Supreme Court, Appellate Division
First Judicial Department

Departmental Disciplinary Committee

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Executive Assistant
to the Chairman

February 15, 1989

PERSONAL AND CONFIDENTIAL

George Sassower
16 Lake Street
White Plains, New York 10603

Re: Matter of Irwin Brownstein, Esq.
Docket No. 263/89

Dear Mr. Sassower:

We have received an answer to your recent complaint against the above-named attorney. We are forwarding it to you for a written reply.

If you disagree with the attorney's statement, please set forth clearly and specifically what you disagree with and why. Be sure to attach copies of any documents relevant to your complaint which substantiate your points of disagreement with the attorney's statement. Please state what events have occurred in regard to your matter since the time you filed your complaint.

If you do not submit a reply within 20 days of the date of this letter, we may conclude that you agree with the attorney's statements. If you have any questions about our procedures, please telephone the undersigned.

Very truly yours,

RICHARD M. MALTZ

By: Carol Scheuer
Carol Scheuer
Legal Assistant

RMM:CS:dml
Enc.

IRWIN BROWNSTEIN
ATTORNEY AT LAW
19 RECTOR STREET
PENTHOUSE
NEW YORK, NEW YORK 10006

212 809-5151

IRWIN BROWNSTEIN

JOAN M. KENNEY

RICHARD E. HERSHENSON
OF COUNSEL

February 9, 1989

Hal Lieberman, Esq.
Acting Chief Counsel
Supreme Court, Appellate Division
First Judicial Department
Departmental Disciplinary Committee
41 Madison Avenue
New York, New York 10010

Re: Complaint of George Sassower
Date: 1/25/89
Docket No. 263/89

Dear Mr. Lieberman,

In response to your letter dated January 31, 1989, you are advised that the undersigned answers as follows to Mr. Sassower's complaint:

Page 1, paragraph 1 is denied, except to admit that I represent clients and I accept money for services.

Page 2, paragraph (h) - My firm now represents Hy Raffe.

Page 2, paragraph 3(b) - Denies the allegations of the Committee and annex hereto a copy of our brief to the Appellate Division in behalf of Mr. Raffe.

Page 2, paragraph 3(c) - I believe that Mr. Raffe is entitled to a termination of payments and a return of monies. However, the Appellate Division, First Department unanimously disagree. (See Decision annexed hereto).

Page 2, paragraph 3(b) - I deny the allegations contained therein.

Page 2, paragraph 4 - Et seq., I deny all the allegations contained therein and, as to all allegations contained in pages 2, 3 and 4, such as they are, I deny them.

The Committee should note that Mr. Sassower is not my client, has had no professional relationship with me and does not stand in privity with me or for that matter with anyone else in this case anymore.

Very truly yours,

IRWIN BROWNSTEIN

IB/tp

Enclosure.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 26, 1989.

Present—Hon. David Ross, Justice Presiding
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach
George B. Smith, Justices.

Feltman, Karesh, Major & Farbman and Lee Feltman, as the court-appointed permanent Receiver for Puccini Clothes Ltd.,

Plaintiffs-Respondents,

-against-

Hyman Raffe,

Defendant-Appellant.

35427

An appeal having been taken to this Court by the above-named appellant,

from an order and judgment (one paper) of the Supreme Court, New York County (Donald Diamond, Special Referee), entered on March 23, 1988,

and said appeal having been argued by Irwin Brownstein,

of counsel for the appellant, and by Donald F. Schneider,

of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that an order and judgment (one paper) so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS

To Be Argued By:
Irwin Brownstein

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

FELTMAN, KARESH, MAJOR & FARBMAN
and LEE FELTMAN, as the court-appointed permanent
Receiver for Puccini Clothes Ltd.,

Plaintiffs—Respondents,

against

HYMAN RAFFE,

Defendant—Appellant.

DEFENDANT - APPELLANT'S BRIEF

BROWNSTEIN & BROWNSTEIN
Attorneys for Defendant—Appellant
19 Rector Street
New York, NY 10006
(212) 809-5151

Of Counsel:
Richard E. Hershenson

New York County Clerk's Docket No. 01509/88

TABLE OF CONTENTS

QUESTION PRESENTED

1. Where a party enters into a stipulation containing, among other things, a provision whereby he agrees to indemnify certain attorneys for litigation expenses with respect to future litigation brought by the party's former attorney relating to a pending dissolution proceeding, and the party's former attorney thereafter continues to commence new litigations endlessly alleging the same or similar claims that have already been dismissed, despite his being disbarred and in violation of court orders directing him not to litigate, and the party has no control over his former disbarred attorney and has pleaded with him to stop, and the party has already been compelled to pay many hundreds of thousands of dollars under the indemnity to the receipient attorneys for frivolous litigations brought by his former attorney, and the receipient attorneys continue to seek many more hundreds of thousands of dollars under the indemnity, should the court find that the indemnity is unconscionable and unenforcable as against public policy and further direct the receipient attorneys to return all moneys already paid under the indemnity?

