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

Petitioner,

Appellate Term Docket
2008-1427 WC

Index # SP 651/89
(# SP-2008-1474)

-against-

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents-Appellants.

Appellant's Memorandum of Law in Reply to Petitioner's Opposition to Appellant's August 13, 2008 Vacatur/Dismissal Motion & in Further Support of Appellant's Motion

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APPELLANT'S MEMORANDUM OF LAW

This memorandum of law is submitted in reply to the memorandum of law of Leonard Sclafani, Esq., attorney for petitioner John McFadden, opposing appellant's August 13, 2008 vacatur/dismissal motion. It is also submitted in further support of appellant's vacatur/dismissal motion, as well as for further sanctions and costs pursuant to 22 NYCRR §130-1.1 against Mr. McFadden and Mr. Sclafani, over and beyond the sanctions and costs that the vacatur/dismissal motion already seeks pursuant to 22 NYCRR §130-1.1.

As hereinafter demonstrated, Mr. Sclafani's opposing memorandum is, *from beginning to end*, legally unsupported and insupportable and, like Mr. McFadden's affidavit that accompanied it, rests on knowingly false and deceitful characterizations, instead of relevant facts. Both documents are properly defined as "fraudulent" and "frauds on the Court", designed to mislead the Court as to the material facts and law so that it will wrongfully deny appellant the relief to which she is entitled, *as a matter of law*.

So that there is no mistake as to the meaning of "fraud", it is defined by Black's Law Dictionary (7th ed., 1999) as:

> "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is willful) it may be a crime."

"Fraud on the court" is defined as:

> "A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding."

Such conduct reinforces that Mr. McFadden has no defense, in fact or law, to appellant's vacatur/dismissal motion – or to the appeal it is designed to obviate. As the treatises

recognize:

> "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secundum, Vol. 31A, 166 (1996 ed., p. 339).
>
> "It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." II John Henry Wigmore, Evidence §278 at 133 (1979).

* * *

Mr. Sclafani begins his memorandum of law by reciting (at pp. 2-3) six grounds on which appellant's vacatur/dismissal motion "must be denied", thereupon elaborating these in four POINTS. All four are frivolous, with three being fraudulent.

MR. SCLAFANI'S POINT I IS MORE THAN FRIVOLOUS, IT IS FRAUDULENT

Mr. Sclafani's Point I (pp. 3-11), entitled "Ms. Sassower's Motion is Procedurally Defective", contains his first two grounds for denying the motion: "it is procedurally defective" and "it raises issues not properly before this Court and/or outside the scope of its subject matter jurisdiction" (at p. 2).

Asserting (at pp. 3-4) that that the "scope of subject matter jurisdiction" of this Court is set forth in "New York Court Rules §730.1" – by which he means 22 NYCRR §730.1 – Mr. Sclafani quotes its subdivision (d) for the proposition that the Appellate Term has "jurisdiction to hear and determine all appeals...". He thereupon implies either that the Court has no jurisdiction to hear motions or that it has none to hear motions for the relief I am

seeking or which he purports I am seeking. In so doing, Mr. Sclafani not only ignores subdivision (f) of §730.1, requiring that motions addressed to the Appellate Term be made returnable in the Clerk's Office at Livingston Street, but disregards 22 NYCRR §732.7, a provision he identifies two pages later as "New York Rules of Court §731.7" stating that it "governs the making of motions before the Appellate Term". Neither 22 NYCRR §730.1 nor §732.7 contain any restriction as to the relief that may be requested by motion.

Plainly, the Court's power to hear and determine "all appeals..." encompasses its power to hear and determine all motions incident thereto, whose relief it may grant in "just and proper" circumstances. Such exists at bar, where the issues are those of fraud concealing a lack of subject matter jurisdiction. Mr. Sclafani provides NO caselaw to the contrary.

