UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JESSE FRIEDMAN, :
CV 06 3136
Plaintiff, :

-against- : U.S. Courthouse
Central Islip, N.Y.
REHAL, :

: TRANSCRIPT OF MOTION

Defendant.
October 3, 2007
- - - - - - - - - - - - - - - - - X 2:05 p.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.

APPEARANCES:

For the Plaintiff: RONALD L. KUBY, ESQ.
DAVID PRESSMAN, ESQ.
118 West 23rd Street
New York, New York 10011

For the Defendant: OFFICE OF NASSAU COUNTY
DISTRICT ATTORNEY
262 Old Country Road
Mineola, New York 11501
BY: JUDITH STERNBERG, ESQ.

Court Reporter: HARRY RAPAPORT, CSR
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

THE CLERK: For oral argument, hearing, Friedman verse Rehal.

Please state your appearances for the record.

MR. KUBY: Ronald Kuby, 119 West 23rd Street, New York, New York.

MR. PRESSMAN: David Pressman, from the office of Ronald L. Kuby.

Good afternoon, Judge.

THE COURT: Good afternoon.

MS. STERNBERG: Judith Sternberg from the Nassau count DA's office, representing the defendants.

THE COURT: So I can hear all counsel, I would suggest you come up. And the oral argument can be cleared up quickly. And I'm attempting to ascertain as to whether obtaining knowledge of the alleged hypnotizing of the victims was known, or could have been known to the petitioner.

So, it is a very small item. It is not on the merits. And I think that we can proceed on that basis.

I do note that in my earlier memorandum and order, that unfortunately in the first paragraph I indicated petitioner's third claim, however, based upon failure to disclose the use of hypnosis on at least one accuser is timely. It should have read: Is possibly timely.

That's what I'm here to decide. And I will hear any additional arguments after we make that determination.

MS. STERNBERG: Did you want us to approach?

THE COURT: I don't think it is necessary, unless Harry indicates that it is hard to hear.

This is one of the world's worst courtrooms for acoustics. The sounds bounce off the panelling, and that's why we have the rather hideous panels here to absorb some of the sounds.

So, if you can't hear me, or I can't hear you, let me know.

Now, can you hear me now that I'm on the microphone?

MR. KUBY: Beautiful.

THE COURT: You heard what I said earlier?

MR. KUBY: Yes.

THE COURT: That we are here for a very limited purpose, which is to make a determination as to whether or not the petitioner knew or could have known the claims that one or more of the accusers was hypnotized.

MR. KUBY: Would you like me to proceed first or the People to proceed first? It is a little sua generics that we are doing.

THE COURT: I assume the State should go first at this point in time.

I have received the latest communication from the state. And I'm not too sure what vehicle you are attempting to use in terms of the Court's decision.

MS. STERNBERG: I'm sorry, Judge?

THE COURT: Why don't you go first and tell me why it is that I should find that the petitioner knew or could have known about the videotaping of the accusers -- not the videotaping, rather, the hypnosis.

MS. STERNBERG: Your Honor, the plea in this case took place in 1988, and in January of 2003 the petitioner acknowledges, and the Court found in its previous decision, that he saw the movie, and in that movie there was an allegation by one of the complainants, that he had been hypnotized.

On that date the defendant knew the faces of the claimants. That's clearly the basis of the claim in his petition.

THE COURT: And the video we are talking about is Capturing the Friedmans?

MS. STERNBERG: Yes.

THE COURT: And that was the documentary that was produced I guess in 2002, or something like that?

MS. STERNBERG: I don't know what year it was produced.

I know that the petitioner claims he saw the

movie on January 10th, 2003, and the People have no reason to dispute that date.

Obviously, on that date he knew this allegation of hypnosis. And, therefore, on that date, the one year statute of limitations as prescribed began to run.

362 days later he filed his post-judgment motion in the state court, thereby tolling the one year statute.

He had then three days left within which he could file his petition.

The Appellate Division denied him permission to appeal from the denial of the post judgment motion on March 10th, 2006. His three days ran on March 13th.

THE COURT: Okay. Straightforward in your mind.

MS. STERNBERG: I would like to also address that I believe it is the petitioner's position that he did not have the factual basis of this claim when he saw the movie; he did not have the factual basis of this claim until the producer of the movie chose to give him the identity of the young man who said in the movie that he had been hypnotized.

