SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MILTON BRESLAW,

Plaintiff,

-against-

EVELYN BRESLAW,

Defendant.

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Index. No. 22587/86

Affidavit in Support of Offer of Proof

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

DORIS L. SASSOWER, first being duly sworn, deposes and says:

I am a non-party, former attorney to the Defendant herein, who moved by Order to Show Cause, dated June 22, 1989, to punish me for contempt of Court, pursuant to Judiciary Law, Sec. 754, for my alleged refusal to turn over her file to successor counsel, her now also former attorneys, Bender & Bodnar, Esqs.

I am fully familiar with all the facts, papers, and proceedings heretofore had herein. All of the facts hereinafter stated are based on direct personal knowledge, except where stated on information and belief, and as to those facts, I believe them to be true. This Affidavit is submitted with leave of Court, granted at the second and last hearing of such contempt proceeding held on May 21, 1990, by way of an offer of proof--the Court having closed the said hearing without having afforded me the opportunity to be heard in open Court in my own defense on my own case, as well as to be cross-examined by my own counsel, since I had been called as a witness on the direct case of Mrs. Breslaw, which took place at the first session on August 30,

Exhibit "B"

1989. Such rights were specifically reserved by my counsel on that date.

The Court, on May 21, 1990, also denied my counsel the right to complete his cross-examination of Mr. Landau and to present witnesses on my behalf, with respect to the issue as to whether contempt had ever occurred, whether any damage had been caused to Defendant, and whether I was the legal cause thereof.

At the outset of these proceedings, the Court issued a Decision dated July 13, 1989, which ordered:

> "a hearing with relationship to the entirety of the instant situation...at which time the Court would inquire and render its judgment as to the turnover of the file, the repayment of all the monies ordered by the Judicial Hearing Officer Klein, and Sassower's conduct throughout these proceedings, including the most recent chronology of events concerning the application to punish for contempt and the request for sanctions."

That Decision, based on only the moving papers submitted by Harvey Landau, Esq., in support of Defendant's Order to Show Cause, constitued a pre-judgment of me and my conduct, so rife with factual errors and omissions that I had expected to testify at length to address it. Having been deprived by the Court of that opportunity for oral testimony, I set forth, in necessarily limited fashion, what I would have testified to relative to the Court's unsubstantiated factual findings and inferences therefrom contained in that Decision, inter alia:

(1) "The retainer agreement provided...":

The Court omits reference to the fact that the Retainer Agreement, signed and initialled by Mrs.

Breslaw in 17 different places, and which she acknowledged she carefully read and understood, explicitly provided that the $10,000 retainer paid was a "minimum, non-refundable retainer".

For the Court's information, Mrs. Breslaw was quite familiar with such provision -- her retainer agreement with my predecessor counsel, Raoul Felder, Esq., contained an identical minimum, non-refundable requirement. J.H.O. Klein's patently erroneous direction of a partial refund of such retainer is one ground of the pending appeal from his multi-faceted Order. (See the recent Bar Association Ethical Opinion, published by The New York Law Journal of January 14, 1990, p. 7, cols. 1-2, confirming the propriety of such provision.) Another ground of the appeal is the fact that after fixing the amount of my lien at $25,000, J.H.O. Klein, without notice, reopened the hearing, which was intended solely to fix my lien, and without affording fundamental due process, purported to determine the amount of my counsel fees on a quantum meruit basis.

(2) "On or about January 20, 1988, the defendant discharged Sassower.":

The Court chooses to omit the significant fact that my discharge was specifically found by J.H.O. Klein to be "without cause".

(3) "The latter (Sassower) moved to fix counsel fees...":

I never made such motion. The only motion made was by Mr. Landau under CPLR Sec 321(b) for substitution and turnover of files. Judge Ferraro thereafter set the matter down for what was intended to be a lien hearing. J.H.O. Klein thereafter issued an Order fixing my lien at $25,000. At a later date, J.H.O. Klein reopened the hearing, without notice, and over my objection on the ground of surprise and lack of jurisdiction, purported to determine my attorney fees.

