

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HAROLD L. ROSENBERGER

Plaintiff,

- v -

NEW YORK STATE OFFICE OF TEMPORARY
AND DISABILITY ASSISTANCE, et al.,

Defendants.

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED

JUL 19 2004

LAWRENCE K. BAERMAN, CLERK
ALBANY

1:04-CV-0475
(GLS)(DRH)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
CROSS MOTION TO STRIKE, or *in the alternative*, to
DENY DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

Harold L. Rosenberger, Plaintiff, pro se
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Dated: July 14th, 2004

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"The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court... As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions..." - *Troxel v. Granville*, 530 U.S. 57; 120 S.Ct. 2054 (2000).

PRELIMINARY STATEMENT

On April 29th, 2004 the Plaintiff commenced this action against the named Defendants. The Defendants were properly served with complaint and summons and the Office of the New York State Attorney General was given notice with a copy of the complaint since the action involved a general constitutional challenge to certain New York State statutes.

On May 7th, 2004 magistrate judge Hon. David R. Homer issued an ORDER. Furthermore, the ORDER commanded "that a formal response to the plaintiff's complaint be filed by the defendants or their counsel as provided for in the Federal Rules of Civil Procedure." All Defendants and the Attorney General were given notice of said ORDER by regular mail. The deadline for Defendants New York Office of Temporary and Disability Assistance (OTDA) and Robert Doar, Commissioner of OTDA, was June 2nd, 2004, and the deadline for Defendant Ulster County Family Court was June 6th, 2004.

On June 21st, 2004, the Plaintiff filed NOTICE with the Court that the Defendants and/or their counsel had failed to appear in the action.

On June 22nd, 2004 entry of default was noted and entered by the Clerk of the Court pursuant to Rule 55(a). See Appendix page A-1.

On June 23rd, 2004, as a result of receiving the clerk's entry of default, the Defendants first appeared in the instant action.

Plaintiff reiterates the Memo of Law offered in the Motion for Default Judgment and to Sustain Entry of Default.

Accordingly, the Plaintiff moves the court to strike the Defendants' Motion to Dismiss the Complaint as untimely and an inappropriate response to the Court's ORDER of May 7th, 2004, or in the alternative, to Deny Defendants' Motion to Dismiss the Complaint. See Appendix page A-2.

POINT I – PLAINTIFF’S GOOD FAITH EFFORT

Plaintiff initiated a good faith effort with Defendants’ counsel to resolve these motions now before the Court.

POINT II – RULE 12(f)

Rule 12(f) of the Federal Rules of Civil Procedure permits a party to move to strike from any pleading “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Plaintiff reiterates the Memo of Law offered in his Motion for Default Judgment and to Sustain Entry of Default and offers it in support that the Defendants’ defenses are insufficient.

POINT III – IMPORTANT LIBERTY INTERESTS AT ISSUE

Plaintiff is aware that motions to strike are generally disfavored and infrequently granted by Federal Courts when they are based solely on a violation of the Federal Rules of Civil Procedure. In the instant case not only have the Defendants disregarded the Rule 12(a)(1), they have additionally disrespected a Court ORDER. Each transgression alone may not rise to the level for this Court to strike future pleadings, but both together do.

Defendants wish the Court to overlook their disregard for the Federal Rules of Civil Procedure and their disrespect for the Court’s ORDER of May 7th, 2004. They fail to acknowledge or express regrets at their disrespect for the Court ORDER entered May 7th, 2004 demanding that they answer the complaint:

“Without question, such cavalier disregard for a court order is a failure, under rule 55(a), to ‘otherwise defend as provided by these rules.’” Shapiro, Berstein & Co., Inc., et al. v. Continental Record Company, Inc., 386 F.2d 426; 1967 U.S. App. LEXIS 4391; Simbrow, Inc. v. United States, 367 F.2d 373 (3d Cir. 1966); Flora Construction Co. v. Fireman’s Fund Ins.

Co., 307 F.2d 413 (10th Cir. 1962), cert. denied, 371 U.S. 950, 83 S. Ct. 505 9 L. Ed. 2d 499 (1963).