The lower court answered in the negative.

The Nature of the Case and the Facts

In this action appellant seeks to set aside as unconscionable and against public policy, a certain indemnity provision contained in a Stipulation under which appellant has already been compelled to pay several hundreds of thousand of dollars and likely will be compelled to pay indefinitely at least many more hundreds of thousands or millions of dollars. All of these enormous payments have been required by the never-ending litigation of appellant's former lawyer who has been disbarred and over whom appellant has no control. The recipient of all these payments has been the respondent attorneys, who have inherited an unconscionable boon out of "sure wins" resulting from continuously having to defend constant new meritless litigation by a now disbarred lawyer.

In or about 1980 a proceeding was commenced in the Supreme Court, New York County, for the dissolution of Puccini Clothes, Ltd. ("Puccini"), a New York corporation in which appellant owns one-third (1/3) of the stock. (R.33)

Appellant's lawyer at that time was George Sassower. Over the course of the next five years Mr. Sassower initiated some thirty-five actions, forty Article 78 proceedings and three hundred motions against various

principals of Puccini as well as numerous lawyers, referees, judges of this Court, etc. (R.33) Among those he has sued "with frequency and regularity" are Special Referee Donald Diamond, who made the judgment from which this appeal is taken. (R.12)

Mr. Sassower's litigation tactics have been described as abusive and in the nature of "blackmail" by various judges. Indeed, Mr. Sassower was punished several times for criminal contempt and has spent time in prison as a result of his conduct in the litigations. (R.33-34)

Eventually in February, 1987 Mr. Sassower was disbarred by the Appellate Division, Second Department. (R.55-57)

Appellant discharged Mr. Sassower as his attorney in or about the summer of 1985. (R.34)

During the course of some of the Puccini-related actions, the parties entered into two Stipulations dated November 4, 1985 and September 4, 1986. (R.58-100)

Those Stipulations contain provisions (para. 5 of the November 4, 1985 Stipulation and para. 8 of the September 4, 1986 Stipulation which replaced the earlier provision) wherein appellant agreed, in substance, to indemnify certain parties against further litigation by Mr. Sassower related to Puccini. (R.63-64, 81-89)

The result of those indemnities, unforeseen by anyone at the time, has been an unconscionable burden on appellant and an unconscionable boon to the respondent attorneys.

Despite the facts that (1) appellant long since discharged Mr. Sassower as his attorney, (2) Mr. Sassower has been disbarred, (3) Mr. Sassower has been enjoined by at least Orders of the Supreme Court of the State of New York and the U.S. District Court, Southern District of New York, from further litigating, (4) Mr. Sassower has been incarcerated on several occasions for litigating in violation of court orders, and (5) appellant has pleaded with Mr. Sassower to stop litigating, Mr. Sassower continued and continues to litigate.

In response to Mr. Sassower's ongoing, never-ending litigation, the respondent attorneys have allegedly already performed legal services for which they have charged appellant a total of some $200,000.00. And there is no end in sight.

Respondents brought this action to recover an additional $229,000.00 in fees from appellant under the subject indemnity. Appellant asserted in his answer that the indemnity is unconscionable and unenforcable, and sought return of all moneys paid by him to respondents.

Both appellant and respondents moved for summary judgment. Special Referee Donald Diamond, who has himself been a co-defendant with respondents in various litigations brought by Mr. Sassower, denied appellant's motion and granted respondents' motion. This appeal followed.

Since the time this appeal was filed, the respondent attorneys sought and obtained a judgment in the lower court awarding them an additional $78,327.09 from appellant under the indemnity.

ARGUMENT

THE INDEMNITIES CONTAINED IN THE STIPULATIONS ARE UNCONSCIONABLE AND UNENFORCABLE AS AGAINST PUBLIC POLICY AND SHOULD BE SET ASIDE

Truly this is a unique situation: on the one hand we have the spectre of a runaway disbarred lawyer who will not be stopped by court orders, injunctions, criminal contempt, incarceration, and disbarment. On the other hand, we have a law firm which is excessively benefiting from all this to the tune of many hundreds of thousands and perhaps millions of dollars, and an individual who is bearing all this burden even though having no control over the party at fault. Surely this is not conscionable and violates public policy.

This Court has held that a court should grant relief against an unconscionable result "where, as here, such relief is required in the interests of justice and to afford the (party) an adequate remedy." Kaminsky v. Kahn, 23 A.D.2d 231 (1st Dep't 1965).

It is fundamental that agreements in violation of public policy are not enforceable. Thus, for example, an agreement which "tends to ... oppression" is void against public policy. Camp-of-the Pines, Inc. v. New York Times Co., 184 Misc. 389 (Sup. Ct. Albany Co. 1945).

Similarly, it has been held that "it is the inherent power both of a court of law and of a court of equity to prevent utilization of the institutions of justice for the perpetration of injustice. The courts are not to be used, under color of contract law, for overreaching, for imposiion of obligation of contract by fraud or duress, or for any purpose which seats injustice in the hall of justice." Weidman v. Tomaselli, 81 M.2d 328(Rockland Co. Ct. 1975), aff'd, 84 M.2d 782 (App. Term 9th and 10th Dist. 1975).

