SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: NINTH & TENTH JUDICIAL DISTRICTS
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JOHN McFADDEN,

Respondent,

**#2008-1427-WC**
**#2009-148-WC**

-against-

Affidavit in Reply & Opposition to Cross-Motion of Leonard Sclafani, Esq. & in Further Support of Motion for Disqualification of Justice Molia & Other Relief

DORIS L. SASSOWER,

Respondent,

ELENA SASSOWER,

Appellant.
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STATE OF NEW YORK )
COUNTY OF SUFFOLK ) ss.:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the above-named appellant *pro se* and fully familiar with all the facts, papers, and proceedings in these two appeals and in the two related appeals in *John McFadden v. Elena Sassower*, #2008-1433-WC and #2008-1428-WC (White Plains City Ct. #SP-1502/07).

2. This affidavit is submitted in reply and opposition to the January 5, 2010 cross-motion of Leonard Sclafani, Esq., attorney for respondent John McFadden, opposing my January 2, 2010 motion to disqualify Justice Denise Molia & other relief and seeking costs and sanctions against me pursuant to 730.3(g) of this Court's Rules. It is also submitted in further support my motion and, additionally, in support of this Court's imposition of <u>maximum</u> costs and sanctions against Mr. Sclafani and Mr. McFadden pursuant to 730.3(g) by reason of the frivolousness of Mr. Sclafani's

opposition/cross-motion.[1] This is separate and apart from imposition of the maximum costs and sanctions which my motion's fourth branch seeks against them pursuant to 730.3(g) for each "occurrence" of their prior frivolous conduct before this Court sanctionable thereunder,[2] which any fair and impartial tribunal would have adjudicated, but which panels of this Court, in which Justice Molia participated, did not (Exhibits F, H, I).[3]

3. As hereinafter shown, Mr. Sclafani's opposition/cross-motion does not deny or dispute ANY of the facts, law, or legal argument particularized by the 26 pages of my moving affidavit.[4] As such, it is no opposition, *as a matter of law* and frivolous *per se*. Indeed, by its deceit, it reinforces my entitlement to the granting of my motion under legal principles I have repeatedly cited to Mr. Sclafani throughout the past 2-1/2 years, including in the "Introduction" of my three reply briefs, annexed to my motion (Exhibit B-2, at pp. 1-2; Exhibit C-2, at p. 1 (fn. 2); Exhibit D-2, at pp. 4-5).

4. Mr. Sclafani's opposing affirmation is essentially fashioned on bald,

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1 22 NYCRR §130-1.1(c) on which 730.3(g) is based, expressly identifies "frivolous conduct" to include "the making of a frivolous motion for costs or sanctions under this section."

2 22 NYCRR §130-1.2 limits maximum sanctions at $10,000 for "any single occurrence of frivolous conduct", with no restriction as to maximum costs.

3 Exhibits referred to in the body of this affidavit are all annexed to my January 2, 2010 motion.

4 Thus, Mr. Sclafani has not denied or disputed – and thereby concedes – the accuracy of the first footnote of my motion (at p. 2), wherein I stated that he had admitted, at oral argument, in response to questioning:

> "that there 'never was a tenancy' – thereby conceding one of my Affirmative Defenses to Mr. McFadden's petition in #SP-651/89 and my Third Affirmative Defense to Mr. McFadden's petition in #SP-1502/07, entitling me to dismissal of both petitions for lack of subject matter jurisdiction."

repetitive declarations that my motion is in "bad faith", factually and legally "unsupported", "insupportable", and "frivolous", and designed to "frustrate, stall, delay, and confuse the ultimate adjudication of...[the] appeals" (¶¶3, 6, 7, 8, 9, 10, 12, 13). These repetitive declarations – constituting the basis for his cross-motion (at p. 5) – are not just false, but knowing false and so-established by the most cursory examination of my motion.

5. Consequently, this affidavit reinforces this Court's duty, upon examination of my motion, to refer Mr. Sclafani and his co-conspiring client to disciplinary and criminal authorities, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct – relief also sought by my motion's fourth branch.