Insofar as Mr. Sclafani purports (at p. 4) that the Court has no jurisdiction to refer a judge or counsel for disciplinary and criminal prosecution "based upon alleged acts before a lower court" or to seek "money damages and/or sanctions against counsel for one's adversary in a lower court proceeding pursuant to 22 NYCRR §130-1.1 et seq." (underlining added), such is knowingly false and deceitful.

Firstly, the misconduct of Mr. McFadden and Mr. Sclafani that elicited appellant's August 13, 2008 motion was committed in this court by their filing of Mr. McFadden's perjurious, indeed fraudulent, August 8, 2008 affidavit in opposition to appellant's July 30, 2008 stay pending appeal, presumably drafted by Mr. Sclafani. Such precipitating conduct is identified at ¶4 of appellant's August 13, 2008 affidavit and focally detailed by her affidavit.

Secondly, other than his materially incomplete citation to and quotation of 22 NYCRR §730.1, Mr. Sclafani not only fails to provide any legal authority for the proposition that this Court has no jurisdiction with respect to misconduct committed in the lower court,

but fails to confront the legal authority invoked by appellant's August 13, 2008 notice of motion, beginning with §100.3(D) of the Chief Administrator's Rules Governing Judicial Conduct. Such requires that when judges receive "information indicating a substantial likelihood" that other judges and lawyers have engaged in conduct violating rules of professional responsibility, they "shall take appropriate action". This mandatory direction neither restricts the nature of the "appropriate action" nor the venue of the violations.

As for Mr. Sclafani's claim (at p. 4) that there is "no authority vesting in the Appellate Term to hear and decide a motion to vacate a petition filed in a holdover summary proceeding in the City Court of White Plains pursuant to CPLR §§3211(a)(1) and 3212b)"—leaving out CPLR §3211(a)(2) "the court has no subject matter of the cause of action" — this Court has general authority to hear motions and Mr. McFadden's Petition is no longer in City Court, but has culminated in a July 3, 2008 decision & order and July 21, 2008 judgment of eviction and warrant of removal, which are before this Court on appeal.

Mr. Sclafani then asserts (at pp. 5-11) that although CPLR §5704 gives the Court authority to address appellant's July 18, 2008 order to show cause, it should not consider her vacatur/dismissal motion pursuant thereto, or, if it does, that it must deny the motion as "procedurally defective for a number of reasons". He sets forth four:

(1) that appellant has not included a copy of her notice of appeal with her motion papers, as required by "New York Rules of Court §731.7"—presumably meaning 22 NYCRR §732.7.

This is frivolous. Appellant's notice of appeal is Exhibit A-1 to her July 30, 2008 order to show cause, which is integrally part of her vacatur/dismissal motion and before the Court in conjunction therewith – a fact Mr. Sclafani ignores. Further, as set forth by ¶5 of

appellant's August 13, 2008 affidavit, her notice of motion was optional, as this Court's form order to show cause, which appellant submitted and Justice McCabe signed, provides for "other and further relief...as may be deemed just and proper", thereby empowering the Court to grant such appropriate relief without her making a motion therefore. Likewise, this is ignored by Mr. Sclafani.

(2) that appellant has not cited CPLR §5704 as the basis for her vacatur/dismissal motion, which, in part, seeks relief that purportedly "would not be available to her and that this Court lacks jurisdiction to grant 'under that Statute'". Mr. Sclafani identifies this relief as requests in appellant's vacatur/dismissal motion which were not also requested by her July 18, 2008 order to show cause that Judge Friia had refused to sign, *to wit*, assessment of damages pursuant to Judiciary Law §487(1); referring Mr. McFadden and Mr. Sclafani for disciplinary and criminal investigation, as well as Judge Friia, and dismissal of Mr. McFadden's Petition pursuant to CPLR §§3211(a)(1) and (2) and CPLR §3212(b).

