

SUPRME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: NINTH & TENTH JUICIAL DISTRICTS

----- X
JOHN McFADDEN,

Respondent,

-against-

DORIS L. SASSOWER,

Respondent,

ELENA SASSOWER,

Appellant.

----- X

Appellate Term: #2009-148 WC

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

**Appellant's Notice of Motion to
Direct the White Plains City Court
Clerk to Furnish a Proper Clerk's
Return on Appeal & Other Relief**

PLEASE TAKE NOTICE that upon the annexed affidavit of appellant *pro se* ELENA SASSOWER, sworn to on May 11, 2009, the exhibits annexed thereto, and upon all the papers and proceedings heretofore had herein, appellant ELENA SASSOWER will make a motion at the Appellate Term of the Supreme Court of the Second Judicial Department at 141 Livingston Street, Brooklyn, New York 11201 on May 29, 2009 at 10:00 a.m., or as soon thereafter as the parties or their counsel can be heard, for an order:

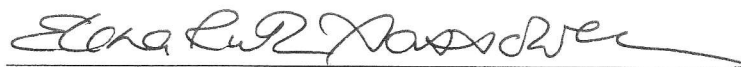
(1) requiring that White Plains City Court Clerk Patricia Lupi furnish the Appellate Term of the Supreme Court's Second Judicial Department with a proper Clerk's Return on Appeal for #2009-148-WC, whose index number in White Plains City Court is #SP-2008-1474;

(2) for such other and further relief as may be just and proper.

Pursuant to CPLR §2214(b), answering papers, if any, are required to be served at least seven days prior to the May 29, 2009 return date.

Dated: New York, New York
May 11, 2009

Yours, etc.,



ELENA RUTH SASSOWER, *Pro Se*
c/o Karmel
25 East 86th Street
New York, New York 10028
Tel: 646-220-7987

TO: LEONARD A. SCLAFANI, ESQ.
Attorney for Respondent John McFadden
Two Wall Street, 5th Floor
New York, New York 10005

ATTORNEY GENERAL ANDREW CUOMO
Attorney for Non-Party White Plains City Court Clerk Patricia Lupi
By: Assistant Attorney General Dian Kerr McCullough
101 East Post Road
White Plains, New York 10601

DORIS L. SASSOWER, Respondent
283 Soundview Avenue
White Plains, New York 10606

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Appellate Term: #2009-148-WC

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

**Appellant's Affidavit in Support
of Motion to Direct the White
Plains City Court Clerk to
Furnish a Proper Clerk's Return
on Appeal & Other Relief**

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss:

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

1. I am the *pro se* appellant whose appeal herein and in #2008-1427-WC have been perfected by a single brief, filed April 17, 2009.¹

2. Prior to perfecting these appeals, I notified this Court's Clerk's Office that White Plains City Court Clerk Patricia Lupi's Clerk's Returns on Appeals for the underlying record, #SP-651/89 and #SP-2008-1474, were non-conforming with Uniform Court Act §1704² and deficient.

¹ I previously perfected two appeals in *John McFadden v. Elena Sassower*, #2008-1433-WC and #2008-1428-WC, by two appellant's briefs, each filed November 13, 2008.

² In pertinent part, §1704(b) specifies that the Clerk's Return on Appeal:

3. With respect to Clerk Lupi's non-conforming and deficient Clerk's Return on Appeal for #SP-651/89, I was told by this Court's Clerk's Office – including its Chief Clerk, Paul Kenny – to make a motion in White Plains City Court. I did this on September 18, 2008, using the index number SP-651/89, as well as the further number SP-2008-1474 that Clerk Lupi had surreptitiously assigned to #SP-651/89 on or about May 30, 2008 (at the direction of White Plains City Court Judge Jo Ann Friia), without notice or explanation.

4. The White Plains City Court's response to my September 18, 2008 motion to compel Clerk Lupi to provide proper Clerk's Returns on Appeals and other information critical to this Court's appellate review was Judge Friia's October 14, 2008 decision & order, bearing the index number SP-2008-1474 alone and purporting that the City Court was "without subject matter jurisdiction to entertain [my] application" (Exhibit A).

5. Clerk Lupi's belatedly-filed Clerk's Return on Appeal for this October 14, 2008 decision & order, dated January 8, 2009³ and also bearing only the index number SP-2008-1474 (Exhibit B-1), is the subject of this motion as it is facially-non-conforming with Uniform Court Act §1704(b) and its accompanying inventory of "Papers Forwarded to Appellate Term" is deficient (Exhibit B-2).

