READING ASSIGNMENT FOR THE FIRST DAY OF ORIENTATION

Attached is a short case that Professor Steve Subrin would like you to read before Monday, August 30, 2010, the first day of your Orientation at Northeastern University School of Law.* Professor Subrin will be referring to this case during his talk to you on that Monday afternoon. But first, here is some preliminary information that should help you understand the case. (Don't panic; Professor Subrin knows that it will take some time before legal language becomes familiar to you and before you can read court opinions in a sophisticated way. He is giving you this case and some information about it so that he can refer to an actual case that you know a little about when he talks about legal education at Orientation.)

The case, *Dioguardi v. Durning,* is what is called a civil case, rather than a criminal case. Neither a state nor the federal government is suing anybody for breaking a criminal law. This is the type of case one might study in a course in civil procedure, which deals with the rules by which non-criminal cases are litigated.

In such a civil case, there is at least one "plaintiff," the person who initiates the lawsuit and is asking the court to grant some kind of recovery or other order against at least one "defendant," the person being sued who allegedly caused some kind of harm to the plaintiff. In this case, John Dioguardi is the plaintiff and Harry M. Durning is the defendant. The party appealing a lower court decision, called the "appellant," is usually the first named party in the title of opinions.

Right under the title of the case there is a citation, a description of where to find the case in official records of decisions and opinions. The "(2d Cir. 1944)" tells you that it is an opinion of the Second Circuit Court of Appeals of the United States federal courts. The case started in a federal trial court, called a District Court, and was appealed to this Circuit Court, a court that hears appeals from the federal trial courts. You are also being told that the opinion of the Circuit Court was given in 1944.

Cases in federal court are normally started with a "complaint," a document filed by the plaintiff telling some of the facts and why the law entitles the plaintiff to call upon a court to give the plaintiff some kind of relief for harm caused to the plaintiff by the defendant. The major issue in the case is whether the plaintiff's complaint, which he has already amended once, is sufficient and whether the case should be dismissed at this early stage of the litigation, meaning that the plaintiff will have lost his case. The amended complaint in this case is printed right before the opinion.

The conduct for the litigation of civil cases in federal court is largely governed by a set of rules called the "Federal Rules of Civil Procedure" (Fed. R. Civ. P.) These rules became law in 1938 and many of them are exactly, or almost exactly, the same today. The Rules were, and still are, promulgated by the Supreme Court of the United States under authority granted by Congress. The language of the Federal Rules of Civil Procedure governing what should be in a complaint remains largely the same today as it was in 1944, when *Dioguardi v. Durning* was decided.

Here are a couple of other things that might help you better understand this case. The Supreme Court in 1935 appointed a committee, called an Advisory Committee, to help it draft the Federal Rules of Civil Procedure. The Circuit Court Judge Clark, who wrote the opinion in *Dioguardi*, was Charles E. Clark, whom the Supreme Court appointed as the "Reporter" of the Advisory Committee; this made Clark the chief draftsman of the original Federal Rules. Clark in his *Dioguardi* opinion says that the Federal Rules do not require "facts sufficient to constitute a cause of action." That language, which Clark rejects, was a requirement in many 19th century state codes of civil procedure. Clark mentions at the end of the opinion that the plaintiff, who is representing himself, may have trouble without a lawyer at a later stage of the litigation called "summary judgment." At that stage, Dioguardi's case can be dismissed if it has become clear, after he has had a chance to gain more information from the defendant and others, that there is no way he can win.

Here are some questions you might consider as you read and reread this short case:

1. What is the language of the Federal Rules that Clark says governs complaints?

2. What attitude is Clark displaying as to the importance of complaints? Does his interpretation seem pro-plaintiff or pro-defendant or neither? Will that always be true? Are you sure?

3. Why would a law professor have you read this circuit court opinion when it is the Supreme Court of the United States that has the final say on what a Federal Rule means?

4. Why not just have you read the applicable Federal Rules, like the rules of what to put in a complaint, rather than opinions that have concrete fact situations? Do you have any idea what Mr. Dioguardi is complaining about? What does he seem to think happened?

5. Here is a shocker. *Dioguardi* is no longer good law. The attitude and interpretation of Clark have recently been rejected by the Supreme Court of the United States. Why would a law professor still have students read such a case? In fact, many civil procedure professors would not have you read this case, but they surely know about it and will want you to know about the previous federal law on complaints. Why this insistence on history and context? Why this use of concrete fact situations? (And in this instance, you have a fact situation about a field of law, the collection of customs and the forced sale of "tonics," that just might not be a field of practice that you will ever encounter in your entire professional life.)

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* The attached excerpt is from SUBRIN, MINOW, BRODIN & MAIN, CIVIL PROCEDURE, DOCTRINE, PRACTICE, AND CONTEXT 197-99 (3d ed. 2008).

■ DIOGUARDI v. DURNING

139 F.2d 774 (2d Cir. 1944)

[*Eds.' Note:* John Dioguardi filed a complaint against Harry M. Durning "Individually and as Collector of Customs at the Port of New York." That complaint was dismissed by the federal district court, but Mr. Dioguardi was permitted to file an amended complaint. The *amended* complaint is reprinted in full below:*

"Plaintiff, as and for his bill of amended complaint the defendant, respectfully alleges:

"FIRST: I want justice done on the basis of my medicinal extracts which have disappeared saying that they had leaked, which could never be true in the manner they were bottled.