This is frivolous. As hereinabove set forth, all the relief requested by appellant's vacatur/dismissal motion is "available" to her from this Court. No resort to CPLR §5704 is necessary. Moreover, as the Court is empowered to grant "such other and further relief...as may be deemed just and proper", it may freely rely on its express authority under CPLR §5704 to grant appellant's July 18, 2008 order to show which Judge Friia refused to sign.

(3) that "Ms. Sassower's moving papers are improper" because "If, in fact she filed any supporting papers at all with her Notice of Motion", they would be the papers she filed on August 13, 2008 in support of her order to show cause for a stay pending appeal, *to wit*, her August 13, 2008 affidavit and July 18, 2008 order to show cause and these "for the most part,...address that motion and Mr. McFadden's opposition to it, and not Ms. Sassower's

pending motion. See also footnote '1' above."

This is not just frivolous, it is a two-fold deceit. First, there is no question as to the papers filed with appellant's August 13, 2008 notice of motion, as they were stated on its face and Mr. Sclafani acknowledges their receipt, including by his "footnote '1' above". Second, her August 13, 2008 affidavit and July 18, 2008 order to show cause do "address" her vacatur/dismissal motion. Indeed, they so conclusively substantiate it that Mr. McFadden's opposition does not identify or confront ANY of the facts they present, but rather engages in such fraudulent claims as his cited "footnote '1' above", whose knowing falsity is detailed by ¶¶8-11 of appellant's accompanying affidavit.

(4) that –

> "The content of Ms. Sassower's papers are nothing short of scandalous and defamatory and must be stricken. They consist almost entirely of unwarranted personal attacks against Mr. McFadden, his counsel, City Court Judge Friia, City Court Judge Hansbury, and each clerk of the White Plains City Court who, at any time, had occasion to cross paths with Ms. Sassower."

This is outright fraud on the Court, evident from Mr. Sclafani's failure to identify even a single instance of the supposed "unwarranted personal attacks" that "almost entirely" fill appellant's papers. Instead, he fills his nearly 3 pages pertaining to the purported "virulent insult and gratuitous defamation" of appellant's vacatur/dismissal motion by impugning appellant's conduct in "the underlying litigation, and other tangentially related litigations before the White Plains city Court and the federal courts". This is ALL irrelevant to the motion – and would <u>also</u> be irrelevant even if true, which it is not.

Among Mr. Sclafani's inflammatory and deceitful characterizations, designed to mislead the Court, is an assertion of seeming fact, which is materially false. Thus, at the top of page 10 he states:

> "Indeed, Ms. Sassower's entire claim of right to occupy Mr. McFadden's coop apartment derives from her claim that the entire Board of Managers of the Coop Corporation in which the apartment is situated discriminated against her on the grounds that she and her mother were single Jewish women, which claim Ms. Sassower continues to make in the instant litigation despite a contrary unanimous verdict of a jury of the U.S. District Court for the Eastern District of New York, following which Ms. Sassower was sanctioned for the frivolity of her claims and the outrageous manner in which she litigated them." (underlining added).

Mr. Sclafani cites no record reference as to where "in the instant litigation" appellant "continues" to make a claim that she is being discriminated against by the Co-Op—and there is NONE. Indeed, such knowing falsehood by Mr. Sclafani, replicating similar deceit by Mr. McFadden[1], is documentarily established by appellant's August 20, 2007 Answer to Mr. McFadden's Petition in #1502/07, which Mr. McFadden's opposing affidavit annexes as its Exhibit V. Its Ninth Affirmative Defense ("Breach of Covenant of Good Faith & Fair Dealing") begins as follows:

> "FORTIETH: From April 2003, petitioner knew that respondent believed that the Co-Op board would approve her purchase of the apartment upon her resubmission of the contract of sale (Exhibit D-1). With his knowledge, she made inquiries of the Co-Op board as to whether she might be approved for the apartment purchase – and received an encouraging response (Exhibit D-2)." (underlining added);

Appellant's belief that the Co-Op would approve the purchase and her readiness to proceed to renegotiate and submit the contract of sale are also embodied in her Second Counterclaim ("Fraud from April 2003 Onward & Extortion") and her Third Counterclaim ("Fraud & Intimidation in June 2006, Retaliatory Eviction").

