

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH JUDICIAL CIRCUIT

COURT OF APPEALS NO. 88-5727

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Honorable Consuelo B. Marshall, Judge

DAVID McCALDEN, d/b/a TRUTH MISSIONS

Plaintiff-Appellant,

vs.

CALIFORNIA LIBRARY ASSOCIATION, CITY
OF LOS ANGELES, AMERICAN JEWISH COMMITTEE,
MARVIN HIER, WESTIN HOTEL CO., AND
THE SIMON WIESENTHAL CENTER

Defendant-Appellees.

BRIEF OF DEFENDANT-APPELLEES
THE SIMON WIESENTHAL CENTER
AND RABBI MARVIN HIER

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CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

The undersigned, counsel of record for Rabbi Marvin Hier and the Simon Wiesenthal Center, Defendant-Appellees, certifies that there are no known interested parties other than those participating in the case.

Dated: January 17, 1989

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and Rabbi Marvin Hier

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**I. STATEMENT OF SUBJECT MATTER
JURISDICTION AND TIMELINESS.**

Jurisdiction of the District Court and this Court is discussed in the Joint Brief of All Defendant-Appellees ("Appellees' Joint Brief"). As set forth in Appellees' Joint Brief, it is the position of Appellees Rabbi Marvin Hier and the Simon Wiesenthal Center that this Court does not have subject matter jurisdiction over this appeal because plaintiff-appellant did not file a timely notice of appeal.

II. ISSUES PRESENTED FOR REVIEW

1. This Court lacks jurisdiction to hear McCalden's appeal because a final appealable order dismissing this lawsuit was entered by the District Court on March 31, 1987 and the Notice of Appeal was not filed until February 10, 1988. (This issue is discussed in Appellee's Joint Brief, Section I.)

2. The alleged communications between Rabbi Hier and the Simon Wiesenthal Center on the one hand and government officials on the other hand were protected under the First Amendment right to petition the government for redress of grievances and California Civil Code Section 47(2). (This issue is discussed in Section IV.B of this brief.)

3. The alleged acts of Rabbi Hier and the Simon Wiesenthal Center of threatening to organize a demonstration, informing certain groups of McCalden's exhibit, urging another party to make certain statements, and renting a conference room, were protected under the First Amendment rights of freedom of speech and freedom of assembly. (This issue is discussed in Section IV.B of this brief.)

4. McCalden has failed to state a claim under 42 U.S.C. Section 1983 against Rabbi Hier or the Simon Wiesenthal Center, because the Second Amended Complaint establishes that Rabbi Hier and the Simon Wiesenthal Center did not act under color of state law. (This issue is discussed in Section IV.C of this brief.)

5. McCalden has failed to state a claim under 42 U.S.C. Section 1983 against Rabbi Hier or the Simon Wiesenthal Center, because petitioning of government officials cannot give rise to liability under 42 U.S.C. Section 1983. (This issue is discussed in Section IV.C of this brief.)

6. McCalden has failed to state a claim under 42 U.S.C. Section 1985(3), because McCalden has failed to demonstrate that he is a member of a class entitled to protection under 42 U.S.C. Section 1985(3). (This issue is discussed in Section IV.A of Appellees' Joint Brief.)

7. McCalden has failed to state a claim under 42 U.S.C. Section 1985(3) against Rabbi Hier or the Simon Wiesenthal Center, because McCalden has failed to allege facts which show state involvement with Rabbi Hier and the Simon Wiesenthal Center or that Rabbi Hier and the Simon Wiesenthal Center acted under color of state law or authority. (This issue is discussed in Section IV.D of this brief.)

8. McCalden has failed to state a claim under 42 U.S.C. Section 1986, because McCalden has failed to allege an underlying claim for relief under section 1985(3). (This issue is discussed in Section IV.B of Appellees' Joint Brief.)

9. McCalden has failed to state a claim for interference

with contract under California law, because he has not alleged that some identifiable pecuniary or economic benefit accrued to the defendant that formerly accrued to the plaintiff. (This issue is discussed in Section IV.C of Appellees' Joint Brief.)