(4) "By Decision and Order of J.H.O. Martin Klein, dated April 11, 1989, and entered on April 12, 1989...":

There was no Order of April 11, 1989, but only a Decision, entered on April 12, 1989, which did not legally require compliance. (Until its directions are embodied in an order or decree, a decision has no legal significance, People v. Keeffe, 50 NY2d 149(1980)); in any case, the effect thereof was stayed by the Appellate Division on April 21, 1989, which stay continued in effect until dissolved on May 18, 1989. A copy of the Order of the Appellate Division vacating such stay was not served on my office until June 1, 1989, and I was unaware of it prior to that date.

(5) "...as clarified technically by his further order dated May 1, 1989...":

Since there was no prior Order, there could be no further Order. On May 3, 1989, J.H.O. Klein had entered an Order, sua sponte, in which he "clarified"

his Decision dated April 11, 1989 by amending it to read "Decision and Order". The Decision, by its terms, required service of a copy of the Order, with Notice of Entry, before any legal obligation to turn over the files would arise, and gave five days therefrom for such file turnover. I was thus clearly entitled to be served with a copy of said Order. There is no question that such Order was not served by Mr. Landau until June 12, 1989. It was also undisputed that service of the requisite underlying Order was not made personally on either Doris L. Sassower or the corporate entity, Doris L. Sassower, P.C, as required before any contempt proceeding would lie. Indeed, the Affidavit of Service by Susan Birnbaum, notarized by Mr. Landau on June 12, 1989, shows that it was only mailed. Therefore, same could not possibly serve as the jurisdictional predicate for any contempt finding. Significantly, Mr. Landau's Order to Show Cause, dated June 22, 1989 misrepresented this fact to the Court by stating at page 4 of his Affidavit that "same was personally served by Susan Birnbaum". At the May 21, 1990 hearing, Mr. Landau's false swearing was sought to be explained away by the unique interpretation that what he meant was that it had been served by Ms. Birnbaum personally by mail!

It might be further noted that service by mail

would have extended the time for turnover-compliance by an additional five days, i.e., not counting the day of service making June 18, 1989, a Sunday, the earliest possible due date. On June 19, 1989, I instructed Muriel Goldberg, Office Manager of Doris L. Sassower, P.C., to call Harvey Landau to make arrangements for the file turnover. She did so. He did not return her call until June 22, when he advised here that this client had no intention of complying with her Court-ordered obligation to pay the experts' fees.

(6) "...and that the defendant make payment of the sum of $3,300 to certain experts retained by Sassower on defendant's behalf within 60 days of service of a copy of the order with notice of entry.":

Nowhere does the Court make any reference to or express the slightest concern with the question of whether Mrs. Breslaw had made the required payment.

(7) "Such service was effectuated on Sassower on April 18, 1989 by the successor attorneys.":

Doubtless this statement by the Court was based on Mr. Landau's representation of the fact twice on page 2 of his Affidavit supporting his contempt Order to Show Cause, buttressed by the Affidavit of Service of Susan Birnbaum, dated April 18, 1989, attesting to service on April 18th of a "Decision & Order with Notice of Entry". Such statement was plainly false since only a copy of the Decision was served on that date. The Order itself did not ensue from J.H.O. Klein, as stated

hereinabove, until May 1--and was not entered until May 3. Parenthetically, not only was the Court misled by such false statement, but my office as well since, in reliance on same and in my absence, a Notice of Appeal was prepared and filed, in the belief that such Decision constituted a final Order--as represented on the legal back of Bender & Bodnar which accompanied such document.

(8) "At that point (May 18, 1989), Sassower was under an absolute duty to turn over the file...":

As shown hereinabove, "at that point" I had not yet been served by Mr. Landau with a copy of the Order with Notice of Entry and hence was under no such absolute duty, since the five days allowed by J.H.O. Klein had not yet even begun to run.

(9) "Under no construction of either the Decision and Order of the Judicial Hearing Officer, as amended to suit Sassower's purely technical prior objection...":

The "purely technical prior objection" was not mine, but that of the Appellate Division -- raised by the Clerk of that Court when he reviewed my papers appealing from what my office, in good faith reliance on Mr. Landau's misrepresentation of the Decision as a Decision and Order, believed was a final Order, but which, in fact, was not an appealable paper. It was at the Clerk's insistence--not mine--that J.H.O. Klein was apprised that a final Order was required. It was on that basis that J.H.O. Klein "sua sponte" issued the so-called clarifying document of May 1, 1989, entered on May 3, 1989.