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[1] Mr. McFadden's affidavit falsely purports at ¶97 that in the proceeding under #1502/07 "Ms. Sassower also continued to claim, as she does on her motion before this Court, and despite the outcomes in her federal litigation: that she has been discriminated against by the Coop..." (underlining added).

MR. SCLAFANI'S POINT II IS FRIVOLOUS

Mr. Sclafani's Point II (p. 11), entitled "Ms. Sassower's Claims and Arguments are Duplicative of Claims Made by Her that are Presently Pending Before this Court"" consists of his third and fourth grounds for denying the motion (at pp. 2-3):

> "it raises matters already the subject of Ms. Sassower's appeal of the City Court's July 3, 2008 decision and order; indeed, it subsumes the appeal";

and

> "it raises issues and presents arguments that are already sub judice before this Court in the context of the application made by Ms. Sassower for a stay of enforcement of the City Court's July 3, 2008 decision and order and the judgment of possession and warrant of eviction that was issued by the City Court as directed in the said decision and order".

Such is frivolous. Aside from the fact that appellant's July 30, 2008 order to show cause for a stay pending appeal is not "already sub judice" – as these are the reply papers in further support thereof – Mr. Sclafani presents no legal basis for why a vacatur/dismissal motion which not only "subsumes the appeal", but obviates it and the necessity of a stay pending appeal, is not in the interest of all concerned. It plainly is – except if Mr. Sclafani's true motive is to rack up avoidable counsel fees from his clients for a superfluous appeal or to harass appellant by the burden and expense of appeal.

MR. SCLAFANI'S POINT III IS MORE THAN FRIVOLOUS, IT IS FRAUDULENT

Mr. Sclafani's Point III (pp. 12-15), entitled "The Doctrines of Res Judicata, Collateral Estoppel and Issue Preclusion Require that This Court Deny Ms. Sassower's Motion", contains his fifth ground for denying appellant's vacatur/dismissal motion:

> "it raises issues, presents arguments and seeks relief that Ms. Sassower is barred from making, presenting and/or obtaining under the doctrines of res judicata, collateral estoppel and issue preclusion" (at p. 3).

Mr. Sclafani presents NO LAW – and there is NONE, as res judicata, collateral estoppel, and issue preclusion are wholly inapplicable to the facts of this case, which Mr. Sclafani conceals. Manifesting this concealment is his false pretense that Mr. McFadden's affidavit has set forth that

> "each of the claims and arguments made by Ms. Sassower...have each been considered and rejected by the White Plains City Court and/or the federal courts and denied on the merits."

for which he presents a list of what he purports to be appellant's already "considered and rejected" "claims and arguments" as set forth by Mr. McFadden's affidavit. The misleading and deceitful nature of this list is best seen by comparing it with the specific "claims and arguments" constituting the actual basis of appellant's vacatur/dismissal motion. These are stated at ¶¶6 and 12 of her August 13, 2008 affidavit.

¶6 of appellant's August 13, 2008 affidavit presents her five specific "claims and arguments" relating to "Fraud, Misrepresentation and other misconduct of an adverse party". The first three of these are:

> **"A.** The warrant of removal, signed by Judge Friia on July 21, 2008 (Exhibit C-2) without change from the proposed warrant of removal of petitioner's counsel, completely falsifies the allegations of petitioner's March 27, 1989 Petition (Exhibit B). COMPARE.
>
> **B.** The warrant of removal, signed by Judge Friia on July 21, 2008 (Exhibit C-2) without change from the proposed warrant of removal of petitioner's counsel, materially alters the Petition's caption (Exhibit B), concealing respondents' jurisdictional objection based on improper service upon respondent Doris Sassower. COMPARE.
>
> **C:** The judgment of eviction, signed by Judge Friia on July 21, 2008 (Exhibit C-1), without change from the proposed judgment of eviction of petitioner's counsel, materially diverges from her July 3, 2008 decision & order (Exhibit A-2), including by (i) changing the caption; (ii) falsely making it appear that respondents filed no Answer

