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

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JOHN McFADDEN,

Respondent,

-against-

DORIS L. SASSOWER,

Respondent,

ELENA SASSOWER,

Appellant.

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Appellate Term: #2009-148-WC

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

Appellant's Affidavit in Reply and in Further Support of Her Motion

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss:

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

1. I am the *pro se* appellant and submit this affidavit in reply to the May 15, 2009 letter of Assistant Solicitor General Diana R.H. Winters (Exhibit A) – the sole opposition to my May 11, 2009 motion for an order: (a) requiring White Plains City Court Clerk Patricia Lupi to furnish this Court with "a proper Clerk's Return on Appeal for #2009-148-WC"; and (b) "for such other and further relief as may be just and proper". This affidavit is also submitted in further support of that motion.

2. At the outset, I object to Ms. Winters interposing her opposition by an unsworn letter addressed to this Court's presiding justice, to which, additionally, I am the only indicated recipient. Ms. Winters' unexplained failure to include John McFadden and Doris L. Sassower as indicated recipients, notwithstanding they are captioned parties and

recipients indicated by my May 11, 2009 notice of motion, suffices for the Court to reject her letter. Indeed, doing so would be consistent with what this Court did by a May 19, 2009 order of its Chief Clerk, Paul Kenny (Exhibit B-1), in denying a letter-application of Mr. McFadden's attorney, Leonard Sclafani, Esq., for an enlargement of time to file a respondent's brief in #2009-148-WC and #2008-1427-WC (Exhibit B-2). Such denial was based on Mr. Sclafani's failure to send copies of his letter-application "to all respondents" – a deficiency I had pointed out to Clerk Kenny in a May 15, 2009 letter to him, indicating, as recipients, Mr. Sclafani, Doris Sassower, and the Attorney General (Exhibit B-3, p. 4).

3. I have confirmed with this Court's Senior Clerk Julio Mejia, with whom I spoke by phone on May 27, 2009, that had Ms. Winters responded to my motion by affirmation – rather than letter – the Clerk's Office would have rejected same for filing if it was not accompanied by an affidavit or affirmation attesting to service on all parties.

4. Ms. Winters offers no explanation for proceeding by letter. Inasmuch as she could as easily have embodied the skimpy content of her letter in an affirmation, the only explanation for her failing to do so is that she did not want to subject herself to the penalties of perjury.[1]

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[1] "The statement of an attorney...when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit." (CPLR §2106: underlining added).

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".

"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).

5. As it is, Ms. Winters' May 15, 2009 letter warrants imposition of costs and sanctions under 22 NYCRR §130-1.1 and this Court's Rule 730.3(g)[2], as well as her referral to disciplinary, if not criminal, authorities pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct[3] – relief which I hereby request. This, because her letter (Exhibit A) and her May 12, 2009 non-party brief on my appeal #2009-148-WC, on which her letter relies are not only frivolous, but constitute fraud on this Court.

6. By her letter, Ms. Winters does not deny or dispute any of the facts on which my motion rests. Thus, she does not deny or dispute the deficiencies of the Clerk's Return on Appeal for #2009-148-WC, enumerated at ¶7 of my moving affidavit – or that the most prejudicial of these deficiencies is its omission of Mr. Sclafani's September 25, 2008 opposing affirmation, as specified at ¶¶9-11 of my affidavit.

7. Nor does she deny or dispute that my May 11, 2009 motion to this Court – like my September 18, 2008 motion in White Plains City Court – was made on advice of this Court's Clerk's Office, including Chief Clerk Kenny, as set forth at ¶¶3 and 6 of my affidavit.

8. Instead, Ms. Winters argues that my May 11, 2009 motion – as previously

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[2] "Any attorney or party to a civil appeal who, in the prosecution or defense thereof, engages in frivolous conduct as that term is defined in 22 NYCRR subpart 130-1.1(c), shall be subject to the imposition of such costs and/or sanctions as authorized by 22 NYCRR subpart 130-1 as the court may direct."

[3] "A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."

my September 18, 2008 motion – seeks "to compel the Chief Clerk [of White Plains City Court] to perform duties required by law" and that "This Court does not have jurisdiction over such a demand because it must be adjudicated in a C.P.L.R. article 78 proceeding brought in the Supreme Court." (underlining added). She then refers the Court to her May 12, 2009 non-party brief on behalf of Clerk Lupi in my appeal #2009-148-WC. According to Ms. Winters, her brief contains "a thorough discussion of this issue".