Such cavalier disregard for a Court ORDER is a failure, especially when a Pro-se litigant is asserting a general constitutional challenge to state statutes that implicate fundamental Liberty interests regarding a parent's autonomous child-rearing decision making.

The Defendants would have this Court sacrifice the fundamental federal rights and Liberty interest of all single and divorced New York parents because of their non-compliance.

No harm will come to the children of New York if the Defendants loose this lawsuit by default or on the merits. The New York State legislature has ready means to write prompt proper legislation to assure parents provide adequate support such that their children do not suffer harm.

**POINT IV – IN THE ALTERNATIVE,
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD BE DENIED**

Motion To Dismiss

Defendants move the Court to dismiss the Plaintiff's complaint. Plaintiff offers the following from the Court of Appeals for the Second Circuit:

"Our review must accept the allegations contained in the petition as true, and draw all reasonable inferences in favor of the non-movant. See Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). Dismissal is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957))." Still v. Debuono, 101 F.3d 888, 891 (2nd Cir. 1996)

Pro Se Plaintiff Dismissal Standard

Plaintiff is pro se and if there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff hasn't thought of, the Court cannot dismiss this case. Because the Plaintiff is pro se, the Court has a higher standard when faced with a motion to dismiss, *White v. Bloom*, 621 F.2d 276 makes this point clear and states:

"A court faced with a motion to dismiss a pro se complaint... must read the complaint's allegations expansively, *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972), and take them as true for purposes of deciding whether they state a claim." *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972).

Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bonner v. Circuit Court of St. Louis*, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)). Thus, if this court were to entertain any motion to dismiss this court would have to apply the standards of *White v. Bloom*.

Plaintiff, in an abundance of caution, should the Court not sustain Default entry and Enter Default Judgment for the Plaintiff but instead reaches to Defendants' argument to dismiss, repeats his arguments against preclusion, against abstention and reaffirms the adequacy of the complaint to state a cause of action.

Rooker-Feldman Doctrine

The Defendants assert that the action is barred by the Rooker-Feldman doctrine .
Plaintiff disagrees.

The Plaintiff has made a general constitutional challenge to New York State law. (Complaint, ¶ 11). *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, (1983)

and all cases relying on it state that a general challenge to the constitutionality of a state statute is the distinct exclusion to the application of the Rooker-Feldman doctrine.

Federal district courts do have jurisdiction “over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case.” Feldman at 486.

As the Court of Appeals for the Second Circuit has held, a litigant may challenge legislation as it exists, but may not challenge the particular application of that legislation to his case:

“Hachamovitch may proceed with his claim that the regulatory scheme as it exists since the Department of Health took over responsibility for physician discipline violates due process, but may not challenge the particular application of that scheme to his case.” Hachamovitch v. DeBuono, 159 F.3d 687, 693 (2d Cir.1998).

Furthermore, as the magistrate judge stated in the court’s ORDER of May 7th, 2004, “The Plaintiff does not seek to overturn the judgment of the state court that gave rise to this controversy.” The Court has already recognized Rooker-Feldman does not apply because of the complaint’s clear statement that the “Plaintiff is not requesting that a State court judgment be overturned, altered, or modified in anyway by this court” (Complaint ¶ 12).

Ankenbrandt Domestic Relations Exception

The Defendants assert that the action is barred by the Ankenbrandt domestic relations exception. Ankenbrandt v. Richards, 504 U.S. 689 (1992).

Plaintiff disagrees.

Ankenbrandt is inapplicable because the Plaintiff is not asking for a divorce, alimony or custody decree (Complaint ¶ 12).

"Although *In re Burrus* technically did not involve a construction of the diversity statute, as we understand *Barber* to have done, its statement that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States," *id.*, at 593-594, has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction. See, e.g., *Bennett v. Bennett*, 221 U.S. App. D.C. 90, 93, 682 F.2d 1039, 1042 (1982); *Solomon v. Solomon*, 516 F.2d 1018, 1025 (CA3 1975); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (CA2 1967); see generally 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* 3609, pp. 477-479, nn. 28-32 (1984). This application is consistent with *Barber*'s directive to limit federal courts' exercise of diversity jurisdiction over suits for divorce and alimony decrees. See *Barber*, 21 How. at 584. 6 We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders." *Ankenbrandt v. Richards*, 504 U.S. 689 at 703 (1992).