> to the Petition; (iii) falsely making it appear that Judge Friia has continuity with #651/89, from its beginning; and (iv) falsely making it appear that Judge Friia's knowledge that is the basis for her deciding petitioner's November 25, 1991 summary judgment motion derives from this proceeding, rather than the separate proceeding, *John McFadden v. Elena Sassower*, #1502/07. COMPARE." (underlining and capitalization in the original)

Mr. McFadden's affidavit mentions the warrant of removal and judgment of eviction at ¶¶87 and 106, without identifying appellant's "claims and arguments" with respect thereto, which he nowhere denies or disputes. Nor does he assert that these "claims and arguments" ever were "considered and rejected", which they were not. The first time appellant ever presented them to any tribunal was by her July 30, 2008 order to show cause, signed by Justice McCabe. Consequently, there is not the slightest factual basis for res judicata, collateral estoppel, or issue preclusion as to any of these three never before presented "claims and arguments".

The fourth of appellant's "claims and arguments" under the rubric "Fraud, Misrepresentation and other misconduct of an adverse party", specified at ¶6 of appellant's August 13, 2008 affidavit, is:

> **"D.** Petitioner's November 25, 1991 summary judgment motion was <u>legally insufficient and deceitful</u> in failing to annex his March 27, 1989 Petition (Exhibit B) and by materially misrepresenting its allegations and the status of the proceeding."

Mr. McFadden's affidavit mentions his November 25, 1991 summary judgment motion only at his ¶¶65-66 – and without identifying appellant's "claims and arguments" pertaining thereto, which he nowhere denies or disputes. Nor does he assert that these "claims and arguments", as specified by ¶6 of appellant's August 13, 2008 affidavit, ever were "considered and rejected", which they were not. The first time appellant ever presented them

to any tribunal was by her July 18, 2008 order to show cause, whose ¶12 expressly identified them as not previously presented, as well as the reason therefore, in support of renewal of Judge Friia's July 3, 2008 decision & order pursuant to CPLR §2221. ¶76 of the order to show cause then specified eight respects in which Mr. McFadden's supporting affidavit to his November 25, 1991 summary judgment motion was "insufficient and fashioned on falsehood and deceit", asserting that Judge Friia would have discerned as much as she actually done a *de novo* review of Mr. McFadden's motion. Judge Friia refused to sign the order to show cause. Consequently, there is not the slightest factual basis for res judicata, collateral estoppel, or issue preclusion as to this "claim and argument".

The fifth of appellant's five "claims and arguments" at ¶6 of her August 13, 2008 affidavit under the rubric "Fraud, Misrepresentation and other misconduct of an adverse party" is:

> **"E.** Petitioner's March 27, 1989 Petition (Exhibit B) is a verifiable fraud, established as such by the October 30, 1987 occupancy agreement, contract of sale, and August 1988 complaint in the federal action, all part of the record herein – barring summary judgment to petitioner, *as a matter of law*."

Mr. McFadden's affidavit mentions his Petition at ¶32, but not appellant's "claim and argument" with respect thereto as set forth at ¶6 of her August 13, 2008 affidavit – the accuracy of which he nowhere denies or disputes. Nor does he assert that such "claim and argument" were ever "considered and rejected", which they were not. The first time appellant challenged Mr. McFadden's March 27, 1989 Petition as a "readily-verifiable fraud" and asserted that it barred summary judgment to him, *as a matter of law*, was at ¶¶25, 73, 76, 91 by her July 18, 2008 order to show cause, which Judge Friia refused to sign. Consequently, there is not the slightest factual basis for res judicata, collateral estoppel, or

issue preclusion as to this "claim and argument".

