NO. 92-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Petitioners,

v.

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.

Respondents,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL PETITION FOR REHEARING

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SUPPLEMENTAL PETITION FOR REHEARING

This Supplemental Petition is submitted to amend and clarify the Petition for Rehearing, filed on May 14, 1993 and calendared for this Court's conference of June 4, 1993. Inadvertently omitted from the Petition for Rehearing through typographical error (at p. 7) was the statutory citation to 28 U.S.C. Sec. 455(a). Petitioners' intended reliance on that section may be seen from their quotation of the language thereof relative to the lower courts' duty to recuse themselves where their "impartiality might reasonably be questioned".

Petitioners further submit that this Court's recent granting of "cert" to the case of United States v. Liteky, #92-6921, is a supervening circumstance which is an additional reason for granting a writ of certiorari in this case. In Liteky, this Court will be interpreting Sec. 455(a) so as to resolve a multi-Circuit conflict as to whether such section requires recusal for judicial, as well as extrajudicial, bias. In that case, the Eleventh Circuit's affirmance of the District Court's denial of recusal rested on the fact that the District Judge's involvement in a prior proceeding involving one of the defendants was not viewed as extrajudicial.

The case at bar gives this Court the opportunity to add depth and dimension to its present consideration of recusal rules. In this case, the Second Circuit did not identify whether the bias which was the subject of Petitioners' bias recusal motions was of judicial or extrajudicial origin, adopting in haec verba the conclusory statement of the District Court (CA-37)[1] that:

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[1] The documents referred to herein are abbreviated as follows: CA- ("Cert" Appendix); Pet. ("Cert" Petition); Reply Br. (Reply Brief); Pet. for Rehearing (Petition for Rehearing).

> "[Petitioners] made several unsupported bias recusal motions based upon this court's unwilling involvement in some of the earlier proceedings initiated by George Sassower..." (CA-10)

Nor did the Second Circuit discuss the due process implications of using recusal motions as a basis for sanctions. Indeed, without any finding that Petitioners' recusal motions were legally insufficient, false, or in bad faith, the Second Circuit invoked inherent power to sustain a sanction award based thereon (Pet. at 22).

Neither the District Court nor Circuit Court Decisions identified that the aforesaid "earlier proceedings initiated by George Sassower" were extrajudicial as to Petitioners--who were neither party nor privy thereto--or that, by reason of said proceedings, the District Judge acquired a "personal knowledge of disputed evidentiary issues" which thereafter arose in Petitioners' instant action.

As reflected by footnote 4 of the District Court's Decision (CA-34), there existed an adversarial relationship between George Sassower and the judges of the Second Circuit as a result of lawsuits brought by him. Such lawsuits, resting on serious allegations of misuse of judicial power, were brought by him during the pendency of Petitioners' action and for several years prior thereto. Under such circumstances, "an objective observer would have questioned" the impartiality of any judge sitting in the Circuit, within the intendment of 455(a). Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

This case documents that the "appearance of impropriety"--which should have required immediate disqualification by both the District and the Circuit Courts--became actualized by their respective denial of Petitioners' right to a fair trial and to a fair hearing of their appeal. The personal animus generated by Mr. Sassower's unrelated litigation against the judges was such as to make retaliation against Petitioners inevitable. This case became the opportunity for the judges of the Second Circuit to advance their own self-interest and that of their judicial brethren by discrediting Mr. Sassower and adversely affecting his right to remain in occupancy of the apartment which was the subject of the instant litigation. Such interest by the judges of the Second Circuit was "direct, personal, substantial, [and] pecuniary", as proscribed by Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1985)[2].

The extent to which the Second Circuit recognized that it stood to gain by an outcome adverse to Petitioners is established by its Decision (CA-6-19) which--like that of the District Court (CA-28-55)--is totally devoid of evidentiary support in the record as to all material facts and, on its face, abandons fundamental legal standards and bedrock decisional law.

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[2] Although all such criteria were met in this case, it may be noted that Justice Brennan stated in his concurring opinion to Aetna,supra, at 829-30:

> "I do not understand that by this language the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation... Moreover, ... an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding."

As illustrative of the aberrant decision-making at issue, the Second Circuit's Decision (CA-6-19), on its face:

> (1) conflicts with Christiansburg v. E.E.O.C., 434 U.S. 412 (1978), by maintaining intact the District Court's $92,000 award under the Fair Housing Act, notwithstanding it vacated same based on Christiansburg (CA-12-13; Pet at 16-19)[3];
>
> (2) conflicts with Alyeska Pipeline v. Wilderness Society, 421 U.S. 240 (1975), by using inherent power to effect substantive fee-shifting[4] (Pet. at 19);
>
> (3) conflicts with Business Guides v. Chromatic Communications, 498 U.S. 533 (1991), by allowing the District Court's admittedly uncorrelated $50,000 award under Rule 11 (CA-

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[3] The unprecedented nature of the Second Circuit's "trumping" of the standard of Christiansburg was set forth in the Petition (at 17) as follows:

> "Research has failed to find a single case, before or after 1988, in which a federal court has resorted to inherent power to shift a totality of litigation fees against losing civil rights plaintiffs, where, as here (CA-13), the action was found not to be 'meritless' under the standards of Christiansburg."

[4] Such substantive fee-shifting is evident from the face of the Judgment (CA-23-4) affirmed by the Second Circuit (CA-20), which made distributive allocations to the respective Respondents solely according to the District Court's Fair Housing Act award (Pet. at 9; 13; 19). As pointed out in the Petition (at p. 19, fn. 14), the effect of the Second Circuit's vacatur of the award under the Fair Housing Act should have rendered the Judgment based thereon a nullity.

