No. 22-6285

IN THE

Supreme Court of the United States

In Re JASON D. FISHER,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is an order dismissing plaintiff-appellants' complaint with leave to amend appealable when: (a) it is not a final decision pursuant to 28 U.S.C. § 1291; and (b) plaintiff-appellant already filed an amended complaint?
2. Whether plaintiff-appellant has satisfied the three conditions of a writ of prohibition and mandamus pursuant to 28 U.S.C. § 1651(a).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, defendant-appellee Guttridge & Cambareri, P.C states that it has no parent corporation and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

This brief is submitted on behalf of defendants-appellees Jo-Ann Cambareri and Guttridge & Cambareri, P.C. ("Appellees"). Plaintiff-appellant Jason D. Fisher's ("Appellant") submission herein confounds the real issues in this case, which are the underlying defects in his complaint, subsequent improper appeals, his unwillingness to comply with the applicable rules of civil procedure, and his repeated attempts to wreak vengeance on all individuals involved in the underlying Divorce Action (as defined below) without any legitimate basis.

Because he was dissatisfied with the outcome of the Divorce Action, Appellant commenced the underlying District Court action against his ex-wife, his ex-wife's counsel, his ex-wife's parents, and Appellees, who are the attorneys that represented Appellant's children in the Divorce Action. Therein, Appellant asserts that defendants-appellees, judges, and court representatives conspired together to form a RICO enterprise in an effort to extort and threaten Appellant into giving up his assets, custody of his children, health care benefits, and alimony he believes he is entitled to.

The Southern District of New York dismissed Appellant's complaint, but granted him leave to amend. Appellant then filed a letter with the Southern District requesting reconsideration of the dismissal with a copy of an amended complaint[1],

[1] Appellant did not serve the Amended Complaint on Appellees.

and filed an appeal of the dismissal order with the Second Circuit. The Second Circuit dismissed the appeal because the order dismissing the complaint with leave to amend was not a final order, pursuant to 28 U.S.C. § 1291.

Appellant now seeks the drastic and extraordinary remedy of a writ of prohibition and mandamus seeking, *inter alia*, to revise the New York State and Federal Rules of Civil Procedure, abolish so-called "permission-based motion systems," overturn all prior orders and determinations in the underlying Divorce Action and District Court action, transfer his already-dismissed complaint to a federal district court outside of the Second Circuit and instruct such District Court "to begin discovery for evaluation of complaint by jury," and initiate a criminal investigation. *See* Petition, p. 32.

As set more fully below, Appellant's petition should be denied in its entirety.

COUNTERSTATEMENT OF THE CASE

I. The Underlying Divorce Action

On July 2, 2018, Appellant commenced a divorce proceeding against his former spouse, defendant-appellee Jennifer Lighter ("Lighter"), in the New York State Supreme Court, Westchester County. *See Fisher v. Fisher*, Index No. 58301/2018 ("Divorce Action"). Appellant was represented by counsel in the

Divorce Action, but his counsel eventually withdrew representation, after which time Appellant represented himself *pro se*.

Defendant-appellee Miller Zeiderman & Wiederkehr (the "MZW Firm") represented Lighter in the Divorce Action. Defendant-appellees Faith Miller, Jennifer Jackman and Tiffany Gallo are partners at the MZW Firm. Appellees represented Appellant's children in the Divorce Action.

II. Proceedings before the Michigan District Court and Southern District of New York

Appellant first commenced a Federal District Court action on July 8, 2021, by filing a complaint in the United States District Court for the Eastern District of Michigan. *See Fisher v. Scheinkman, et al.*, No. 21-cv-11600 (E.D. Mich. July 8, 2021). Plaintiff never served the complaint upon Appellees. Plaintiff's complaint alleges, pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), that all of the defendants-appellees violated various federal criminal statutes, defrauded him in the Divorce Action, and stole his intellectual property. *See* Appendix II. The Michigan District Court transferred the case to the Southern District of New York, because the events giving rise to Plaintiff's claims occurred within the Southern District. *Id.*