Collateral Estoppel

The Defendants assert that the action is barred by the concept of collateral estoppel.

Plaintiff disagrees.

As the Second Circuit Court of Appeals has held in *Cobb v. Pozzi*, 352 F.3d 79 (2nd Cir. 2003),

"Under New York law, collateral estoppel 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.' *Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir. 1994) (quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487, 490 (1984)). New York courts will invoke the doctrine of collateral estoppel "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, [*61] and the [party against whom preclusion is sought] had a full and fair opportunity to litigate the issue in the earlier action." *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478, 482, 712 N.E.2d 647 (1999) (citation omitted). Also, the issue raised in the first action must be 'decisive' of the second action. See *Curry v. City of Syracuse*, 316 F.3d 324, 331 (2d Cir. 2003) (citation omitted). The burden of showing that an issue raised in a subsequent proceeding 'is identical to

one that was raised and necessarily decided in the prior action rests squarely on the party moving for preclusion.' Sullivan v. Gagnier, 225 F.3d 161, 166 (2d Cir. 2000)." Cobb v. Pozzi, 352 F.3d 79, 101 (2nd Cir. 2003).

The complaint offers no evidence that any of these elements above exist, let alone all. Defendants offer no evidence of identical issues being litigated by the same parties resulting in a final judicial decision.

As such, collateral estoppel does not apply.

Res judicata

The Defendants assert that the action is barred by the concept of res judicata.

Plaintiff disagrees.

As the Second Circuit Court of Appeals has held in Epperson v. Entertainment Express, Inc., 242 F.3d 100 (2nd Cir. 2001):

Under the traditional rule of res judicata, a valid, final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action. The first judgment, when final and on the merits, thus puts an end to the whole cause of action. Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968) [*24] (citations omitted). Epperson v. Entertainment Express, Inc., 242 F.3d 100, 105-106 (2nd Cir. 2001)

The complaint offers no evidence that any of the elements, or same cause of action, above exist, let alone all. In fact, none of the elements exist, including same case of action, let alone all. Defendants offer no evidence of a final decision on the merits between the same parties on the same issues.

As such, res judicata is not applicable.

Younger Abstention Doctrine

The Defendants assert that the Younger Abstention Doctrine bars the action. Younger v. Harris, 401 U.S. 37 (1971).

Plaintiff disagrees.

In order for the Younger Abstention Doctrine to apply, there must be ongoing proceedings in state court. The Younger abstention doctrine scope and elements are succinctly summarised in Diamond D Constr. Corp. v. McGowan, 282 F.3d 191 (2nd Cir. 2002).

“Younger abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims.” Grieve v. Tamerin, 269 F.3d 149, 152 (2d Cir. 2001); Diamond D Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2nd Cir. 2002)

In the instant case, there are no such ongoing state court proceedings. To the contrary, the orders of the state court are final (Complaint, exhibit 2).

As such, the Younger Abstention Doctrine does not apply.

Case or Controversy Requirements

The Defendants assert that there is no case or controversy, and thus the Plaintiff lacks standing.

Plaintiff disagrees.

This Court has preliminarily agreed with the Plaintiff in its Order of May 7, 2004, “Rosenberger does not seek to overturn the decision of the state court giving rise to this controversy.”

Defendants state Plaintiff is relying on the “abstract claim that New York’s income based child support statutes are unconstitutional.”¹ This is inaccurate.

The Plaintiff attached as exhibits to his complaint copies of the support order and wage execution from the state court (Complaint, exhibit 2). There is nothing abstract about these documents and their impact on the Plaintiff. The Plaintiff has been injured, continues to be injured, and will continue to be injured by the challenged State statutes.

Failure to State a Claim

The Defendants assert that the Plaintiff has not stated a claim upon which relief can be granted.

Plaintiff disagrees. All necessary elements for a valid claim are adequately pled.