9. The purported "thorough discussion" is a two-page "Argument" (pp. 4-6) that is factually false, misleading, and irrelevant, with citations of law having nothing to do with the relationship between a court and its clerk's office, as here at issue. That relationship was highlighted by Point II of my appellant's brief (pp. 74-79), entitled:

> "White Plains City Court has Jurisdiction and Supervisory Responsibilities over its own Clerk and a Fair & Impartial Tribunal Would Have Granted the Relief Requested by Sassower's September 18, 2008 Motion",

which, referring to my October 10, 2008 affidavit in opposition to the Attorney General's cross-motion to dismiss my September 18, 2008 motion, stated:

> "As pointed out at ¶15 of [my] October 10, 2008 affidavit (Exhibit O), the Attorney General did not purport [in his cross-motion] that the City Court did not have jurisdiction over its own Clerk or that it could not order her compliance with the relief requested by [my] motion within this landlord-tenant proceeding. Nor did Judge Friia's October 14, 2008 decision make such claim in asserting that because the requested relief could be sought by way of Article 78, therefore 'The City Court is without jurisdiction to entertain respondent's application', citing CPLR §7804(b).[fn] Such is wholly inapplicable as [my] 'application' was not by Article 78 – nor did it have to be.
>
> A court has jurisdiction over its own clerk's office, which exists to serve it by handling its administrative needs and responsibilities. Indeed, it is a cause for discipline for a judge to fail 'to supervise his court clerk and otherwise administer the court in an appropriate manner, resulting in,

among other things, poor record keeping and poor case management', *Matter of McDonnell*, Determination of the NYS Commission on Judicial Conduct, February 5, 2009, at pp. 3, 7, citing §100.3(C) of the Chief Administrator's Rules Governing Judicial Conduct.[fn]

§100.3C(2) of the Chief Administrator's Rules Governing Judicial Conduct states:

> 'A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.'

[My] October 10, 2008 affidavit (Exhibit O) cited §100.3(C)(2) of the Chief Administrator's Rules in its ¶¶24-25 pertaining to the jurisdiction of White Plains City Court judges over Clerk Lupi." (my appellant's brief, pp. 75-76, underlining added).

10. Ms. Winters' non-party brief does not deny or dispute that "A court has jurisdiction over its own clerk's office, which exists to serve it by handling its administrative needs and responsibilities". Nor does her brief deny or dispute that Clerk Lupi is among the "staff, court officials, and others subject to [Judge Friia's] direction and control" and that my September 18, 2008 motion demonstrated the necessity that such "direction and control" be exercised.

11. Ms. Winters' apparent concession, by her letter (Exhibit A), that a proper Clerk's Return on Appeal is among the "duties" of the White Plains City Court Clerk "required by law" does not mean – as Ms. Winters' letter purports – that enforcement "must" be by "a C.P.L.R. article 78 proceeding brought in Supreme Court" and that "This Court does not have jurisdiction" by reason thereof – which is her sole basis for opposing my May 11, 2009 motion.

12. Likewise, the assertion in Ms. Winters' non-party brief (at p. 5) that mandamus, embodied by Article 78, "lies to compel the performance of a ministerial act enjoined by law" does not mean, as she there purports (at p. 5), that "A proceeding seeking that relief must be brought under Article 78 of the C.P.L.R." (underlining added). Ms. Winters' supporting citations, CPLR 7801 and *Matter of De Milio v. Borghard*, 55 NY2d 216, 219 (1982), do not stand for the proposition that Article 78 is an exclusive remedy, rather than an available one.[4]

13. Indeed, to purport – as Ms. Winters does – that the only way a court can enforce compliance by its clerk with the requirements of a Clerk's Return on Appeal is if a litigant goes to the effort and expense of initiating an Article 78 proceeding against the clerk – would render trial courts and this appeals court virtually incapable of protecting the appellate process from wayward clerks.

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[4] The Attorney General's position in White Plains City Court was that I had no Article 78 remedy – a fact concealed by both Ms. Winters' letter and non-party brief. Thus, in the Attorney General's cross-motion to dismiss my September 18, 2008 motion, it was claimed, under a title heading "The Motion Fails to State a Claim for Mandamus to Compel", that Article 78 was unavailable to me because my motion had "not provided any statutory or common law evidence showing that Patricia Lupi, as Chief Clerk of the City of White Plains, was required by law to perform any of the acts" (¶9); and "not provided any evidence that suffices to show that Patricia Lupi has a legal duty to perform any of the acts that were requested" (¶11).

I demonstrated that this was false by my October 10, 2008 opposing affidavit – and its "dispositive" nature was highlighted by my April 17, 2009 appellant's brief (at pp. 3-4) – for which reason I annexed the affidavit as Exhibit O to the compendium of exhibits accompanying my appellant's brief.

Ms. Winters' sole reference to that Exhibit O by her non-party brief (at pp. 4-5) is for purposes of deceitfully purporting that I was required to proceed by Article 78 because I there "argued that the Chief Clerk was required by law to produce the documents [I] requested" – concealing not only the context of my "argu[ment", which was to expose the Attorney General's falsehood that Article 78 was unavailable, but my showing that there was no jurisdictional bar to my proceeding by motion within the landlord/tenant proceeding, as I had done.