52-3) to remain intact, notwithstanding it vacated the Rule 11 award for failing to identify a single sanctionable document (CA-14; Pet. at 7, fn. 4; 19-20);

(4) conflicts with the plain language of 28 U.S.C. Sec. 1927 by keeping intact an unidentified portion of the $42,000 sanction awarded thereunder as to Doris Sassower (CA-at 14-6); which unidentified sum was totally uncorrelated to any sanctionable conduct--let alone to any "excess costs" "reasonably incurred" (CA-5; Pet. at 7-8; 19-21);

(5) conflicts with Chambers v. Nasco, 111 S.Ct. 2123 (1991)[5]--the sole authority on which it relies for its use of inherent power--by, inter alia,: (a) omitting the requisite finding that available sanctioning rules and provisions were inadequate so as to establish any "necessity" for such invocation; and (b) omitting the requisite finding that due process had been met before inherent power was invoked (Pet. at 21-24; Reply Br. 1-6);

(6) violates the Code of Judicial Conduct by including dehors the record matter, inadmissible hearsay, and knowingly false and defamatory

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[5] The NAACP Legal Defense and Educational Fund, which participated in this case as amicus curiae before the Second Circuit, recently cited the Second Circuit's Decision as "an unwarranted expansion of Chambers" "indicative of a growing trend too undermine the American Rule as explicated in Alyeska..." (see Appendix to Pet. for Rehearing, para. 6).

> material obtained ex parte and as to which Petitioners were given no notice or opportunity to be heard (Pet. at 10-11; Reply Br. at 7; Pet. for Rehearing at 4).

Not apparent on its face was the Second Circuit's disregard of United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949), and Brocklesby Transport v. Eastern States Escort, 904 F.2d 131 (1990), when it denied--without discussion--Petitioners' threshold jurisdictional objection that the fully-insured defendants were not the "real parties in interest" and that the sanction award was a "windfall" to them, proscribed by countless decisions of this Court, including Hensley v. Eckerhart, 461 U.S. 424 (1983) (Pet. at 9; 10; 25-26; 27).

These and other deviant aspects of the Second Circuit's Decision were detailed--with citation to legal authorities--in Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc[6]. Said Petition further showed (at pp. 10-11) that the "facts" relied on by the Second Circuit to support its $92,000 fee-shifting award were wholly false and contradicted by the record[7]. The refusal of the judges of the Second Circuit--each of whom were furnished a copy of that Petition--to grant rehearing to Petitioners is, in view of that Petition, an abdication of their adjudicative responsibilities so extraordinary as to be confirmatory of a bias overriding those duties.

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[6] A copy of said Petition for Rehearing is on file with this Court as Exhibit "C" to Petitioners' December 2, 1992 motion to extend time to file their Petition for Certiorari.

[7] For the convenience of the Court, the pertinent excerpt from pages 10-11 was annexed as a Supplemental Appendix to Petitioners' Reply Brief.

The Second Circuit's actual knowledge that the record and controlling law would not support imposition of sanctions against Petitioners is unmistakable from review of the appellate submissions before it. Those submissions leave no doubt that the reason the Second Circuit did not identify in its Decision Petitioners' arguments on appeal--which it summarily dismissed as "totally lacking in merit" (CA-18; Pet. at 11)--is because any one of those arguments would have sufficed in and of itself for vacatur of the sanction award against them (Pet at. 9-10).

Likewise, the fact that the Second Circuit's Decision does not identify what is being sanctioned under inherent power is no accident. Rather, as can be seen from the appellate submissions, it is a reflection of the Second Circuit's actual awareness that no sanctionable conduct by Petitioners can be identified--there being none. Similarly, the Second Circuit's failure to make the requisite threshold determination as to due process--including Petitioners' right to an impartial decisionmaker--bespeaks its full knowledge that Petitioners' due process rights were violated by a district judge whose actual bias and malice were indisputably proven by his decision which falsified, fabricated, and omitted all material facts in order to do Petitioners maximum injury (Pet. at 9).

Heretofore, Petitioners have stated that their Rule 60(b)(3) motion is "dispositive of every issue before this Court" (Reply Br. at 10, Pet. for Rehearing, at 6). However, to properly evaluate Petitioners' right to recusal--not only of the District Court, but of the Second Circuit--it is the appellate submissions that were before the Second Circuit which must be examined by this Court.

The gravity of the charges raised in the Petition for Rehearing--that federal judges, sworn to uphold the rule of law, have knowingly and deliberately perverted our sacred judicial process to advance ulterior retaliatory goals-- removes this case from the ordinary discretionary review presented by other applications for certiorari. This is particularly so where, as here, the District and Circuit Courts' Decisions are so aberrant on their face as to be suspect.

This case, considered as a companion to Liteky, will give this Court an extraordinary and essential opportunity to redefine and reinforce the high standards Congress intended to be met by federal judges whose "impartiality might reasonably be questioned".

Had the Second Circuit applied the unequivocal congressional mandate of 455(a) and the constitutional mandate of due process, it could neither have sustained the District Court nor sat on the case itself since both courts were required thereunder to disqualify themselves, sua sponte, for actual and apparent bias. Aetna, supra; Liljeberg, supra.

CONCLUSION

For all the foregoing reasons, as well as those contained in the Petition for Rehearing, the Petition for Certiorari, and the Reply Brief, Petitioners respectfully pray that this Court, in the exercise of its "power of supervision", grant rehearing, vacate the Order denying certiorari, and grant the Petition for Certiorari so as to review the Decision and Judgment below.

Respectfully submitted,

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