6. As Mr. Sclafani's opposing affirmation provides no citation to the paragraphs of my motion whose five branches he contends are in "bad faith", "unsupported", "insupportable", "frivolous", and designed to "frustrate, stall, delay, and confuse the ultimate adjudication of...[the] appeals" (¶¶3, 6, 7, 8, 9, 10, 12, 13), I am providing those citations below to assist the Court in establishing the true facts:

- with respect to my motion's first branch, for "Justice Molia's Disqualification for Demonstrated Actual Bias and Interest", whose particulars I set forth under that title by my ¶¶11-20 and, additionally, by my ¶¶6 and 7, Mr. Sclafani devotes three paragraphs: his ¶¶4-6. These are completely non-responsive to my factual and legal presentation – whose accuracy he does not deny or dispute in any respect. Nor do these three paragraphs even baldly claim that Justice Molia is a fair and impartial judge or that she showed herself to be one by her participation on my three prior motions or at the oral argument of my four appeals, where, *inter alia*, in violation of the Court' own rules (Exhibit E) and without explanation, Mr. Sclafani was permitted to argue the two appeals herein, notwithstanding he had filed NO respondent's brief.

- with respect to my motion's second branch, for "Fact-Based, Law-Supported Determinations of the Issues Presented by my Prior Motions as Dispositive", whose particulars I set forth under that title by my ¶¶21-25, Mr. Sclafani devotes two paragraphs: his ¶¶7-8. These are completely non-responsive to my factual and legal presentation – whose accuracy he does not deny or dispute in any respect. Thus Mr. Sclafani does not contest that my prior motions presented issues dispositive of my appeals – and that these very issues are now before the Court as part of my appeals and would be confronted by any fair and impartial tribunal. Such exposes the deceit of his objection to this branch that because I did not appeal the Court's denials of the motions and did not include reargument/renewal of those denials in my instant notice of motion, this branch suffers "procedural" and "jurisdiction[al]" "deficiencies" (at ¶7). There are no such "deficiencies", as the dispositive issues of my prior motions are presented by my appeals – to which he filed NO respondent's brief[5] and which any fair and impartial tribunal would adjudicate, in the first instance, precisely because they are dispositive.

- with respect to my motion's third branch, "Directing a Subpoena to the White Plains City Court Clerk", whose particulars I set forth under that title by my ¶¶26-36, Mr. Sclafani devotes two paragraphs: his ¶¶11-12. These are completely non-responsive to my factual and legal presentation, whose accuracy he does not deny or dispute in any respect. Thus Mr. Sclafani does not contest that verifying the status of #SP-651/89 and #SP-434/88; #SP-500/88, and #SP-652/89 is essential to my appeals – and with respect to #SP-651/89 dispositive, if closed. Such exposes the deceit of his unintelligible claim (at ¶11) that this branch of my motion "fails to recognize the current status of the instant litigations among other factual and legal considerations", as it is precisely such "current [& prior] status" that this branch seeks to determine.

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[5] The last two pages of my July 16, 2009 letter to Clerk Kenny (Exhibit D-3, pp. 9-10) reflect how Mr. Sclafani's rejected-and-never-refilled respondent's brief for appeals #2008-1427-WC & #2009-148-WC sought to obscure and mislead the Court with respect to the dispositive issue that was the subject of my August 13, 2008 vacatur/dismissal motion, featured in the "Introduction" of my appellant's brief (Exhibit D-1, pp. 2-3), *to wit*, the actual content of Mr. McFadden's March 27, 1989 Petition and the divergence between it and the July 21, 2008 judgment of eviction and warrant of removal, drafted by Mr. Sclafani. This is the FIRST dispositive issue for which the second branch of my instant motion (at ¶¶22-23) seeks to have this Court make a "fact-based, law-supported determination[]".

- with respect to my motion's fourth branch, "Sanctions & Costs Pursuant to §730.3(g) of this Court's Rules and Disciplinary & Criminal Referrals Pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct", whose particulars I set forth under that title by my ¶¶37-43, Mr. Sclafani devotes a single paragraph, his ¶13. This paragraph, consisting of a single sentence, is completely non-responsive to my factual and legal presentation, whose accuracy he does not deny or dispute in any respect. Indeed, insofar as Mr. Sclafani claims (at ¶13) that this branch contains "arguments and prayers for relief...actually pending on the appeals herein", this is precisely what my motion highlights and explicitly reinforces by this branch (at ¶42).

