "No appeal lies from an order declining to sign an order to show cause." *Naval v. American Arbitration Assn.*, 83 A.D.3d 423 (N.Y. Sup. Ct. App. Div. 1st Dept. 2011); *see Nova v. Jerome Cluster 3, LLC*, 46 A.D.3d 292 (N.Y. Sup. Ct. App. Div. 1st Dept. 2007). Contrary to the requirements of CPLR § 5704(a), Rakofsky has sought relief from an order for which no appeal lies before this Court – a long-standing and immutable principle of New York law. *See Batterman* v. *Finn,* 40 N.Y. 340 (N.Y. 1869) (dismissing appeal from non-final order).

Judge Goodman's order is definitively non-final. The Judge designated the order as "non-final," and offered as succinct a reason as possible for declining to sign Rakofsky's papers: They were "incomprehensible." (Exh. F at 2) Rakofsky's motion thus fails under CPLR § 5704(a). The Appellate Division has repeatedly declined to grant relief under § 5704(a). *T.D. v. N.Y. State Office of Mental Health*, 228 A.D.2d 95, 103 (N.Y. Sup. Ct. App. Div. 1st Dept. 1996) (denying motion under § 5704 arising from Supreme Court's declining to sign an order to show

cause); *County of Orange v. Civil Service Employees Assn.*, 51 A.D.2d 1031 (N.Y. Sup. Ct. App. Div. 2d Dept. 1976) (refusing to exercise § 5704 powers "lightly"); *In re Willmark Svc. Sys., Inc.*, 21 A.D.2d 478 (N.Y. Sup. Ct. App. Div. 1st Dept. 1964). The Court could further deny Rakofsky's submission for the same reasons of "incomprehensib[ility]" that the Supreme Court did. This Court has no shortage of reasons to deny Rakofsky's motion, and is not bound to grant a § 5704 motion merely because it is made.

II. Rakfosky is Not Entitled to Relief for Judge Goodman's Decision to Admit Marc Randazza *Pro Hac Vice*.

Despite failing for the reasons set forth above, Rakofsky's request for the removal of counsel for the many Defendants filing this brief is improper. Rakofsky alleges nothing deficient about Randazza's *pro hac vice* application. As with other matters of case administration, *pro hac vice* motions are, when appealed on their own and not as part of an order to show cause, reviewed for an abuse of discretion. *Perkins v. Elbilia*, 2011 WL 6347855 (N.Y. Sup. Ct. App. Div. 1st Dept. Dec. 20, 2011). Such an abuse is found only when the attorney is admitted despite a defective application. *Id.* Rakofsky has not alleged this ground, and Mr. Randazza's application is properly made. All arguments Rakofsky does raise have been refuted before the Supreme Court (Exhs. G, H). Rakfosky's motion fails.

III. This is Not a Case Appropriate for Emergency Intervention, But If Rakofsky's Stay is Lifted, it Should be Lifted as to All Parties.

The motion pending before this Court neither requires nor justifies a drastic remedy overriding the Supreme Court's judgment. Judge Goodman has not made a final ruling, or even a non-final ruling, materially affecting the Plaintiff's rights. The Supreme Court's judge did not – could not – reach the substance of Rakofsky's requested order to show cause because it was, in

her own words, "incomprehensible." A review of the documents submitted by Mr. Rakofsky demonstrates that Judge Goodman's evaluation was not erroneous. In fact, it could be characterized as quite charitable. Regardless, Judge Goodman's statements are not beneficial to Rakofsky's case-in-chief, wherein he has sued dozens of attorneys and journalists for questioning his competence.

Judge Jackson said it was "readily apparent" that Rakofsky's performance in the *Deaner* trial was "not up to par under any reasonable standard of competence under the Sixth Amendment." (Exh. D at 6:17-19) Judge Jackson specifically found that Rakofsky's advocacy was "below what any reasonable perrson could expect in a murder trial." (*Id.* at 4:24-5:1) Now, Judge Jackson's observations about Rakofsky's trial skills are corroborated by Judge Goodman's indictment of his written advocacy – that it is "incomprehensible." (Exh. F at 2) It is no accident that two separate judges, both tasked with protecting Rakofsky's due process rights, have reached such unflattering conclusions (Exhs. D, F).