"SECOND: Mr. E.G. Collord Clerk in Charge, promised to give me my merchandise as soon as I paid for it. Then all of a sudden payments were stopped.

"THIRD: Then, he didn't want to sell me my merchandise at catalogue price with the 5% off, which was very important to me, after I had already paid $5,000 for them, beside a few other expenses.

"FOURTH: Why was the medicinaly given to the Springdale Distilling Co. with my betting price of $110; and not their price of $120.

"FIFTH: It isn't so easy to do away with two cases with 37 bottles of one quart. Being protected, they can take this chance.

"SIXTH: No one can stop my rights upon my merchandise, because of both the duly and the entry.

"WHEREFORE: Plaintiff demands judgment against the defendant, individually and as Collector of Customs at the Port of New York, in the sum of Five Thousand Dollars ($5,000) together with interest from the respective dates of payment as set forth herein, together with the costs and disbursements of this action."]

CLARK, Circuit Judge:

In his complaint, obviously home drawn, plaintiff attempts to assert a series of grievances against the Collector of Customs at the Port of New York growing out of his endeavors to import merchandise from Italy "of great value," consisting of bottles of "tonics." We may pass certain of his claims as either inadequate or inadequately stated and consider only these two: (1) that on the auction day, October 9, 1940, when defendant sold the merchandise at "public custom," "he sold my merchandise to another bidder with my price of $110, and not of his price of $120," and (2) "that three weeks before the sale, two cases, of 19 bottles each case, disappeared." Plaintiff does not make wholly clear how these goods

*Reprinted in Jack H. Friedenthal et al., *Civil Procedure: Cases and Materials* (9th ed. 2005).

came into the collector's hands, since he alleges compliance with revenue laws; but he does say he made a claim for "refund of merchandise which was two-third paid in Milano, Italy," and that the collector denied the claim. These and other circumstances alleged indicate (what, indeed, plaintiff's brief asserts) that his original dispute was with his consignor as to whether anything more was due upon the merchandise, and that the collector, having held it for a year (presumably as unclaimed merchandise under 19 U.S.C.A. § 1491), then sold it, or such part of it as was left, at public auction. For his asserted injuries plaintiff claimed $5,000 damages, together with interest and costs, against the defendant individually and as collector. This complaint was dismissed by the District Court, with leave, however, to plaintiff to amend, on motion of the United States Attorney, appearing for the defendant, on the ground that it "fails to state facts sufficient to constitute a cause of action."

Thereupon plaintiff filed an amended complaint, wherein, with an obviously heightened conviction that he was being unjustly treated, he vigorously reiterates his claims, including those quoted above and now stated as that his "medicinal extracts" were given to the Springdale Distilling Company "with my betting (bidding?) price of $110; and not their price of $120," and "It isn't so easy to do away with two cases with 37 bottles of one quart. Being protected, they can take this chance." An earlier paragraph suggests that defendant had explained the loss of the two cases by "saying that they had leaked, which could never be true in the manner they were bottled." On defendant's motion for dismissal on the same ground as before, the court made a final judgment dismissing the complaint, and plaintiff now comes to us with increased volubility, if not clarity.

It would seem, however, that he has stated enough to withstand a mere formal motion, directed only to the face of the complaint, and that here is another instance of judicial haste which in the long run makes waste. Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rules of Civil Procedure, Rule 8(a), 28 U.S.C.A. following section 723c; and the motion for dismissal under Rule 12(b) is for failure to state "a claim upon which relief can be granted." The District Court does not state why it concluded that the complaints showed no claim upon which relief could be granted; and the United States Attorney's brief before us does not help us, for it is limited to the prognostication — unfortunately ill founded so far as we are concerned — that "the most cursory examination" of them will show the correctness of the District Court's action.

We think that, however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced — and, indeed, required by 19 U.S.C.A. § 1491, above cited, and the Treasury Regulations promulgated under it, formerly 19 CFR 18.7-18.12, now 19 CFR 20.5, 8 Fed. Reg. 8407, 8408, June 19, 1943. As to this latter claim, it may be that the collector's only error is a failure to collect an additional ten dollars from the Springdale Distilling Company; but giving the plaintiff the benefit of reasonable intendments in his allegations (as we must on this motion), the claim appears to be in effect that he was actually the first bidder at the price for

which they were sold, and hence was entitled to the merchandise. Of course, defendant did not need to move on the complaint alone; he could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting. It appears to be well settled that the collector may be held personally for a default or for negligence in the performance of his duties.

On remand, the District Court may find substance in other claims asserted by plaintiff, which include a failure properly to catalogue the items (as the cited Regulations provide), or to allow plaintiff to buy at a discount from the catalogue price just before the auction sale (a claim whose basis is not apparent), and a violation of an agreement to deliver the merchandise to the plaintiff as soon as he paid for it, by stopping the payments. In view of plaintiff's limited ability to write and speak English, it will be difficult for the District Court to arrive at justice unless he consents to receive legal assistance in the presentation of his case. The record indicates that he refused further help from a lawyer suggested by the court, and his brief (which was a recital of facts, rather than an argument of law) shows distrust of a lawyer of standing at this bar. It is the plaintiff's privilege to decline all legal help, *United States v. Mitchell*, 2 Cir., 137 F.2d 1006, 1010, 1011; but we fear that he will be indeed ill advised to attempt to meet a motion for summary judgment or other similar presentation of the merits without competent advice and assistance.

Judgment is reversed and the action is remanded for further proceedings not inconsistent with this opinion.