

Southern District Civil Practice Roundup

Expert Analysis

You Can't Sue the Judge, or Can You?

Although judges are sometimes attacked in public comments outside the courtroom, including notably by our own President, those of us who practice regularly before the courts operate on the assumption that judges are broadly immune from attack within the legal system, i.e., they enjoy complete immunity from suit. In a recent decision in *Zappin v. Cooper*, 2018 WL 708369 (S.D.N.Y. Feb. 2, 2018), Southern District Judge Katherine Polk Failla discusses a surprising gap in judicial immunity accorded to New York state judges in particular, ultimately dismissing the claims against a judge on alternative grounds.

'Zappin v. Cooper'

The defendant in *Zappin v. Cooper*, New York State Supreme Court Justice Matthew F. Cooper, presided over much of plaintiff's contentious divorce proceedings. Justice Cooper

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issued a decision in September 2015 which, among other things, imposed sanctions on the plaintiff at the request of the court appointed attorney for plaintiff's child (the AFC). The trigger for the sanctions application was

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a complaint that plaintiff had filed with the Office of Professional Medical Conduct (OPMC) against the AFC's retained medical expert, but the AFC also referenced plaintiff's "overall misconduct" during the divorce proceedings. In granting sanctions, the court made a series of factual findings

concerning plaintiff's conduct toward Justice Cooper himself, the prior judge assigned to the case, opposing counsel, the AFC, and the AFC's medical expert.

The plaintiff sued Justice Cooper in federal court, not for the decision itself, but for having transmitted the decision—which plaintiff claimed was false and defamatory—to the media and tabloid newspapers, including the New York Law Journal, the New York Post and the New York Daily News. He asserted claims for defamation, intentional infliction of emotional distress, tortious interference with prospective economic advantage, and denial of due process. Plaintiff contended that Justice Cooper's ulterior motives were revealed by his publication of the sanctions decision, and specifically that the "main thrust" of the decision was to "purposefully inject into the media and publicize scandalous and false statements ... designed to harm [plaintiff's] reputation and professional standing."

No Judicial Immunity Or Other Immunity

Justice Cooper moved to dismiss on multiple grounds, including sovereign immunity, judicial immunity, the

Rooker-Feldman doctrine, collateral estoppel and failure to state a claim.

Judge Failla turned first to defendant's argument that plaintiff's suit was barred by the Eleventh Amendment, as a suit against him in his official capacity as to which the state had not waived sovereign immunity. Although defendant argued that his sanctions decision and administration of the divorce proceeding in general were "quintessential judicial acts," the court found that plaintiff's suit was brought against Justice Cooper in his individual capacity, and only for harms arising from his purported "extrajudicial" conduct of disseminating the opinion to the press. She concluded sovereign immunity was thus not implicated.

For much the same reason, Judge Failla also rejected defendant's argument that the suit was barred by the *Rooker-Feldman* doctrine, which prevents federal courts from hearing suits that amount to appeals from state court decisions. Noting that *Rooker-Feldman* applies only where the injury complained of in the federal suit arises from a state court judgment, she again stressed that the injury complained of in the suit before her arose from dissemination of the state court judgment rather than from the judgment itself. She found that *Rooker-Feldman* was thus inapplicable.

Judge Failla then turned her attention to the question of judicial immunity. She noted that judicial immunity "is an immunity from suit, not just from

the ultimate assessment of damages," and applies even for actions a judge took in error, maliciously or in excess of his authority. The only exceptions to the doctrine are where "a Judge does not act like a Judge," or where "a Judge, though acting under color of judicial authority, lacks any jurisdiction supporting judicial authority for the action taken." 2018 WL 708369, at *9 (internal citations omitted). The plaintiff argued that both of these exceptions applied.

Judge Failla acknowledged that her willingness to forgo what she viewed as the more sensible approach taken by the Second Circuit, in favor of faithful application of a 75-year old state court opinion, was influenced by the fact that Justice Cooper offered a narrower ground for dismissal that she found persuasive.

Judge Failla quickly dispatched with plaintiff's argument that Justice Cooper lacked subject matter jurisdiction to sanction the plaintiff for having filed a complaint with OPMC against the medical expert. She held that his imposition of sanctions, and his observation that the OPMC complaint was a cynical and malicious interference with the medical license of a court expert witness, was within the larger context of presiding over and managing the divorce proceedings.

She "easily" found that the sanctions decision was *not* in the "clear absence of all jurisdiction."