Having failed to submit a plain statement of the relief he desired to the Supreme Court, and now submitting an equally difficult-to-follow request with this Court, Rakofsky seeks a wide range of relief, ranging from instant appeal of Mr. Randazza's *pro hac vice* admission to the partial lifting of a stay so that only he may engage in a cornucopia of actions including filing motions, undertaking discovery and modifying the caption. All of these motions can be made before the Supreme Court. The only obstacle Rakofsky cites to their filing is the stay *he* requested (Exh. E). Initially, Rakofsky requested this stay for his own protection, so that he may retain an attorney to respond to the many motions to dismiss to be filed in this case (*id.*). Now, Rakofsky attempts to turn what he sought as a defensive tool into a weapon he may use against

the Defendants. Even if the relief Rakofsky sought were available, he seeks to obtain it through improper means.

The Defendants have patiently abided by the stay and waited their collective turn to file a motion to dismiss (Turkewitz Aff. ¶¶ 12-14, Exh. I). When Rakofsky sought this stay, it was not so that he may wait for many months before attempting to restart his litigation campaign by seeking unusual remedies against non-parties ranging from Google to the Defendants' own counsel (Exh. E). He should not now be allowed to re-write history and use the stay in the manner he now seeks, rearranging the entire proceeding to the Defendants' detriment. Such conduct forces Defendants -- who have been waiting to vindicate their First Amendment rights -- to endure the burden of further cost and delay if Rakofsky's hodge podge of requested remedies is granted.

If this Court is to take any action affecting the Supreme Court proceedings, it should be to lift the stay *entirely*, so the Defendants may file the motion to mismiss they already served upon all parties in December, 2011. (Turkewitz Aff. ¶¶ 12-14) Rakofsky has already amended his Complaint once, and attempted service of his original and amended Complaint on the Defendants. If he desires further relief, he may seek it after the Defendants are allowed to file their motion to dismiss nearly nine months after this litigation commenced (Exh. I). All that is required in doing so is for the stay to be lifted entirely, and the Defendants would consent to such relief, as it would allow them to file their already served motion to dismiss. Should the Court dissolve the stay so that the Defendants may file a motion to dismiss, the litigation will recommence its movement toward swift resolution.

If the stay is not lifted completely, then it should remain fully in effect, so that all parties are bound by the same terms until it is dissolved . The Defendants do not consent to a one-sided

lifting of the stay that will allow Rakofsky to file another flurry of incomprehensible documents with the Supreme Court without any right to a response. While entirely maintaining or fully lifting the stay will allow the Supreme Court case to either remain in stasis or move forward, any partial treatment will impermissibly favor Rakofsky and deny the Defendants their day in court.

Conclusion

It was Rakofsky, rather than the Defendants, who initially sought a stay in this case (Exh. E). If Rakofsky is not content with this stay, then it should be lifted – immediately, as to all parties, so the Defendants may dismiss the pending claims against them. In the alternative, the stay should remain in place. What should not be permitted, however, is for Rakofsky to unilaterally file motions with the Court in order to prolong and geometrically expand this litigation. Accordingly, this Court should deny Rakofsky's application.

This brief is respectfully submitted on behalf of the following Defendants: (1) Eric Turkewitz, (2) The Turkewitz Law Firm, (3) Scott Greenfield, (4) Simple Justice NY, LLC, (5) blog.simplejustice.us, (6) Kravet & Vogel, LLP, (7) Carolyn Elefant, (8) MyShingle.com, (9) Mark Bennett, (10) Bennett And Bennett, (11) Eric L. Mayer, (12) Eric L. Mayer, Attorney-at-Law, (13) Nathaniel Burney, (14) The Burney Law Firm, LLC, (15) Josh King, (16) Avvo, Inc., (17) Jeff Gamso, (18) George M. Wallace, (19) Wallace, Brown & Schwartz, (20) "Tarrant84", (21) Banned Ventures LLC, (22) BanniNation, (23) Brian L. Tannebaum, (24) Tannebaum Weiss, (25) Colin Samuels, (26) Accela, Inc., (27) Crime and Federalism, (28) John Doe # 1, (29) Antonin I. Pribetic, (30) Steinberg Morton, (31) David C. Wells, (32) David C. Wells P.C., (33) Elie Mystal, (34) AboveTheLaw.com, and (35) Breaking Media, LLC.

Respectfully submitted this 26th day of January, 2012

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