(10) "...the said attorney intended to bring on a contempt proceeding against Sassower unless the file was turned over to them by June 9." (the next day):

> Omitted by the Court is the fact that the replacement attorneys demanded that in addition to the turnover of the file on or before June 9, 1989, there was also demanded a "refund of fees due Mrs. Breslaw". Such demand was improper, no refund being then due her. Since under any construction of either the Decision and Order of the Judicial Hearing Officer, as amended, or the May 18th Decision of the Appellate Division vacating my stay, I had an additional 27 days granted me by virtue of that stay which Mrs. Breslaw did not have the benefit of, inasmuch as she neither sought, nor was granted any comparable stay, her obligation to pay the experts' fees directed had to arise before my obligation to pay her--both of us having been granted 60 days from service of the Notice of Entry to make our respective payments. Consequently, under applicable law, including the "clean hands doctrine", Mrs. Breslaw could not qualify to seek contempt against me without tendering payment on her part.

(11) "The fact is that in response to a distinct motion Sassower had made to the J.H.O. for reargument of that decision and order, which motion had been submitted to him on June 30, he issued an Order dated July 7...":

> The Order of J.H.O. Klein, although dated July 7, 1989, was <u>not</u> entered until July <u>10</u>th--and <u>not</u> received by my office until July <u>11</u>th. Indeed, late in the day

on July 7th, Muriel Goldberg of my office was told by the Judicial Hearing Officers' Administrative Office that J.H.O. Klein had not yet filed any decision on my reargument motion.

Ms. Goldberg's Affidavit on that motion, incidentally, recited her telephonic efforts to reach Mr. Landau relative to making turnover arrangements, as well as her eventual conversation with him on June 22nd--since he did not return her calls until that date--wherein, as stated hereinabove, he admitted that Mrs. Breslaw had no intention of complying with her obligation to pay the experts' fees, as directed by J.H.O. Klein.

(12) "The case has been further complicated by Sassower's failure to respond to that motion, which was returnable before this Court on July 10.":

Completely omitted by the Court is any reference to my telephone conversation with Judge Fredman's law secretary, Jack Schachner, Esq., on June 23, 1989, wherein I first learned in connection with my Order to Show Cause for Reargument, which was signed that day by Judge Fredman, that His Honor had, the day before, signed Mr. Landau's contempt Order to Show Cause, which was returnable on July 10, 1989. My June 23, 1989 Order to Show Cause had included a decretal paragraph staying the Decision by J.H.O. Klein pending a hearing on my motion to reargue and modify. When I learned

that such Order to Show Cause had been submitted to Judge Fredman and that he had struck that paragraph from his signed Order, and that the return date chosen by the Court was July 10, a date I was to be abroad, I immediately called the Court's Law Secretary and informed him that I had long-standing travel plans to be out of the country on July 10th. He told me not to worry, that nothing would be done on that date since he understood that the contempt motion could not be dealt with until an Order was entered on the reargument motion.

The Court also completely omits any reference to my court appearance on June 30, 1989, the return date of the reargument motion and my request for a two-week adjournment of that motion, as well as the contempt motion on for July 10, both on for the first time, because I was going to be in Europe for two weeks, beginning July 9, 1989. Mr. Schachner said that such adjournment request was a reasonable one, particularly in light of the fact that I had not yet received Mr. Landau's opposing papers which had been filed that day, with an Affidavit of Service showing that they had been mailed to me that very day--two days late. Neither Mr. Landau, nor any representative from his office, made any appearance in Court that day to answer my motion, or apply for an adjournment. Mr. Schachner said it

would be necessary for me to telephone Mr. Landau to see if he would consent to the adjournment of his motion, as well as my own--as to which he was then clearly in default since my Order to Show Cause, signed by Judge Fredman himself on June 22nd, had provided that Mr. Landau serve his opposing papers on me by June 28th. As my letter to the Court dated July 5th stated, Mr. Landau refused to take my telephone call--although his secretary conveyed to me that Mr. Landau refused to consent to any adjournment, notwithstanding his papers on my motion were plainly untimely. Mr. Schachner, over my objection, stated he would call Mr. Landau outside of my presence--in Chambers where Judge Fredman was present. The adjournment was denied notwithstanding the acceptance of Mr. Landau's late papers.