The law is very clear, and your Honor discussed it in her earlier decision, that your time is -- your time doesn't begin to run when you gather all, or begin to gather your evidence. Your time begins to run when you know the factual predicate.

And the fact of the hypnosis is the factual predicate, and that's obvious from the defendant's papers. Regardless of the complainant's identity -- his papers don't make any reference to the complainant's identity. They don't depend on his identity. They depend solely on his claim, which the People dispute. But nonetheless, that is the claim, that he was hypnotized.

THE COURT: That the accuser was hypnotized?

MS. STERNBERG: Pardon me?

THE COURT: The accuser was hypnotized?

MS. STERNBERG: Yes, the young man's testimony -- not his testimony, but the statement in the movie. And that happened on January 10th, 2003. On that date the complainant knew that claim.

THE COURT: Thank you.

Mr. Kuby.

MR. KUBY: Thank you, Judge.

Good afternoon.

The People allege that it was indeed January 10th, 2003, Jesse Friedman sees the film Capturing the Friedmans, and that's when the factual predicate of the claim was discovered.

In fact, and I will attempt to demonstrate in argument that it was in fact July 2003, the time that Jesse Friedman obtained access to the director's materials

that he knew the factual predicate that would support the claim.

Now, in order to sort of break that down, on January 10th, 2003, he sees the film.

What does he have? He sees a person on the screen, a person whose face is cloaked in shadows, an undisclosed location, who is both anonymous and presented anonymously, about whom there is no identifying information. It is a person who states not under oath that he was one of the people who testified in the Friedman case, and he remembered nothing about his molestation until he was hypnotized.

Now, Jesse Friedman did not recognize him. He didn't know his identity. He didn't even know if in fact he was a complainant. Most important here, he had no way of finding out until he obtained access to the Jarecki material.

No degree of due diligence would have led Jesse Friedman to the facts underlying his claim until he got access to the director's material.

What is clear is Jesse Friedman didn't have the designation Gregory Doe, until he obtained access to the director's material.

He is not named, obviously, by his real name nor the Gregory Doe designation.

So the Court understands this, the significance of the Gregory Doe designation is this: The complainants were named in the original paper turned over to Jesse Friedman's defense counsel in the pretrial hearing as Richard Doe, Gregory Doe, and Samuel Doe, and generally identified as to where the alleged molestation took place and other details.

But without the Gregory Doe designation, Jesse Friedman had absolutely nothing. He was able to learn that the mystery man was indeed Gregory Doe when he got access to the Jarecki materials.

He was able to obtain a transcript of the actual interview. He was able to obtain identifying information. And it was there and at that point that the due diligence clock began to run.

To try to illustrate this in a different way, assume a continuum. Someone makes an anonymous phone call to Friedman in a phone call, and says I testified in the Friedman case, and I had my testimony hypnotically refreshed. I remember nothing before I was hypnotized. Click.

No one could argue under those circumstances that the clock would begin to run. No one could argue that the due diligence clock could begin to run there because there was no place to go with this phone call.

At the other end of the continuum, someone walks in and says, hi, my name is X, I'm better known as Gregory Doe. I testified at the grand jury to the charges to which you pled guilty, and I didn't know anything until I attended the hypnosis sessions, and I'm more than willing to testify for you.

Clearly there the due diligence clock begins to run.

For Jesse Friedman's case, this was not an anonymous phone call. But it was an anonymous depiction in a film.

It is not as though Jesse Friedman saw that and did nothing.

Again, I'm not entirely clear on what we are doing besides arguing, but I want to bring the Court's attention to two letters we were unable to uncover. And let me give copies to the People. And I will submit them to the Court in the nature of an offer of proof, and obviously they can be authenticated at a later time if necessary.

THE COURT: Sure.

(Handed to the Court.)

MR. KUBY: I will not read them all to the Court. But I will note that on April 3rd, 2003, and that's the one-page document, and that's an E-mail from an

attorney Sammy Israel, who was retained by Jesse Friedman. And it is an E-mail to Jarecki, and Jarecki's response.

Israel says I want to start a time log with certain of the individuals you contacted in the film.

Jarecki puts him off. And he says, I'm not going to give you access now. Wait. Wait for the press to build up a little more, let's meet on April 18th.