The Supreme Court, in a recent case, has held that the Fourteenth Amendment’s Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Troxel v. Granville, 120 S. Ct. 2054, 2059-60 (2000) (quoting Washington v. Glucksberg, 521 U.S. 702, 719-20, 117 S.Ct. 2258 (1997)).

The Defendants reliance on Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) is misplaced.

Stanley supports the Plaintiff’s position.

In Stanley, the Supreme Court declared unconstitutional an Illinois State statute that presumed an unmarried father was an unfit parent:

“The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic

¹ Memorandum of Law In Support of Defendants’ Motion to Dismiss the Complaint, pg. 9.

arrangements.” Stanley v. Illinois, 405 U.S. 645, 651 (1972), citing Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

The Defendants mistakenly offer Stanley for the authority “that makes clear that support orders – which implicate ‘mere...shifting economic arrangements’ - stand on a different constitutional footing from the parental liberty interest in bringing up their children, molding the moral, religious, educational, and cultural values of their offspring.”² This is a misinterpretation of the Stanley decision. If one goes back to the original citation from whence the Stanley cite is derived, a much different picture emerges. In Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), the complete citation is,

“Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics.” Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

Mr. Justice Frankfurter was discussing the philosophy of Mr. Justice Holmes when it came to free speech verses economic legislation. As such, he believed that rights that are derived from economic legislation do not come to the court with the same momentum for respect as those “liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.”

The Liberty Right to Free Speech; the Liberty Right to an Abortion; the Liberty Right to “establish a home and bring up children”; the Liberty Right “to control the education of their own”; the Liberty Right to “the care, custody and management of their child”, which the plaintiff assert includes how and to what extent a parent provides financially for their child. These Liberty Rights not derive from economic arrangements or

² Memorandum of Law In Support of Defendants’ Motion to Dismiss the Complaint, pg. 14.

from economic legislation, nor are they subservient to such legislation. They exist independently and stand alone.

While the New York State's income-based child support statutes may well be viewed as a sort of economic legislation, the Liberty Right to care for and provide for one's offspring as one sees fit certainly does not derive from this legislation.

To the contrary, as the Plaintiff asserts in his complaint, the legislation impermissibly infringes upon these Liberty Rights. If we were instead to accept the argument of the Defendants in reference to the Stanley decision, and follow it to its' logical conclusion, it would mean that the State has unfettered power to mandate to all parents - married, single and divorced – how and to what extent they must financially provide for their offspring. This argument is the alter-ego of the Plaintiff's argument in his complaint.

In addition, the Stanley decision held that the Illinois statute implicated parental Liberty interests and that the presumption of unfitness could not stand:

“Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.” Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Similarly, the challenged New York State income-based child support statute runs roughshod over the Liberty interest and fundamental rights of parents and children. The challenged statute implicitly declares the parent unfit to make financial decisions relating to his or her children, mandates a percentage of income for child support, arbitrarily decrees that percentage of income support is correct, and places the burden on the parent to prove otherwise. The state, through the income based child support statute, overreaches its constitutionally delegated authority. As in Stanley, the Plaintiff asserts that the challenged New York statutes should not stand.

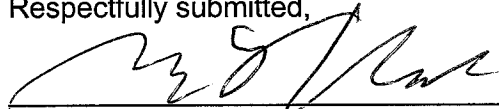
CONCLUSION

For all the aforementioned reasons, and to maintain the dignity and the rules of the court, the Defendants' Motion to Dismiss the Complaint and all further pleadings made by the Defendants should be stricken.

In the alternative, if the Court does not see fit to strike, it should deny the Defendants' Motion to Dismiss the Complaint.

Dated: July 14th, 2004
Highland, New York

Respectfully submitted,



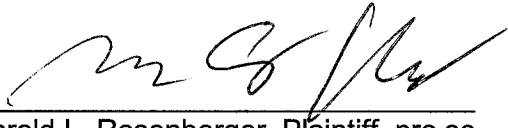
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16th day of July, 2004 served this Notice Of Cross Motion and Memorandum Of Law In Support of Plaintiff's Cross Motion to Strike, or in the alternative, to Deny Defendants' Motion To Dismiss Complaint prior to filing the same, by depositing a copy thereof, prepaid, in the Federal Express Mail, properly addressed upon,