10. McCalden has failed to state a claim under the Unruh Civil Rights Act, because McCalden did not allege that Rabbi Hier or the Simon Wiesenthal Center committed any acts of violence or made any threats of violence to McCalden. (This issue is discussed in Section IV.G of this brief.)

11. McCalden has failed to state a claim under the Unruh Civil Rights Act, because McCalden has failed to show that he is a member of any class subject to protection under the Unruh Act. (This issue is discussed in Section IV.G of this brief.)

III. STATEMENT OF THE CASE.

A. PREFATORY STATEMENT.

The District Court's order dismissing all claims against Rabbi Marvin Hier and the Simon Wiesenthal Center should be affirmed. All of the alleged acts of Rabbi Hier and the Simon Wiesenthal Center were Constitutionally protected and statutorily privileged. The Second Amended Complaint filed by McCalden merely alleges that Rabbi Hier and the Simon Wiesenthal Center contacted their elected representatives in the City Council and the State Legislature and requested that they take certain official actions; threatened to organize and organized a demonstration; informed others about McCalden's activities; urged another organization to make certain statements; and rented a conference room at a hotel. As discussed below, it is

clear that all of these acts are privileged.

Furthermore, McCalden has failed to state a claim against Rabbi Hier and the Simon Wiesenthal Center for interference with contract, violation of 42 U.S.C. Sections 1983 and 1985, or violation of the Unruh Act or Tom Bane Civil Rights Act, for the reasons discussed below.

B. NATURE OF THE CASE

The Plaintiff-Appellant is David McCalden, doing business as Truth Missions ("McCalden"). McCalden's organization is in the business of disseminating publications which claim that the Holocaust, in which the Nazis murdered six million Jews during the period from 1932 to 1945, is merely a hoax and that the genocide of the Jews by the Nazis did not take place. (McCalden's E.R. 1/ p.3, Order entered February 11, 1987 p. 3; McCalden's E.R. pp. 17-54, Second Amended Complaint; CR 12, Notice of Motion and Motion to Dismiss, etc.)

Defendant-Appellee Marvin Hier ("Rabbi Hier") is a Rabbi and Dean of the Simon Wiesenthal Center. Defendant-Appellee the Simon Wiesenthal Center is an organization which fights against anti-Semitism and racism, and maintains a museum of the Holocaust. (McCalden's E.R. pp. 17-54, Second Amended Complaint; CR 12, Notice of Motion and Motion to Dismiss, etc.; CR 26, Reply Memorandum of Defendants.)

McCalden's Second Amended Complaint asserts claims against

1. In this brief, the Excerpts of Record submitted by Appellant McCalden shall be designated as "McCalden E.R." Portions of the record shall be referred to by the designation "CR," followed by the number that the document has on the District Court Docket sheet.

Rabbi Hier and the Simon Wiesenthal Center for i) interference with contract, ii) deprivation of rights (42 U.S.C. Section 1983), iii) conspiracy to interfere with civil rights (42 U.S.C. Section 1985(3)), iv) neglect to prevent conspiracy (42 U.S.C. Section 1986), and v) violation of the Unruh Civil Rights Act.

C. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

As discussed more fully below, the United States District Court for the Central District of California, Judge Consuelo B. Marshall, dismissed McCalden's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted.

D. STATEMENT OF FACTS.

1. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT.

McCalden claims in the Second Amended Complaint that on or about July 19, 1984, he entered into a written contract with Defendant California Library Association ("CLA") for the rental of exhibit space at the CLA's 86th Annual Conference scheduled for December 1 through 5, 1984, at the Westin Bonaventure Hotel in Los Angeles. (Paragraph 14, McCalden E.R. p. 4.) McCalden also alleges that on or about August 17, 1984, he entered into an additional written contract with the CLA for the presentation of a program at the conference. (Second Amended Complaint para. 15, McCalden E.R. p. 4-5.)

The Second Amended Complaint alleges that on or about November 16 or 17, 1984, the CLA canceled the two contracts discussed above. (Paragraph 16, McCalden E.R. p. 5.) The

Second Amended Complaint alleges that Rabbi Hier and the Simon Wiesenthal Center performed various acts which induced or encouraged the CLA to cancel its contracts with McCalden.