We don't know the result of that meeting, but we know the consequence. Because on May 9th Sam Israel sends the letter to Jarecki, claiming that Jarecki has effectively prevented Jesse from having counsel, and states, and I quote the small portion, denied me his lawyer access to materials that might help Jesse in launching a collateral challenge to his conviction. Close quotes.

So, again, as of May 9th, Jesse still doesn't have access.

If the Court examines the case law, and I know you have because you cited much of it, what is key here is actually access to the facts, not some sort of belief that facts may exist.

In Pacheco versus Artuz (ph), we cite in our papers, habeas action, the star eye witness submits an affidavit saying he perjures himself, and in fact, the defendant didn't do the shooting.

The prosecution says, hey, Mr. Defendant, you are way out of time. You knew all along you didn't do the shooting. You could have gotten this at any point prior to now. This is years too late.

The Artuz court said, no.

He didn't actually discover the facts necessary until the witness wrote to him and said, I testified against you. I lied, and I'm willing to come forward now and tell the truth.

Once he had that type of access to the witness, the one year clock began to run.

This is true in Hector versus Greiner, G-R-E-I-N-E-R, where the Court noted the petitioner had access to the transcript. He had access to the book. So, of course, he was on notice of the facts.

It is true in the Ludicore, L-U-D-I-C-O-R-E case, where the one year clock began once the defendant's attorney received the clerk's police report.

Now, he didn't receive all the evidence to make this claim. But once he made -- had actual access to the police report, that's when the one-year time began. It didn't happen when he felt there may be a Clarkstown (ph) police report, or even if there was evidence that there was a Clarkstown police report somewhere. It began when he had access to the facts.

So, let's see if we can agree on something.

How do we characterize the Gregory Doe comments in the movies in terms of their factual significance?

And I have a thought, and the thought is this: It might be fair to characterize them as a commercial film, containing snippets of interviews, cut and spliced and taken out of context, all unsworn, is reliable evidence of nothing.

And I think it follows that that description cannot possibly provide access to the factual predicate necessary to support a claim.

So, this is my characterization, but it is not mine alone. This is Ms. Sternberg's characterization of the film and the depictions and the tape, which she made as recently as August 21st, 2007, and as long ago as November 4th, 2004.

Reliable evidence of nothing.

To look at it in one more way. Let's assume that Jesse Friedman sees this film on January 10th, and forgetting about exhaustion requirements and other claims, files his habeas petition the next day and says, look, I have these facts.

What would the People say about that petition that showed the film?

We know the answer to that. We know the answer

because the People have successfully invoked this phrase, as well as others, time and time again, to say that this film is absolutely worthless.

The People's memorandum in opposition to the 440, they say that that Jarecki's interviews, quote, may be a provocative sound bite for a movie, but it has no place in a serious consideration of the allegations now before the Court. They said these snippets are, quote, a textbook example of non-evidence that, quote, fails to establish the factual allegation on which he bases his motion.

That claim, had Jesse Friedman brought it at that time, without at least being able to verify that this was a complaining witness, would have been dismissed.

So, the same statement state that has repeatedly and successfully argued that this unsworn snippet of this person is entitled to no weight whatsoever; it is just a good sound bite, but has no place for serious issues before the federal court.

This same state comes forward and says, it is more than enough to establish the factual basis that supports the claim.

And I urge you to reject that. And I urge you to reject something else.

THE COURT: Aren't they very dissimilar

responsibilities and obligations?

Think about it. Your client for the first time learns, according to your argument, that there has been someone that has made a claim that he would not have brought these charges if it hadn't been for this hypnotic incident.

MR. KUBY: Right.

THE COURT: That's very different from what the People's responsibility would be at the time that they are arguing against the 440 motion. Very different context.

MR. KUBY: Understood.

But the tone and quality of the argument as to the value of this evidence, the significance of it, the weight to which it is entitled, and its non-evidentiary character. I do think that that argument, since they made it so successfully below, it is not the least bit unfair to point out to this Court that this is exactly the same evidence that they repeatedly categorize as non-fact, non-evidence, and utterly meaningless.

I don't see how you can take this utterly meaningless, quote-unquote, set of allegations, and then claim that it makes out the factual support necessary.

The factual support necessary wasn't obtained by Jesse Friedman until he had actual access.

Had Andrew Jarecki chosen to wait a year and a

half before Jesse Friedman was given access, there was nothing he could have done. He did his best, and that's all he could do.