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Lisa Ullman, independently and as attorney for all Defendants
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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CLERK'S CERTIFICATE OF ACTION TAKEN ON
PLAINTIFF(S) REQUEST FOR ENTRY OF DEFAULT

Harold L. Rosenberger

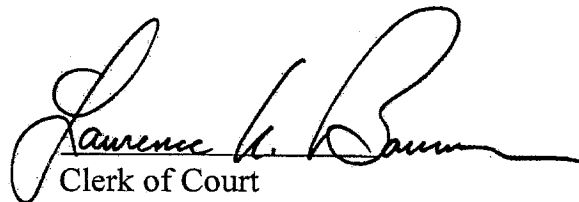
vs.

CASE NUMBER: 04cv475 (GLS/DRH)

New York State Office of Temporary and Disability
Assistance; Robert Doar, Commissioner, Office of Temporary
and Disability Assistance, in his official capacity; Ulster County
Family Court

I, LAWRENCE K BAERMAN, CLERK, by William J. Griffin, Deputy Clerk, certify that I have reviewed the Court's docket and have determined that proof of proper service for the party against whom judgment is being sought has been filed and that this party has not appeared in the action. Accordingly, entry of default is hereby noted and entered on this 22th day of June, 2004 against New York State Office of Temporary and Disability Assistance; Robert Doar, Commissioner, Office of Temporary and Disability Assistance, in his official capacity; Ulster County Family Court.

Dated: June 22, 2004


Clerk of Court

s/William J. Griffin
Deputy Clerk

A-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HAROLD L. ROSENBERGER,

Plaintiff,

-v.-

1:04-CV-0475
(GLS)(DRH)

NEW YORK STATE OFFICE OF TEMPORARY
AND DISABILITY ASSISTANCE, *et al.*,

Defendant.

APPEARANCES:

HAROLD L. ROSENBERGER

Plaintiff, *pro se*

Highland, NY 12528

DAVID R. HOMER, U.S. MAGISTRATE JUDGE

ORDER

Presently before the Court is a *pro se* complaint filed by Harold Rosenberger ("plaintiff" or "Rosenberger"). Rosenberger has paid the filing fee required for this action.

In his *pro se* complaint Watson seeks a declaratory judgment from this Court that New York State Family Court Act §413 and Domestic Relations Law §240 are unconstitutional. More specifically, plaintiff alleges that these statutes interfere with his constitutionally protected rights to privacy and due process. Rosenberger does not seek to overturn the decision of the state court giving rise to this controversy. For a more complete statement of plaintiff's claims, reference is made to the entire complaint.

WHEREFORE, it is hereby

ORDERED, that the Clerk shall issue summonses and forward them, along with a copy of the complaint and General Order 25, to plaintiff for service of same on the defendants in accordance with the Federal Rules of Civil Procedure, and the Clerk shall forward a copy of this Order and the complaint to the Office of the New York State Attorney General by regular mail, and it is further

ORDERED, that the parties shall comply with General Order 25, which sets forth the Civil Case Management Plan used by the Northern District of New York, and it is further

ORDERED, that a formal response to plaintiff's complaint be filed by the defendants or their counsel as provided for in the Federal Rules of Civil Procedure subsequent to service of process on the defendants, and it is further

ORDERED, that any paper sent by a party to the Court or the Clerk shall be accompanied by a certificate setting forth the date a true and correct copy of same was mailed to all opposing parties or their counsel. **Any letter or other document received by the Clerk or the Court which does not include a certificate of service which clearly states that an identical copy of same was served upon all opposing parties or their attorneys is to be returned, without processing, by the Clerk.**


Plaintiff shall comply with all requests by the Clerk's Office for any documents that are necessary to maintain this action; failure to do so will result in the dismissal of the instant action. Plaintiff is also required to promptly notify the Clerk's Office and counsel for the defendants of any change in his address; failure to do same will result in the

dismissal of the instant action. All motions shall comply with the Local Rules of Practice of the Northern District, and it is further

ORDERED, that the Clerk serve a copy of this Order on plaintiff by regular mail.

IT IS SO ORDERED.

Dated: May 7, 2004 _____



United States Magistrate Judge