McCalden alleges in his Second Amended Complaint that the Simon Wiesenthal Center and Rabbi Hier performed the following acts:

1. It is alleged on information and belief that Rabbi Hier, acting individually and as dean of the Simon Wiesenthal Center, requested his City Councilman to introduce a City Council resolution regarding McCalden's participation in the California Library Association ("CLA") conference. It is alleged on information and belief that in so doing, Rabbi Hier misrepresented to his City Councilman the nature and purpose of McCalden's intended program at the CLA conference, McCalden's beliefs, and other matters. (CR 53, Second Amended Complaint para. 27, McCalden E.R. p. 24.)

2. It is alleged on information and belief that Rabbi Hier and/or the Simon Wiesenthal Center and/or the American Jewish Committee ("AJC") sought and obtained the cooperation of public officials, including Mayor Tom Bradley, Assembly Speaker Willie Brown, State Senate President David Roberti, and Assembly Majority Floor Leader Mike Roos, as part of a conspiracy to pressure the CLA to cancel its contracts with McCalden, and that in furtherance of the conspiracy each of these officials contacted the CLA for the purpose of inducing the CLA to cancel the contracts. (CR 53, Second Amended Complaint para. 36, McCalden E.R. p. 28.)

3. It is alleged on information and belief that Rabbi Hier,

acting individually and as dean of the Simon Wiesenthal Center, threatened to organize and organized a demonstration against McCalden's program, in order to pressure the CLA into canceling its contracts with McCalden. It is alleged on information and belief that Rabbi Hier knew and intended that the demonstration would create a reasonable probability of property damage and violence. (CR 53, Second Amended Complaint para. 32-33, McCalden E.R. p. 10-11.)

4. It is alleged on information and belief that Rabbi Hier and/or the Simon Wiesenthal Center and/or the AJC allowed information concerning McCalden's exhibit and program to pass to members of certain militant, violence prone groups who thereupon made plans to attend and disrupt McCalden's program. (CR 53, Second Amended Complaint para. 34, McCalden E.R. p. 27.)

5. It is alleged on information and belief that representatives of the American Jewish Committee ("AJC") contacted a representative of the California Library Association ("CLA") and informed him that if McCalden's contracts were not canceled, the CLA conference would be disrupted, there would be damage to property, and the CLA would be "wiped out." It is further alleged on information and belief that Rabbi Hier and the Simon Wiesenthal Center urged, requested, knew, and approved of this contact by the AJC. (CR 53, Second Amended Complaint para. 24, McCalden E.R. p. 23.)

6. It is alleged on information and belief that the Simon Wiesenthal Center, at the direction of Rabbi Hier, rented a conference room at the Bonaventure Hotel for the same evening

that McCalden had rented a conference room for his presentation. (CR 53, Second Amended Complaint para. 29.) McCalden alleges on information and belief that the principal purpose that the Simon Wiesenthal Center rented the conference room was to position itself to be able to disrupt McCalden's program. (CR 53, Second Amended Complaint para. 30, McCalden E.R. p. 25.)

7. It is alleged on information and belief that the City of Los Angeles, through its Mayor, Police Department, City Council and others, knew and either tacitly approved or failed to prevent or deter the conduct of the Simon Wiesenthal Center and/or Rabbi Hier. (Second Amended Complaint para. 39, McCalden E.R. p. 29) 2/

The Second Amended Complaint made the following claims for relief:

1. First Cause of Action - Breach of Contract against the California Library Association.

2. Second Cause of Action - Interference with Contract against the American Jewish Committee, City of Los Angeles, Rabbi Hier, Westin Hotel Co., and the Simon Wiesenthal Center.

3. Third Cause of Action - Violation of U.S. Constitution against the City of Los Angeles.

4. Fourth Cause of Action - For Deprivation of Rights against the City of Los Angeles, Rabbi Hier, the Simon Wiesenthal Center and the American Jewish Committee.

2. It should be noted that most of these allegations, and in particular the ones which imply that Rabbi Hier or the Simon Wiesenthal Center in any way condoned any form of violence, are completely false. However, since this appeal involves a dismissal based on the pleadings, McCalden's allegations must be accepted for purposes of this appeal.