But I do want to address the issue of the People's timeliness in making these arguments before this Court today. Because I think that the People have waived the very argument on timeliness grounds that they have advanced here.

I'm reminded of the case of Davis versus Johnson, we simply had the, quote, timing works both ways. If the State wants to kill a man because his filings are not on time, it should raise the issue promptly.

By order dated July 13th, 2006, the first judge to have this petition, ordered the People to answer the petition within 60 days. The People chose not to answer. Instead, they filed a motion to dismiss under 12(b)(6), without first securing leave or at any time securing leave to file an answer. But that's fine, they can make a 12(b)(6) motion. They did so in December of 2006.

Point one on the motion is that the petition is untimely and should be dismissed. And they made a number of timeliness arguments.

They did not make the timeliness argument that they make here today, and that they attempted to make back in August.

Now, it is a basic rule of civil litigation -- at least when I was going to law school, and I don't see that anything changed -- that if you are making a motion dismiss on the basis of 12(b)(6) you are required to include all of the grounds available to you at the time you make the motion. Otherwise you've waived. At least that's what I remember learning.

This is not fancy lawyering, like post-conviction relief when the Court of Appeals has jurisdiction. This is just basic lawyering 101.

They elected not to raise this timeliness claim and proceed on the other claims, which is fine. Textbook definition of waiver. This Court ruled in their favor on almost everything, almost.

It is a little unexpected that they didn't get everything, and they come in 364 days later and make a brand-new argument that they could have made back on September 11th, 2006, saying, Judge, we got all the time in the world. Why not?

Now, when I make a mistake, and I'm three months out of time, the People say the remedy should be, of course, my client is precluded from proceeding further.

But when the People are a year late making this argument on timeliness, what happens?

Well, I submit that the rules should apply to

them. This is waiver. It is deliberate waiver as that term is construed under the Supreme Court case of Day versus McDonough (ph), and they have waived their right to proceed on this argument.

Thank you.

THE COURT: Mr. Kuby, if you could just go back to a moment on your time line.

I assume this is so from the initial statement made by the respondents, that on January 10th, 2003 the petitioner saw this film.

MR. KUBY: Correct.

THE COURT: When for the first time did he learn the identity of or have access to the facts, the materials of Gregory Doe?

MR. KUBY: My understanding is he first began to obtain the Jarecki materials at the beginning of July 2003.

We have been unable to at this point to reconstruct whether he saw the Gregory Doe interview in the first week or the fourth week --

THE COURT: When you say saw the interview?

MR. KUBY: Saw the transcript of the interview; saw the identifying information; saw the Gregory Doe file. Just because of the remoteness in time and the fact that nobody really foresaw this was ever going to be an issue

at the time, didn't minutely chronicle the box by box, document by document search. But he first gained access the beginning of July 2003.

So, even if he saw it on day one, if the very first thing in the first box he opened was, Gregory Doe, this is it, he still would be within the one-year period.

THE COURT: How many boxes were there approximately? Give me some idea of the type of material, and also whether it still exists today.

MR. KUBY: Give me a moment on that.

(Whereupon, at this time there was a pause in the proceedings.)

MR. KUBY: The first question I can only answer in generalities, thousands of pages, but not hundreds of thousands of pages.

The second question as to what still exists? I would love to know the answer to this myself.

I contacted Andrew Jarecki in the course of this litigation, and I asked that I be given access to the file. I, too, have been put off at various times and in various ways. And I don't yet have subpoena power to conduct discovery. So I'm presuming that the corpus of his material is intact. But as to where it is, how to get it, and as to specifically if he kept, for example, any sort of log as to when Jesse came, when Jesse didn't come,

I can't answer those questions now.

I can represent that July 1st is the absolute earliest date Jesse received any of these materials, and that's the day we used in the course of this litigation. I know the People dispute the significance of it, but I don't believe they dispute the date.

THE COURT: Ms. Sternberg.

MS. STERNBERG: I haven't seen these letters and these E-mails before. I don't think it supports the petitioner's position. That's exactly what I said in my papers.

THE COURT: If you can just speak into the microphone, because I don't believe we can hear you.

MS. STERNBERG: The movie is not evidence of anything. But it is the factual basis of these claims. And he had that factual basis in January.

