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BY HAND

June 13, 2008

FILED CITY COURT OF WHITE PLAINS, N.Y.
2008 JUN 13 P 3:17

Patricia Lupi, Chief Clerk
White Plains City Court
77 Lexington Avenue
White Plains, New York 10601

RE: Request for Clarification of Ms. Rodriguez' June 9, 2008 Letter
John McFadden v. Elena Sassower, White Plains City Court #SP-1502/07

Dear Ms. Lupi,

I am at a loss to understand the June 9, 2008 letter of Court Assistant Jacqueline Rodriguez responding to my June 6, 2008 letter to you.

My June 6th letter to you enumerated three simple questions:

> "(1) the name of the judge before whom SP-1502/07 is scheduled for trial [on June 30, 2008];
>
> (2) whether it was that judge who decided to schedule SP-1502/07 for trial and, if so, whether he/she reviewed the pleadings, motions, and decisions in the case prior thereto;
>
> (3) whether it was that judge who decided to add "SP 651/89" to the trial notice and the reason for doing so inasmuch as it is not the "(original #)", has a different premise, has a different caption with an additional party, and is only one of three open proceedings."

Rather than answer directly, Ms. Rodriguez' letter states:

> "the answers are in a decision that you received on or about October 11, 2007. As a courtesy, the pertinent answers to your questions have been highlighted."

There were three highlighted portions on the decision she enclosed:

On the first page, the machine stamp:

"FILED CITY COURT OF
WHITE PLAINS, N.Y.
2007 OCT 11 P 12:22"

On the second page, the final paragraph:

> "Last, the Court has reviewed 'Decision on Motion' dated December 19, 1991 under Index No. 651/89 and notes the following: The Hon. James B. Reap is retired. Since the Order 'reserved decision' it does not fall within the ambit of CPLR 9002. Additionally, to the extent a prior action remains pending, the Court is not required to enter an order of dismissal under CPLR 3211 (a) (4). Rather, the Court will consolidate any prior pending action with the instant proceeding to avoid duplicative trials and promote judicial economy (*see Toulouse v. Chander*, 5 Misc.3d 1005 [A], FN. 9)."

And on the third page, the identification of the judge who has signed the decision:

"HON. BRIAN HANSBURY
CITY COURT JUDGE"

Please advise as to what Ms. Rodriguez' letter means – not the least reason being because Judge Hansbury thereafter recused himself by a January 29, 2008 decision & order, stating:

> **"The undersigned hereby recuses himself and directs the Clerk of the Court to assign this matter to another judge of White Plains City Court."**

In so doing, Judge Hansbury did not direct this case for trial. He directed it for assignment to "another Judge of White Plains City Court", who was then free to make such determinations as were appropriate, based on the record of the case.

Did you assign the case to "another Judge of White Plains City Court", as Judge Hansbury directed? If so, what was the date on which you made the assignment – and who was the judge? Was it that judge who decided to schedule the case for trial – and is the June 30th trial to be before him/her? Did that judge also decide to add only a single additional docket number, #651/89, to the trial notice – and to represent it as "(original #)"

No fair and impartial judge assigned to this case and reviewing its pleadings, motions, and decisions could schedule it for a trial – or rely on Judge Hansbury's October 11, 2007

decision. Indeed, the fraudulence of that decision – including with respect to its last paragraph pertaining to consolidation of "any prior pending action" is resoundingly established by my November 9, 2007 order to show cause to disqualify Judge Hansbury for actual bias and interest. Such motion additionally sought vacatur of the October 11, 2007 decision, whether directly by reason of Judge Hansbury's disqualification or upon the granting of reargument.[1] As ¶4 of my moving affidavit therein stated:

> "**4.** As hereinafter demonstrated, absent rank incompetence, no fair and impartial tribunal could have rendered the October 11, 2007 decision & order [hereinafter "decision"], as it flagrantly violates controlling legal and adjudicative standards and falsifies the factual record to deprive me of relief to which I am entitled, *as a matter of law*. That relief, which would have obviated a trial – and which must properly do so upon this motion – is the granting of my [September 5, 2007] cross-motion to dismiss the Petition, for summary judgment on my Counterclaims, and for costs and sanctions against, and disciplinary and criminal referrals of, petitioner, John McFadden, and his attorney, Leonard A. Sclafani, Esq., for fraud and deceit. The decision denies all such dispositive relief without identifying ANY of the facts, law, or legal argument presented by my cross-motion, and without citing ANY applicable law." (underlining and capitalization in the original).