On November 16, 2021, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the Honorable Chief U.S. District Judge Laura Taylor Swain ("Judge Swain") dismissed Appellant's complaint on the grounds that the allegations against

defendants-appellees were conclusory and insufficient to support any claim under RICO (the "SDNY Order"). *Id*. Judge Swain noted that "it is likely that the defects in [Appellant's] complaint cannot be cured with an amendment." *Id.* However, in an abundance of caution in light of Appellant's *pro se* status, Judge Swain granted Appellant thirty (30) days leave to file an amended complaint. *Id.*

On December 13, 2021, Appellant filed a letter to Judge Swain requesting reconsideration of the dismissal of the complaint and enclosed a copy of a proposed amended complaint. Appellant did not serve Appellees with a copy of the amended complaint. *Fisher v. Scheinkman et al*, No. 1:21-cv-07784-LTS (SDNY July 8, 2021); Docket No. 13.

III. The Second Circuit Appeal

On December 14, 2021, a day after filing his amended complaint, Appellant filed a Notice of Appeal of the SDNY Order. On appeal, Appellant improperly requested that the Second Circuit analyze his amended complaint by asking: "Has the updated Complaint provided enough facts to overcome the 'conclusory' claim?" *Fisher v. Scheinkman et al.*, No. 21-3029 (2d Cir. 2021), Docket No. 29.

Pursuant to an order dated October 3, 2022, the United States Court of Appeals for the Second Circuit dismissed the appeal on the grounds that "a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291." Appendix VIII (citing *Slayton v. Am. Express Co.*, 460 F.3d 215, 224 (2d

Cir. 2006) ["A dismissal with leave to amend is a non-final order and not appealable"]).

THE PETITION FOR A WRIT OF PROHIBITION AND MANDAMUS SHOULD BE DENIED

I. The SDNY Order is not a Final Order

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Flanagan v. United States*, 465 U.S. 259, 263, 104 S. Ct. 1051, 1053–54, 79 L. Ed. 2d 288 (1984) (citing Cobbledick v. United States, 309 U.S. 323, 324, 60 S.Ct. 540, 541, 84 L.Ed. 783 [1940]). 28 U.S.C. § 1291 confers appellate jurisdiction upon the Court of Appeals only from "final decisions of the district court." 28 U.S.C. § 1291. This rule of finality requires "that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981). "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945) (explaining that the basis of this policy is to prevent piecemeal litigation).

Here, the Court of Appeals for the Second Circuit's dismissal of Appellant's appeal of the SDNY Order was proper because the SDNY Order was not final. The SDNY Order granted Appellant thirty (30) days leave to amend the complaint.

Thereafter, Appellant filed a letter with the SDNY requesting reconsideration of the dismissal and enclosed a copy of the amended complaint. As such, any appeal of the SDNY Order was not only improper on the basis of finality, but moot in light of the amended complaint.

II. Appellant Has Not Satisfied the Conditions for a Writ of Prohibition and Mandamus.

Pursuant to 28 U.S.C. § 1651(a), "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

> As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires . . . a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004) (internal quotations and citations omitted).

Appellant meets none of these conditions. *First*, notwithstanding Appellant's inaccurate perspective of the underlying proceedings, the issue here is

that Appellant is attempting to appeal a non-final order dismissing his complaint with leave to amend, where he has already submitted (but not served) an amended complaint. *Second*, Appellant fails to show that his right to issuance of the writ is clear and indisputable, because he fails to (and cannot) establish that: (1) the SDNY Order was a final order; nor that (2) the SDNY Order and subsequent Second Circuit order dismissing the appeal were erroneous. *Third*, the writ is inappropriate under these circumstances, where Appellant seeks excessive and extraordinary remedies such as revision of the New York State and Federal Rules of Civil Procedure, abolishment of so-called "permission-based motion systems," reversal of all prior orders and determinations in the underlying proceedings, transfer of Appellant's already-dismissed complaint to a federal district court outside of the Second Circuit and instruction to such district court "to begin discovery for evaluation of complaint by jury," and initiation of a criminal investigation.

Based on the foregoing, Appellant has not satisfied his burden to demonstrate why this Court should issue a writ of prohibition and mandamus.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of prohibition and mandamus should be denied.

Dated: January 11, 2023
Uniondale, NY

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