Petitioner argues just now that he didn't have to do anything. If the producer Jarecki chose not to give him access for a year, ten years, twenty years, he didn't have to do anything. But he had the opportunity immediately to file his 440 motion in the county court with his myriad of other claims, and to ask the county court to order Jarecki to give him access to that material.

In fact, when the 440 was pending before the

county court, it ordered Jarecki to allow the People access to the out-takes of interviews that were in the film and represented to the Court as evidence.

The defendant -- the petitioner, I'm sorry, in this case, made no effort to do anything to get access, except apparently to wait.

These papers that Mr. Kuby has just given me, indicate that he knew as soon as he saw the movie that these claims would be the basis -- that these statements in the movie could be the basis of legal claims. And he chose to wait until Mr. Jarecki gave him access. That's not due diligence.

THE COURT: What about the fact that he got a lawyer, and the lawyer contacted Jarecki?

MS. STERNBERG: And the lawyer apparently chose to wait. The lawyer is in his stead.

THE COURT: And you are suggesting at that point in time he should have sought an order directing access in county court?

MS. STERNBERG: Yes.

He should have sought legal assistance from the Court in getting access to these materials that he knew from the movie was the factual basis for his claim.

THE COURT: Not relied on counsel representing him on the 440 motion?

MS. STERNBERG: Well, if there is the suggestion that counsel was ineffective, failing to do that --

THE COURT: I don't know.

MS. STERNBERG: -- but he has no constitutional claim concerning effectiveness of counsel in the collateral motion.

THE COURT: Yes.

MS. STERNBERG: His time ran when he knew someone was hypnotized and that was the basis a now Brady claim.

THE COURT: Yes.

MR. KUBY: Again, the issue isn't when he had an inkling. The issue is when he had access to the factual basis, without knowing that this person actually was one of the people who testified against him resulting in an indictment to which he ultimately pled guilty -- without that fact -- again, the Gregory Doe name was not used, and it was all shrouded in anonymity. He had no facts, he had allegations.

He could have gone into court and said, look, I believe this is an accuser.

And the People would have come back and said, we don't know who these people are. This is a Hollywood movie. We are not going to go run around and defend a claim against any or every actor made in every movie that

Hollywood puts out. This has no business in the federal court.

What does Jesse do? He gets a lawyer, the lawyer asks for materials.

The lawyer puts him off. May 9th he asks again.

A couple of months later Jesse gets the material.

Should he have filed a 440 and spent a year and a half fighting it, as to whether he will get discovery, fighting a motion to dismiss, because you have not alleged any facts, Mr. Friedman? You just alleged conjecture based on an unsworn Hollywood film.

To give you an example, the DNA cases, Johnson versus United States, 544 US 295.

You are on notice for the facts that support your claim when you get the DNA test back with the results. That's when you are on notice of the facts.

Of course, the courts have said, nonetheless, once you have your sample, and you know that there is a sample to compare it with, and the technology exists, then you have to proceed with reasonable promptness.

So, to make an analogy here, Jesse knows that there is somebody out there saying these things. He is trying to find out who this person is. And he does so with reasonable promptness, within a six-month period of

time. But the facts that underlie his claim don't exist until he knows this in fact was one of the witnesses who testified against him. And he didn't have that Gregory Doe information until July at the very earliest.

THE COURT: Anything else you would like to respond to, Ms. Sternberg?

MS. STERNBERG: No. Thank you, your Honor.

THE COURT: I will reserve decision on this.

Obviously, the respondents aren't claiming that there is much in dispute here other than the effect of the defendant's -- excuse me, the petitioner's waiting until sometime in July 2003 to actually get these materials. And it is a question of interpretation.

I don't think there is any need to have additional testimony at this point in time. It is pretty much as a matter of law that I can decide these issues, unless you have some case law supporting to the contrary, I will make that determination and I will render a written decision.

MR. KUBY: Thank you, Judge.

THE COURT: As far as the discovery motion, I think at this point in time it is premature, and it is related more to the merits than anything else.

MR. KUBY: I understand. It is not surprising given the procedural posture of the case. It does

illustrate though one of the difficulties, even once one files one's claim, actually using the judicial process to get discovery, as opposed to the more informal process that Mr. Friedman was ultimately able to use which probably gave him the material faster.

THE COURT: Sometimes we have to wait a while to render justice, Mr. Kuby.

MR. KUBY: And I don't have a probable with waiting.

THE COURT: Motion to have discovery is denied.

(End of proceedings.)