The referred-to demonstration of my moving affidavit then spanned 30 pages (pp. 5-35), all under the capitalized title heading,

> "THE OCTOBER 11, 2007 DECISION MANIFESTS THE COURT'S ACTUAL BIAS REQUIRING VACATUR UPON THE COURT'S DISQUALIFICATION OR UPON THE GRANTING OF REARGUMENT & RENEWAL".

Indeed, my accompanying memorandum of law described the October 11, 2007 decision as:

> "'so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause' of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960)." (p. 1)

and stated:

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[1] The fraudulence of the decision's last paragraph concerning consolidation is detailed at pages 18-22 of my moving affidavit in support of my November 9, 2007 order to show cause under the subtitle heading "As to my First Affirmative Defense ('*Open Prior Proceedings*')".

> "Should Judge Hansbury not disqualify himself and vacate the October 11, 2007 decision based on the factual and legal showing in respondent's accompanying affidavit, he must – consistent with his ethical duty – disclose the facts bearing upon the appearance and actuality of his bias and interest. Likewise, such duty of disclosure falls on any other judge who, based on respondent's motion herein, does not deem Judge Hansbury to be disqualified and allows his October 11, 2007 decision to stand." (pp. 1-2).

These assertions, on the first page of my memo of law, were repeated at the memo's end:

> "Should Judge Hansbury not disqualify himself based on this motion, he must justify his October 11, 2007 decision by confronting and addressing, with specificity, the facts and law which the motion presents. Only by so doing can he demonstrate that there are no grounds on which his impartiality might 'reasonably be questioned'. In such circumstance, he must make disclosure as to the facts bearing upon his impartiality. Likewise, any other judge of this Court who adjudicates this motion." (p. 6).

On November 16, 2007, Judge Friia granted the stay of trial that my November 9, 2007 order to show cause had requested pending determination of the motion. Two and a half months later, Judge Hansbury determined the motion by his January 29, 2008 decision, recusing himself, without explanation – but only after denying ALL my motion's substantive relief, again in a conclusory and demonstrably fraudulent fashion, citing NO law, identifying NONE of the facts, law, or legal argument I had presented, and concealing or obscuring most of my requested relief, including disclosure and vacatur: Indeed, Judge Hansbury's January 29, 2008 decision denied my requested substantive relief on the pretext that

> "respondent's moving papers are supported by nothing more than conclusory and unsubstantiated assertions, falling short of the standards for a motion to reargue/renew, and offer no basis in fact or law for the disqualification of the undersigned Judge. The balance of respondent's motion is denied in its entirety."

It takes no more than a few minute' comparison of these sentences with my November 9, 2007 order to show cause to establish the flagrant deceit of Judge Hansbury's January 29, 2008 decision – further demonstrating his disqualification for actual bias. Moreover, by reason of the legal sufficiency of my November 9, 2007 order to show cause in establishing Judge Hansbury's actual bias and the fraudulence of his October 11, 2007 decision, he had NO jurisdiction to do anything by his January 29, 2008 decision other than to disqualify himself and vacate the October 11, 2007 decision.