On the question of whether Justice Cooper was "acting like a judge" in disseminating the opinion, Justice Failla noted that the Second Circuit employs a functional approach to determining whether an act by a judge is judicial or extra-judicial, and that that analysis turns on the application of state law. *Id.* at *10 (citing *Bliven v. Hunt*, 579 F.3d 204, 209-10 (2d Cir. 2009)). Quoting the Supreme Court's decision in *Forrester v. White*, 484 U.S. 219, 227 (1988), she observed that "[d]ifficulties have arisen ... in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." 2018 WL 708369, at *10.

Judge Failla went on to note that publishers of judicial decisions, irrespective of whether they are classified as official or unofficial reporters, are entitled to absolute immunity when they accurately publish a judicial decision. "[S]hifting perspectives from [the] publisher to [the] composer," she noted that the actual writing of the opinion, as discussed earlier, is absolutely immune as a judicial act, and that disseminating the decision to an *official* reporter is likewise judicial in nature in light of a judge's duty to facilitate publications of their opinions. *Id.* at *11 (citing *Murray v. Brancato*, 290 N.Y. 52, 56 (1943)). She observed, however,

that this “leaves one interstitial possibility, and it is the critical issue here: Whether a judge is absolutely immune from suit for the act of *disseminating* a judicial decision to an *unofficial* reporter.” She held that although a federal judge would enjoy immunity regardless of the nature of the reporter, “New York state law furnishes a different answer for state judges.” *Id.* (contrasting *Garfield v. Palmieri*, 297 F.2d 526, 527 (2d Cir. 1962) (federal judge’s transmission of opinion to an unofficial reporter within the scope of the absolute privilege), with *Murray*, 290 N.Y. at 56-58 (judicial immunity extends only to publication of opinions in official reporters because a judge has no duty to publish in unofficial reporters)).

Justice Cooper put forth several arguments urging the court to find that *Murray*, decided by the New York Court of Appeals in 1943, is no longer good law, including that the Appellate Division, Second Department has recognized the New York Law Journal as an official reporter, see *Sassower v. Finnerty*, 465 N.Y.S.2d 543, 545 (2d Dep’t 1983), and that it “defies logic” to expose judges to liability based on their sending opinions to unofficial reporters. Judge Failla expressed sympathy with these arguments, observing that “*Murray*’s ‘immunity gap’ leaves judges exposed in a manner inconsistent with judicial immunity principles.” 2018 WL 708369, at *14. She noted

that if free to do so, she would adopt the Second Circuit’s stance in *Garfield*, according immunity equally to publication in official and unofficial reporters. She concluded however, that she enjoyed “no such liberty,” because *Murray* is squarely on point and remains “relic though it may be,” controlling state law.

Collateral Estoppel as Alternative Grounds for Dismissal

Judge Failla acknowledged that her willingness to forgo what she viewed as the more sensible approach taken by the Second Circuit, in favor of faithful application of a 75-year old state court opinion, was influenced by the fact that Justice Cooper offered a narrower ground for dismissal that she found persuasive. Specifically, she held that plaintiff’s claims were barred by collateral estoppel because the factual issues dispositive of his claims had been fully and fairly litigated in the divorce proceedings that resulted in the sanctions decision and its affirmance by the Appellate Division, First Department.

Judge Failla commented that the collateral estoppel analysis in this case turned on the “idiosyncratic situation” arising from the sanctions decision’s “dual role” as both the disseminated document containing the allegedly false and defamatory statements, and a judicial decision on the merits by a court of competent jurisdiction whose findings were affirmed on the merits. *Id.* at *14.

She went on to hold that the material facts decided by the sanctions decision are identical to the facts underlying all of plaintiff’s claims in the federal litigation, inasmuch as plaintiff’s claims are predicated on the dissemination and falsity of those very factual determinations. She found that the specific facts challenged as false by the plaintiff were integral to the court’s sanctions decision, and further, that the First Department’s affirmance, characterizing the sanctions decision as “detailed” and “amply supported by the record,” established that the issues raised in the case before her were identical to, and actually decided in the sanctions decision and its affirmance. *Id.* at *18-19. Judge Failla also determined that the plaintiff had been given a full and fair opportunity to litigate the issues in the sanctions decision, and that those issues were decisive on the case before her. Specifically, she held that because the facts plaintiff claims are false were adjudicated to be accurate by the state trial court and confirmed on appeal, dissemination of those accurate, adjudicated facts cannot serve as a basis for plaintiff’s claims, none of which could prevail. She proceeded to dismiss the complaint without leave to amend.