(13) "...that I expected her, or such representative as she suggested, to be in my court on July 10, as directed by the Order to Show Cause, as adjourned on her behalf and with the consent of her adversary from the original July 7 return date to July 10...":

The Order to Show Cause was never adjourned from July 7th to July 10th since the original return date on the copy of the Order to Show Cause served on me by Mr. Landau was July 10th, as shown by the copy of that paper annexed hereto. Additionally, I would never have asked that it be adjourned to July 10th, since I had longstanding plans to be in Europe on that date,

including airline tickets and hotel reservations which had already been made.

(14) "There was no appearance on July 10 by Sassower or by any representative on her behalf.":

I had not had any adverse response form the Court prior to my departure on July 9th to the adjournment requested in my letter dated July 5, 1989 of this first-time on motion based upon my expressed desire to retain outside counsel and my inability to be personally present. In view of the assurance I had received from Mr. Schachner that nothing would be done with the contempt motion until a decision on the reargument motion was filed, and the information we received on Friday afternoon that there was no such decision filed, I had a good faith, reasonable belief that my adjournment request would be granted. However, based upon my many years of experience in this courthouse--and even my experience of June 30th when Mr. Landau did not appear on the return date of my motion--I had reason to believe that my office would receive a call if an appearance by my office was nonetheless to be required by the Court. Indeed,d on June 30th, even though Mr. Landau had not served me with his opposing papers, as required by my Order to Show Cause, and even though he did not appear in court on that date to make application for an adjournment or for consideration of his untimely papers, the Court

telephone him, ex parte, and subsequently accepted his late papers. Notwithstanding the usual practice of the court clerk telephoning when a local attorney has failed to appear, and the practice followed by this Court in this particular case in the preceding week (which I had personally witnessed), I had nonetheless left instructions with my office that a representative be present in court on the morning of July 10th to verify the adjournment. Through a combination of unforeseen circumstances, beyond my control, that individual did not show up for work that morning and thereafter called to say that he had quit to take other employment. My office manager, who had been away on vacation leave the preceding week, herself did not arrive until the late morning. Upon her discovery of the letter of the Court stating that I or my representative was expected to be in Court on July 10th, she immediately called the Court and reporter that its letter had just been received--and that I had never seen it before my departure.

(15) "No proof was submitted that Sassower never saw my letter before she left.":

Had she been given an opportunity to testify, my former office manager, Muriel Goldberg, who was on call on May 21, 1990 pursuant to a subpoena served on her, would have testified that (a) there was no suggestion by the Court of any need for such proof to be

submitted; and (b) she herself had asked the Court specifically whether she could send a lawyer over that afternoon or the next day to deal with any questions the Court had concerning the matter--and was told by Mr. Schachner that he'd "let her know". When no call from the Court was received, Ms. Goldberg placed a further call and was told by Judge Fredman's Chambers that she should not call again on the matter and would hear from the Court.

(16) "...(any lawyer, even one without Sassower's long experience, is aware that a court appearance is required in the kind of situation in which Sassower was involved on that date)...":

It is precisely because of the serious, quasi-criminal nature of the proceeding, inter alia, that I decided to seek outside counsel. I had apprised the Court of that fact in my letter of July 5, 1989--and believed that the Court would likewise recognize that even a lawyer has a right to counsel in a matter of such gravity--and that a 30-day adjournment of this first-time on motion in order to obtain counsel would be in order and in accord with the reasonable requirements of the law. Cf. CPLR 321(c).

(17) "...her capricious disappearance has once again prevented the defendant from receiving her file...":

The Court had been apprised as early as June 23, 1989 that I had long-standing travel plans to be out of the country for two weeks beginning July 9, 1989.

There was no basis for the Court's statement that my non-appearance was a "capricious disappearance". In fact, the Court was furnished in August 1989, as part of my written submission at that time, an Affirmation of my physician confirming that my trip was medically dictated. Indeed, later events--including the recommendation on September 15, 1989 for my hospitalization--confirmed the fragile state of my health at that time.