Applicable treatise authority includes Judicial Disqualification: Recusal and Disqualification of Judges, Richard E. Flamm (Little, Brown and Company, 1996). Under the title heading, "§22,4 Actions by Disqualified Judge", is the following:

> §22.4.1 *Void Orders*
>
> "When a judge presumes to take substantive action in a case despite having recused himself from it, or after he should have recused himself but did not, any such action is often considered a nullity and any orders issued by such a judge are considered absolutely void for want of jurisdiction.
>
> Generally, void orders or judgments are subject to reversal and redetermination and may be set aside by the court on its own motion. Such orders may also be subject to collateral attack upon application, whenever they are brought into question at any time prior to final judgment.
>
> §22.4.2 *Voidable Orders*
>
> Though in many jurisdictions orders that have been rendered by a disqualified judge are deemed to be void, some courts in other jurisdictions have indicated that constitutional provisions, statutory provisions, and court rules pertaining to judicial disqualification do not necessarily render the actions and orders of a disqualified judge void in any fundamental sense. At most, such actions or orders are rendered voidable if objections to the disqualified judge acting in the case are raised by an interested party in a court that has subject matter jurisdiction in a proper and timely fashion.
>
> Unlike void orders, which are usually considered to be absolute nullities, voidable orders are generally deemed to be binding on the parties unless and until they have been vacated by the trial court or reversed by an appellate court. Such orders are ordinarily not susceptible to collateral attack." (pp. 651-653, footnotes omitted, underlining added).

Also applicable is the section entitled "§22.5 Retroactive Disqualification", which states:

> "The mere fact that a judge has been disqualified or has opted to recuse himself from presiding over a matter does not mean that he was actually biased in it. Unless the complaining party can make a showing of actual bias on the part of the disqualified judge, there is no reason to presume that the decisions rendered by that judge were in any way tainted.
>
> ...those decisions that have been rendered by a disqualified judge after the filing of a justified judicial disqualification motion will ordinarily be vacated upon the request of an adversely affected party; where a disqualified judge took actions prior to the filing of the disqualification motion or his

> decision to voluntarily step down, such actions ordinarily need not be set aside. Such actions, however, may be reconsidered and possibly vacated or amended by a successor judge upon a proper motion." (pp. 656-657, footnotes omitted).

Vacatur of both Judge Hansbury's October 11, 2007 and January 29, 2008 decisions is additionally compelled as his without-explanation recusal was in face of my November 9, 2007 order to show cause for his disqualification not only for actual bias, but for interest pursuant to Judiciary Law §14. As stated by my memo of law:

> "It is long-settled that a judge disqualified by statute is without jurisdiction to act and the proceedings before him are void, *Oakley v. Aspinwall, supra*, 549, *Wilcox v. Arcanum*, 210 NY 370, 377 (1914), *Casterella v. Casterella*, 65 A.D.2d 614 (2nd Dept. 1978), 1A Carmody-Wait 2nd §3:94." (p. 3).

Upon vacatur of Judge Hansbury's aforesaid two decisions, be it for actual bias or interest, I am entitled to findings of fact and conclusions of law with respect to the second and third branches of my September 5, 2007 cross-motion for dismissal and summary judgment. Such will establish the truth of what I stated to Judge Friia on November 16, 2007 – and reiterated by my November 26, 2007 affidavit, which was the last submission in the record of my November 9, 2007 order to show cause:

> "...the only trial warranted herein is as to the amount of compensatory and punitive damages due me on my Counterclaims – since, *as a matter of law*, I am entitled to the granting of the second and third branch of my September 5, 2007 cross-motion: dismissal of the Petition and summary judgment on those Counterclaims." (¶7, underlining added).

If, as it appears, you did not assign this case to "another judge of White Plains City Court", as Judge Hansbury directed by his January 29, 2008 decision & order, please advise why and confirm that you will rescind your May 30, 2008 notice of trial and assign the case to "another judge of White Plains City Court" forthwith. Otherwise, please answer my questions on page two in boldfaced type – beginning with my request that you explain the meaning of Ms. Rodriguez' June 9th letter and furnish the name of the judge to whom you assigned the case pursuant to Judge Hansbury's January 29, 2008 decision & order and the date thereof.

Thank you.

Very truly yours,

ELENA RUTH SASSOWER, *Pro Se*

cc: Leonard Sclafani, Esq.