- with respect to my motion's fifth branch, "Other & Further Relief, Including Referral of Culpable Court Attorneys for Investigation and Dismissal & Disclosure of their Names", the particulars of which I set forth by my ¶¶44-46, Mr. Sclafani devotes two paragraphs, his ¶¶9-10. These are completely non-responsive to my factual and legal presentation, whose accuracy he does not deny or dispute in any respect. Indeed, his two paragraphs do not even baldly claim that the basis for my requested relief, *to wit*, the Court's decisions on my prior three motions and the performance of Justices Molia and Iannacci at the oral argument of my appeals, are defensible. In fact, Mr. Sclafani conceals that the latter is even a basis for the request.

7. As for Mr. Sclafani's claim that my motion is

> "nothing short of a brazen, transparent and bad faith attempt to intimidate this Court into granting [Sassower's] pending appeals" (¶3)

and that my fifth branch has as its

> "purpose and intent to intimidate the Court and all those in it, justices, clerks and legal secretaries alike, from determining Sassower's appeals in favor of McFadden" (¶10),

these characterizations have no basis in the motion, whose five branches are all aimed at ensuring fact-based, law-supported adjudications of my decisive appellate issues, such as did not occur on my prior motions and as to which the Court gave no discernible recognition at the oral argument. As pointed out by my motion – without contest from

Mr. Sclafani – my November 9, 2007 order to show cause for Judge Hansbury's disqualification and my July 18, 2008 order to show cause for Judge Friia's disqualification are

> "dispositive of all four [of my] appeals, with their sufficiency in establishing the disqualification of Judges Hansbury and Friia requiring, *as a matter of law*, that the appealed-from decision/orders, judgment of eviction, and warrant of removal be not only reversed, but vacated[fn.9], with referrals of both City Court judges to disciplinary and criminal authorities, pursuant to this Court's mandatory 'Disciplinary Responsibilities' under §100.3D(1) of the Chief Administrator's Rules Governing Judicial Conduct – relief my briefs expressly seek (Exhibits B-1, C-1, D-1) [fn.10]." (¶12, underlining in the original).

The outcome of my four appeals are thus *matters of law*, not intimidation. Likewise, *matters of law* are the dispositive issues of my pre-appeal motions, reiterated in my appellant's brief for #2008-1427-WC and #2009-148-WC, and highlighted at ¶¶21-25, 26-36 of my motion, without contest by Mr. Sclafani. Indeed, inasmuch as Mr. Sclafani did not file a respondent's brief for #2008-1427-WC and #2009-148-WC and has not contested that his briefs for #2008-1433-WC and #2008-1427-WC are no opposition, *as a matter of law*,[6] it is a deceit for him to pretend that the appeals might be decided "in favor of Mr. McFadden".

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> fn.9 "The sufficiency of my July 18, 2008 order to show cause in establishing Judge Friia's disqualification – embodied by the third "Question Presented" of my appellant's brief for #2008-1427-WC & #2009-148-WC – is discussed by its Point III (at pp. 79-87). The sufficiency of my November 9, 2007 order to show cause for Judge Hansbury's disqualification – embodied by the first "Question Presented" of my appellant's brief for #2008-1428-WC – is discussed by its Point I (at pp. 27-28). The law with respect to vacatur, rather than reversal, based thereon appears at pages 29-31 of my appellant's brief for #2008-1428-WC and pages 24-26 of my appellant's brief for #2008-1427-WC & #2009-148-WC."

> fn.10 "These exhibits are the 'Introduction' and 'Conclusion' sections of my three appellant's briefs on my four appeals."

6 ¶5 of my motion; Exhibit B-2, p. 1; Exhibit C-2, p. 1.