6. This motion – like my September 18, 2008 motion in White Plains City Court

"shall contain the judgment or order appealed from and all the original papers upon which the judgment or order was rendered or made, duly authenticated by the certificate of the clerk having the custody thereof, or copies thereof duly certified by such clerk, and shall have annexed thereto the opinion of the court, if any, and the notice of appeal."

³ Clerk Lupi's Clerk's Return on Appeal, though dated January 8, 2009, was not received by this Court's Clerk's Office until on or about January 28, 2009 – and would likely never have been forwarded but for the intervention of this Court's Clerk's Office, resulting from my communications with it on January 5, 2009. [See my January 5, 2009 letter to this Court's Clerk, Paul Kenny, which is Exhibit A-1 in the compendium accompanying my April 17, 2009 appellant's brief.]

– is necessitated by the position of this Court’s Clerk’s Office that it is the litigant’s burden to ensure the integrity of the Clerk’s Return on Appeal and that it will not reject even a facially-non-conforming Clerk’s Return, as at bar. Rather, the litigant must seek relief through motion practice. This position and my intention to make this motion were set forth by my April 14, 2009 letter to Clerk Kenny⁴ as follows:

“With respect to the deficiencies of the Clerk’s Return on Appeal for Judge Friia’s October 14, 2008 decision & order (#2009-148-WC), summarized at pages 1-2 of my March 13th letter, my understanding from you and [Senior Court Clerk Julio] Mejia is that the Appellate Term Clerk’s Office does not recognize any obligation to correct these deficiencies. Rather, the burden is on me to secure a proper Clerk’s Return on Appeal for #2009-148-WC by bringing a motion either before the Appellate Term or the White Plains City Court.

Based on Judge Friia’s October 14, 2008 decision & order disposing of my September 18, 2008 motion to secure proper Clerk’s Returns on Appeals for #2008-1427-WC, #2008-1433-WC, and #2008-1428-WC, it is pointless for me to bring a comparable motion in White Plains City Court to secure a proper Clerk’s Return on Appeal for #2009-148-WC. Therefore, I will proceed by motion before the Appellate Term for correction of the deficiencies in the Clerk’s Return on Appeal for #2009-148-WC.” (at p. 2).

7. The material respects in which Clerk Lupi’s January 8, 2009 Clerk’s Return on Appeal for #2009-148-WC is non-conforming and deficient, previously enumerated for Clerk Kenny in my referred-to March 13th letter⁵, are:

(a) the certification of the Clerk’s Return on Appeal (Exhibit B-1) is not signed by White Plains City Court Chief Clerk Patricia Lupi, but by her assistant, Jacqueline Rodriguez, who signed Ms. Lupi’s name;

(b) the certification of the Clerk’s Return on Appeal (Exhibit B-1) falsely

⁴ My April 14, 2009 letter to Clerk Kenny is Exhibit B-2 in the compendium accompanying my April 17, 2009 appellant’s brief.

⁵ My March 13, 2009 letter to Clerk Kenny is Exhibit B-1 in the compendium accompanying my April 17, 2009 appellant’s brief.

attests that “The within case and exceptions are settled” and indicates “Justice’s minutes of testimony”. In fact, neither the “case” nor any “minutes of testimony” were “settled”.⁶ Similarly, the accompanying inventory of “Papers Forwarded to Appellate Term” (Exhibit B-2) falsely purports, as its first item, “settled minutes” – when, in fact, the Clerk’s Return contains no “minutes” of any sort;

(c) the certification of the Clerk’s Return on Appeal (Exhibit B-1) falsely attests to transmittal to the Appellate Term of “the originals...of all papers required to be returned”, when, in fact,

(i) the Clerk’s Return contains no original of Judge Friia’s October 14, 2008 decision & order – nor even a copy – and the inventory of “Papers Forwarded to Appellate Term” (Exhibit B-2) does not list it.⁷

(ii) the Clerk’s Return contains neither an original nor copy of the September 25, 2008 opposing affirmation of Leonard Sclafani, Esq. (Exhibit C)⁸ and the inventory of “Papers Forwarded to Appellate Term” (Exhibit B-2) does not list his affirmation, even while identifying Sclafani as attorney in the case.

8. Ten days after my March 13th letter to Clerk Kenny⁹, I was able to secure access to the White Plains City Court file of #SP-2008-1474 and saw the original of Judge

⁶ Settlement is governed by §1704(a) of the Uniform City Court Act.

⁷ All copies of the October 14, 2008 decision & order in the Clerk’s Return on Appeal are attachments to other documents, *to wit*, (a) my October 16, 2008 notice of appeal; (b) Mr. Sclafani’s October 17, 2008 notice of entry; and (c) Assistant Attorney General McCullough’s October 21, 2008 decision on motion with notice of entry. These attached copies are all unentered.