Because it is the respondent attorneys who have been receiving unseemly, ongoing, exorbitant compensation, the Court should be even more sensitive to appellant's claims. The courts have always been careful to scrutinize agreements providing for compensation to members of the Bar particularly where the agreement "is fraught with a potential for an unconscionable result that may taint the honor of the bar." Gross v. Russo, 76 M.2d 441 (Sup. Ct. Richmond Co. 1974).

Thus, the Court of Appeals has condemned agreements providing for compensation for attorneys where "'the recovery may be such that what was in the first instance a fair contract becomes unfair in the enforcement ... (A lawyer) is an officer of the court, and is judged as such, and technical contractual rights must yield to his duty as

such officer.'" Gair v. Peck, 6 N.Y.2d 97, 107 (1959), cert. den., 361 U.S.374 (citations omitted).

In the case at bar, because the challenged indemnities were contained in stipulations in pending actions, there is even broader latitude for this Court to set them aside.

The Court of Appeals has held that

> It is sufficient if it appear that either party has inadvertently, unadvisably, or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing may work to his prejudice. (In re Estate of Frutiger), 29 N.Y.2d 143, 150, 324 N.Y.S.2d 36 (1971), quoting approvingly from Van Nuys v. Titsworth, 57 Hun 5, 10 N.Y.S. 507)

Thus, a party may be relieved from a stipulation "if there has been a showing of fraud, collusion, mistake, accident, surprise, or where it otherwise appears that to deny relief would be harsh or unjust." Bussing v. Caligiuri, 65 A.D.2d 764, 409 N.Y.S.2d 781 (2d Dep't 1978).

Similarly, it was held in Central Valley Concrete Corp. v. Montgomery Ward & Co., 34 A.D.2d 860, 310 N.Y.S.2d 925 (3rd Dep't 1970):

> Since there is some ambiguity as to the exact meaning and intent of the stipulation, Special Term properly vacated it in the interests of justice. (Citations omitted) "Relief from stipulations will be granted based on

> general equitable considerations, particularly where, due to circumstances beyond the control of parties, the purposes of the stipulation are frustrated or the contingencies of the settlement fail to occur." (Monasebian v. Du Bois, 30 A.D.2d 839, 293 N.Y.S.2d 27.)

This Court in Horodeckyi v. Horodniak, 9 A.D.2d 732 (1st Dep't 1959), held that where a stipulation "rested upon on assumption which was subsequently proven false", the court properly vacated the stipulation. See also Phoenix Ass. Co. v. Stark Mobile Homes, Inc., 39 A.D.2d 514 (1st Dep't 1972).

Indeed, it has been held that even unilateral mistake is sufficient to relieve a party from "the consequences of a stipulation". Carrion v. Metropolitan Transportation Authority, 92 A.D.2d 907 (2d Dep't 1983).

A more clear cut case for application of this rule could hardly be imagined. Appellant inadvertently, unadvisably, and improvidently agreed to the indemnity provision, never dreaming that it could cost him hundreds of thousands and perhaps millions of dollars in attorneys fees and that the respondent attorneys could avail themselves of such an unconscionable boon.

Accordingly, the indemnities contained in the stipulations should be set aside,* and the moneys previously paid thereunder by appellant to the respondent attorneys should be returned.

*Both stipulations containing the indemnities expressly provide (para. 22 of the November 4, 1985 stipulation and para. 26 of the September 4, 1986 stipulation) that if any provision is declared unenforcable, that will not affect the remainder of the stipulation.

CONCLUSION

For the foregoing reasons, (1) the judgment of the lower court should be reversed, (2) the complaint should be dismissed with prejudice, (3) a declaration should be made that the subject indemnities are unenforcable, and (4) the respondent attorneys should be directed to return to appellant all moneys paid by appellant.

Respectfully submitted,

BROWNSTEIN & BROWNSTEIN
Attorneys for Defendant - Appellant Hyman Raffe

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
----------X

FELTMAN, KARESH, MAJOR & FARBMAN and LEE FELTMAN, as the court-appointed permanent Receiver for Puccini Clothes Ltd.,

Plaintiffs-Respondents,

-against-

HYMAN RAFFE,

Defendant-Appellant.
----------X

N.Y. County

Index No. 01509/88

STATEMENT PURSUANT TO CPLR 5531

1. The index number in the court below is 01509/88.

2. The full names of the parties are stated above.

3. This action was commenced in Supreme Court, New York County.

4. This action was commenced on or about October 27, 1987. The complaint was served on or about October 27, 1987. The answer was served on or about November 18, 1987. The reply was served on or about November 19, 1987.

5. This is an action to recover for attorneys fees allegedly rendered pursuant to an indemnity agreement.

6. This is an appeal from an Order and Judgment of Special Referee Donald Diamond entered on March 23, 1988.

7. This appeal is on a full reproduced record.