Additionally, there was no basis for the Court' statement suggesting that I had previously "prevented the defendant from receiving her file"--when the Court, at that time, had before it only half a story. Indeed, in setting the record straight, this defendant has always had the opportunity to obtain her file--without even paying a dime form her pocket--since form the very inception of the proceedings initiated by Mr. Landau in February 1988, I had stated that I was willing to turn over the files to him--without asserting my retaining lien for any unpaid legal fees and without asserting any charging lien on the proceeds of her recovery with only a promise by Ms. Breslaw to pay the experts' fees of $3,650 at the conclusion of her divorce action. Mr. Landau and his client refused that most reasonable offer, insisting instead on making me go through needless and costly hearings because of their adamant

belief that, notwithstanding my Retainer Agreement, I had no right to retain experts on Mrs. Breslaw's behalf--experts whose work product Mr. Landau later availed himself of to Mrs. Breslaw's advantage. That outrageous, unfounded contention by them was flatly rejected by J.H.O. Klein in his Decision dated April 11, 1989 in which he stated that Mrs. Breslaw's claim was precluded by the terms of the Retainer Agreement and that she "did not establish lack of understanding of the terms" as claimed by her.

(18) "...I must either accept the gross insult visited upon me...":

There was no basis for such precipitous conclusion--particularly when the Court received information on the very day of the non-appearance that no default or disrespect of the Court was intended, and particularly in light of the fact that an immediate offer was made by my office manager to send a lawyer representing my office over to the Court.

(19) "The Court will hold a hearing with relation to the entirety of the instant situation on July 27, 1989 at 9:30 a.m., at which time the Court will inquire and render its judgment as to the turnover of the file, the repayment of all the monies ordered by the Judicial Hearing Officer Klein..."

Nonetheless, at the July 27, 1989 Court appearance, the Court made it clear that it was not interested in inquiring into the monies ordered to be repaid by Evelyn Breslaw. The Court explicitly stated at that time that Mrs. Breslaw's obligation was not in

front of him--and throughout the subsequent Court proceedings totally ignored the fact that Mrs. Breslaw had not met her requirement--which, by law, was a prerequisite for her bringing any contempt proceedings against me. Indeed, Mr. Landau's failure to observe that requirement before bringing on such legally unfounded motion should subject him to sanctions. Such sanctions against Mr. Landau and his client are, of course, merited for many other reasons set forth hereinabove, as well as in the Memorandum of Law, which demonstrated that this Court never even had subject matter jurisdiction over this entire proceeding.

As to the damage question, I would have testified that Mrs. Breslaw was ferverently intent on delaying in every way possible the divorce action her husband had commenced against her so that he could marry his paramour with whom he was living. Mrs. Breslaw told me a number of times when I attempted to get her cooperation with the deposition schedule embodied in prior orders of this Court that she was not interested in cooperating with such schedule. Indeed, she refused to cooperate to such an extent that my then trial counsel withdrew on that ground--just as, I understand, Mr. Landau has similarly withdrawn due to the noncooperation of Mrs. Breslaw. Annexed hereto are copies of two letters I wrote to Mrs. Breslaw which highlight her unwillingness to proceed in an expeditious fashion. Her decision

to discharge me was doubtless part of this overall strategy to stymie her husband. It is my opinion, which I would have testified to, that the true reason that Mrs. Breslaw would never agree to my reasonable and generous settlement offer to turn over her files--without an assertion of any liens--is that she did not wish to possess the files--because she wanted an excuse not to proceed with the divorce action for as long as she could get away with it.

The fact is Mr. Landau was perfectly able to proceed without my files, and did so when he chose to present his application for an award of interim counsel fees from the Court. Indeed, Mr. Landau never demonstrated what there was in my files that made any difference to his proceeding. Nor did Mr. Landau demonstrate how he could have allowed my request for only a "paper promise" to pay $3,600 in expert fees at the conclusion of this multi-million dollar matrimonial to stand in the way of his getting the files if in fact, as he pretends, he needed them. I was always willing to forego any commitment as to my own unpaid fees and leave that issue to be resolved at the end of the case. But Mrs. Breslaw and her counsel consistently refused. The only rational explanation is that it was consistent with Mrs. Breslaw's wishes that the divorce action be delayed as long as possible--using the file as a pretext. This is further borne out by the fact that from July 27, 1989, when Mr. Landau received the files, until he was relieved by Order of the Court which, upon information and belief, took place in April of this year, he still did not

succeed in getting Mrs. Breslaw to submit to her deposition and to bring the case to trial.

The foregoing is illustrative of the substantial testimony I would have given had I been allowed to be heard in my own defense to establish my good faith and that at no time did I deliberately intend to commit any contemptuous conduct or to show any disrespect for this Court.

s/
DORIS L. SASSOWER

Sworn to before me
this 18th day of June, 1990

s/
Notary Public