⁸ I previously supplied this Court with a copy of Sclafani’s September 25, 2008 opposing affirmation on November 3, 2008 to further support my October 15, 2008 order to show cause for reargument, renewal & other relief in #2008-1427-WC. [See ¶24 of my November 3, 2008 affidavit therein.]

⁹ It must be noted that the March 13th letter identified (at p. 5) a significant occasion when this Court’s Clerk’s Office acted to correct a material deficiency of the Clerk’s Return on Appeal for #SP-651/89. After months of my repeatedly alerting it to the fact that Judge Friia’s July 21, 2008 judgment of eviction was unentered, this Court’s Clerk’s Office communicated with the White Plains City Court Clerk’s Office that such was unacceptable. The City Court Clerk’s Office responded on October 23, 2008 by faxing this Court’s Clerk’s Office the July 21, 2008 judgment with a handwritten entry, backdated to July 21, 2008. [See Exhibit C-4 of the compendium accompanying my April 17, 2009 appellant’s brief].

Friia's October 14, 2008 decision & order (which was unentered)¹⁰ and Mr. Sclafani's September 25, 2008 opposing affirmation. I apprised Clerk Kenny and Mr. Mejia of this in my subsequent phone conversations with them.

9. The omission of Mr. Sclafani's September 25, 2008 opposing affirmation from Clerk Lupi's January 8, 2009 Clerk's Return on Appeal (Exhibit B) is the most prejudicial of its deficiencies as it serves to conceal:

(a) that I did not bring an Article 78 proceeding against Clerk Lupi, for which she would have standing as a party to interpose opposition, but brought a September 18, 2008 motion within this landlord-tenant proceeding, whose petitioner, John McFadden, represented by Leonard Sclafani, Esq., had already interposed opposition prior to the Attorney General's unlawful appearance representing Clerk Lupi;

(b) that Mr. Sclafani's September 25, 2008 opposing affirmation was replete with deceit and fraud, entitling me to sanctions and costs under 22 NYCRR §130-1.1 and disciplinary and criminal referral against him – relief I expressly sought by my October 10, 2008 affidavit in reply, whose ¶¶26-38 constituted a virtual line-by-line analysis of Mr. Sclafani's opposing affirmation.¹¹

10. These issues are embodied by the second "Question Presented" of my April 17, 2009 appellant's brief (pp. vi-vii), summarized at pages 59-63 thereof, and argued by my Point II (at pp. 74-79).

11. Mr. Sclafani's September 25, 2008 opposing affirmation is part of the record

¹⁰ CPLR §5016(a) entitled "What constitutes entry" identifies same as the signature of the Clerk and subsequent filing by him. CPLR §2220 entitled "Entry and filing of order; service", states:

"An order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable..."

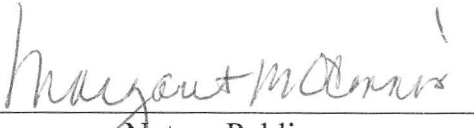
¹¹ My October 10, 2008 affidavit, a full copy of which I also supplied this Court on November 3, 2008 to further support my October 15, 2008 order to show cause for reargument, renewal & other relief (see fn 8, *supra*), is most conveniently accessible, albeit without its annexed exhibits, as Exhibit O to my April 17, 2009 appellant's brief. The original, with exhibits, is in Clerk Lupi's January 8, 2009 Clerk's Return on Appeal.

that was before Judge Friia. It was improper for her to fashion her October 14, 2008 decision & order as if that affirmation did not exist (Exhibit A), with Clerk Lupi thereafter covering up for Judge Friia by omitting it from the January 8, 2009 Clerk's Return on Appeal (Exhibit B-2).

WHEREFORE, it is respectfully prayed that relief be granted in accordance with my accompanying notice of motion.


ELENA RUTH SASSOWER

Sworn to before me this
11th day of May 2009


Notary Public

MARGARET M. O'CONNOR
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN SUFFOLK COUNTY
REG. NO. 01OC6132954
MY COMMISSION EXPIRES AUG. 29, 2009

THIS DECISION CONSTITUTES THE ORDER OF THE COURT

Dated: White Plains, New York
October 14, 2008



HON. JO ANN FRILIA
CITY COURT JUDGE

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Respondent

Appellate Term Docket
#2009-148-WC

White Plains Index:
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SP 2008-1474)

-against-

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Appellant Elena Sassower's Motion to Direct
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a Proper Clerk's Return on Appeal & Other Relief

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