8. The foregoing gives context to Mr. Sclafani's failure to sign the printed certification on the legal back of his cross-motion,[7] which states:

> "Pursuant to 22 NYCRR 1301.1a [sic] the undersigned, an attorney admitted to practice in the courts of New York State, certifies that upon information and belief, and after reasonable inquiry, the contentions contained in the annexed documents(s) [sic] are not frivolous"

9. Mr. Sclafani's own affirmation reflects his consciousness of its frivolousness and falsity. Thus, he affirms it "under penalty of perjury", but not as "true" – repeating his pattern and practice in earlier filings, to which I repeatedly objected, setting forth the following legal authority:

> "CPLR §2106: 'The statement of an attorney…when subscribed and affirmed by him to be true under the penalties of perjury, may be served and filed in the action in lieu of and with the same force and effect as an affidavit.' (underlining added).
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> According to McKinney's Consolidated Laws of New York Annotated, 7B, p. 817 (1997), Commentary by Vincent C. Alexander. 'While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of prosecution for perjury for a false statement'.
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> 'Those who make affidavits are held to a strict accountability for the truth and accuracy of their contents.', 2 Carmody-Wait 2d, §4:12, citing *In re Portnow*, 253 A.D. 395 (2nd Dept. 1938)."[8]

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[7] Mr. Sclafani's failure to sign the printed certification on his legal back was reported to me by this Court's Senior Court Clerk Julio Mejia on January 15, 2010 – upon my telephoning him and asking him to check whether it had been signed.

[8] See the following from the record of *McFadden v. Sassower*, #SP-1502/07 (White Plains City Court) – encompassed by my appeals to this Court: #2008-1433-WC, #2008-1428-WC: (1) my September 5, 2007 cross-motion, at ¶8 (fn. 3); (2) my September 11, 2007 reply affidavit, at ¶7; (3) my November 26, 2007 reply affidavit, at ¶4 (fn. 3).

See also my May 28, 2009 reply affidavit in further support of my May 11, 2009 motion to this Court to require Clerk Lupi to file a proper Clerk's Return on Appeal in #2009-148-WC (at ¶4 (fn.1)) – annexed as Exhibit L to my accompanying January 19, 2010 reply affidavit to Deputy Solicitor General Gutman's affirmation in opposition to this motion.

10. This Court has yet to hold Mr. Sclafani and Mr. McFadden to ANY accountability, let alone "strict accountability", for the pervasive perjuries and fraud permeating each of their prior submissions to it, utterly polluting the judicial process and obstructing and obscuring my absolute legal entitlement to dismissal of Mr. McFadden's demonstrably false March 27, 1989 Petition, covered up by the July 21, 2008 judgment of eviction and warrant of removal, which Mr. Sclafani drafted. (see fn. 5, *supra*).

11. Mr. Sclafani's opposition/cross-motion, herein analyzed, is now his latest flagrant litigation abuse, which any fair and impartial tribunal would forcefully address, utilizing 730.3(g), as well as Judiciary Law §487 and statutory provisions for perjury, which I expressly request.

12. To the extent that in the 16 months since the Appellate Division, Second Department promulgated 730.3(g), this Court has yet to render any precedential, reported decisions pertaining thereto – including as to the making of a frivolous sanctions motion (see fn. 1, *supra*) – this is the right case for it to do so.

Elena Sassower

ELENA SASSOWER

Sworn to before me this
19th day of January 2010

Joann E Schnauf

Notary Public

JOANN E. SCHNAUFER
Notary Public, State of New York
No. 01SC5081241
Qualified in Suffolk County
Commission Expires June 30, 2011

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: NINTH & TENTH JUDICIAL DISTRICTS

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JOHN McFADDEN,

Respondent,

**#2008-1427-WC**
**#2009-148-WC**

-against-

DORIS L. SASSOWER,

Respondent,

ELENA SASSOWER,

Appellant.

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# APPELLANT'S AFFIDAVIT IN REPLY & IN OPPOSITION TO CROSS-MOTION OF LEONARD SCLAFANI, ESQ. & IN FURTHER SUPPORT OF HER MOTION FOR DISQUALIFICATION OF JUSTICE MOLIA & OTHER RELIEF

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Appeal #3: Judge Jo Ann Friia's July 3, 2008 Decision & Order
July 21, 2008 Judgment of Eviction
July 21, 2008 Warrant of Removal

Appeal #4: Judge Jo Ann Friia's October 14, 2008 Decision & Order

(White Plains City Court #SP-651/89 & #SP-2008-1474)