14. Conspicuously, Ms. Winters' non-party brief does not identify – nor deny or dispute – the assertion in my appellant's brief (at pp. vi, 1, 4, 74-75) that at issue are proper Clerk's Returns on Appeal and other documents and information essential to this Court's appellate review.

15. I have not as yet replied to Ms. Winter's May 12, 2009 non-party brief – other than by a May 26, 2009 letter to Clerk Kenny, with copies to Ms. Winters, Mr. Sclafani, and Doris Sassower (Exhibit C). In pertinent part, my letter states:

> "...the Attorney General's May 12, 2009 non-party brief, signed by Assistant Solicitor General Diana R.H. Winters, is based on flagrant falsification and omission of material facts. This requires either that Ms. Winters withdraw her non-party brief – as I am hereby demanding she do by copy of this letter to her – or that I be burdened with a reply brief lest her materially false and deceptive non-party brief mislead the Court.
>
> ...
>
> Absent her...withdrawing her non-party brief, as she is duty-bound to do because it is a fraud on this Court and itself *prima facie* proof that the Attorney General's representation of Clerk Lupi is contrary to 'the interest of the state', I will ask this Court for sanctions and costs against Ms. Winters and her superiors at the Solicitor General's Office, pursuant to this Court's Rule 730.3(g), and that it make disciplinary and criminal referrals of them, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.
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> Tellingly, Ms. Winters' May 12, 2009 non-party brief fails to include a certification pursuant to 22 NYCRR §130-1.1 that its content is not frivolous, unlike my April 17, 2009 appellant's brief which so-certifies." (Exhibit C, underlining and italics in the original).

16. I herein incorporate this May 26, 2009 letter (Exhibit C), as if fully set forth. Indeed, its illustrative example of the falsity of Ms. Winters' brief – *to wit*, her bald claim (at p. 4) that Clerk Lupi was "represented by the Attorney General under Executive Law §63(1)" in White Plains City Court – is germane to the THRESHOLD question as to

whether the Attorney General's representation of Clerk Lupi before this Court is lawful.

17. Ms. Winters' letter merely states:

> "I represent non-party respondent Patricia Lupi, the Chief Clerk of the City Court of the City of White Plains, in the above referenced appeal." (Exhibit A).

She makes no claim that the representation is consistent with law – or what that law might be.

18. Executive Law §63.1 requires that the Attorney General's participation in legal proceedings be predicated on "the interest of the state". In pertinent part, it reads:

> "The attorney-general shall:
>
> 1. Prosecute and defend all actions and proceedings in which the state is interested...in order to protect the interest of the state... No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant." (underlining added).

19. Where, as here, the Attorney General flagrantly falsifies and omits the material facts of the case, as by the Attorney General's cross-motion in White Plains City Court to dismiss my September 18, 2008 motion[5] and by Ms. Winters' May 12, 2009 non-party brief on appeal #2009-148-WC, such is *prima facie* evidence that the actual facts – and law to which they give rise – do not permit the representation.

20. Pursuant to Executive Law §63.1, it is I who was – and am – rightfully

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[5] The fraudulence of the Attorney General's cross-motion to dismiss was particularized, virtually line-by-line, by a 12-page analysis contained in my October 10, 2008 opposing affidavit, annexed as Exhibit O to the compendium of exhibits to my appellant's brief.

entitled to the Attorney General's representation &/or intervention. I requested such representation &/or intervention so as to uphold the interest of the state "in ensuring the integrity of court records and the proper functioning of the White Plains City Court Clerk's Office" by a September 29, 2008 letter to the Attorney General[6]– as to which, based on the F.O.I.L. evidence now before this Court by my May 26, 2009 letter (Exhibit C), there appears to have been no determination by the Attorney General's Office. Such requires responsive action by this Court THRESHOLD.

WHEREFORE, it is respectfully prayed that this Court, in addition to directing a proper Clerk's Return on Appeal, grant such "other and further relief" as imposition of costs and sanctions against Assistant Solicitor General Diana R.H. Winters and the Attorney General's Office, pursuant to 22 NYCRR §130-1.1 and this Court's Rule 730.3(g), as well as other "appropriate action" consistent with §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, such as their referral to disciplinary and criminal authorities for investigation and prosecution for their frivolous and fraudulent advocacy, in and of itself violative of Executive Law §63.1

ELENA RUTH SASSOWER

Sworn to before me this
28th day of May 2009

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

Notary Public

[6] This September 29, 2008 letter, which I placed before the White Plains City Court by my October 10, 2008 affidavit, annexed thereto as Exhibit N, is additionally part of Exhibit P-2 to my compendium of exhibits to my appellant's brief.

SUPREME COURT OF THE STATE OF NEW YORK
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JOHN McFADDEN,

Respondent

-against-

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Respondent,

ELENA SASSOWER,

Appellant.

Appellate Term Docket
#2009-148-WC

White Plains Index:
#SP 651/89
SP 2008-1474)

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

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