¶12 of appellant's August 13, 2008 affidavit specifies her "claims and arguments" based on lack of subject matter jurisdiction, as follows:

> **"B. There is no landlord-tenant relationship between the parties.** Contrary to petitioner's March 27, 1989 Petition purporting that respondents 'entered in possession [of the subject premises] under a month to month rental agreement' on no specified date, for no specified 'rent', with no copy of this purported 'rental agreement' annexed (Exhibit B), respondents 'entered in possession' of the subject premises under an October 30, 1987 written occupancy agreement, which was part of a contract of sale, denominating the parties as 'Sellers' and 'Purchasers' and expressly stating 'in no way do the parties intend to establish a landlord/tenant relationship'...." (bold and underlining in the original).

Mr. McFadden's affidavit concedes, by his ¶11, that respondents entered in possession of the subject premises under the occupancy agreement that was part of a contract of sale, but conceals its language "in no way do the parties intend to establish a landlord/tenant relationship" and that respondents' April 24, 1989 motion to dismiss his Petition for lack of subject matter jurisdiction was based on that language.[2] Indeed, because such language is dispositive, his affidavit's ¶¶39-46 do not identify or discuss how Judge Reap's September 18, 1989 decision denied dismissal of his Petition based thereon. Nor do his affidavit's ¶¶23-29 identify or discuss how Judge Reap's January 25, 1989 "Consolidated Decisions" had denied dismissal of his identical Petition in #504/88 based on that language. Instead, his affidavit baldly purports that these decisions became binding because respondents failed to

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[2] As noted at footnote 9 of appellant's accompanying affidavit, the Court's copy of respondent's April 24, 1989 motion, annexed to Mr. McFadden's affidavit as Exhibit C, may be missing pages. This includes the second and third page of the supporting affirmation pertaining to the City Court's lack of subject matter jurisdiction by reason of this language of the occupancy agreement disavowing a landlord/tenant relationship.

perfect their appeal from the January 25, 1989 decision and did not appeal the September 18, 1989 decision. This is echoed by Mr. Sclafani, who asserts:

> "Moreover, because appeals taken by Ms. Sassower from the decisions that rejected Ms. Sassower's said arguments were either decided against her or were abandoned by her on appeal, those decisions rejecting her claims are final decisions, as a result of which Ms. Sassower is barred on her motion herein from relitigating the claims and arguments so decided, and from obtaining the relief so denied to her, under the doctrines of res judicata, collateral estoppel, and issue preclusion." (at pp. 12-13).

This is a further deceit. The only appeals "decided against [appellant]" were in the federal litigation, where the language of the occupancy agreement disavowing a landlord/tenant relationship was never at issue – and never determined. As for her not perfecting the appeal from Judge Reap's January 25, 1989 decision, such does not give rise to res judicata, collateral estoppel, or issue preclusion for numerous reasons. These are particularized by ¶¶34-39 of appellant's accompanying affidavit, whose footnotes 7, 13, 16, 18, and 19 contain citations of law establishing the inapplicability of res judicata, collateral estoppel, or issue preclusion. In the interest of economy, these are expressly incorporated herein by reference – as they put to establish that none of Judge Reap's decisions can or do support res judicata, collateral estoppel, or issue preclusion.

The balance of Mr. Sclafani's Point III (at pp. 13-15) rests on the deceit that appellant's July 18, 2008 order to show cause – as likewise its appended July 8, 2008 order to show cause – each repeated "claims and arguments" that had been previously "considered and rejected", thereby both justifying Judge Friia's refusals to sign them and her fraudulent notations in so doing, as well as his pretense that res judicata, collateral estoppel, and issue preclusions apply. Such essentially replicates ¶¶108-116 of Mr. McFadden's affidavit, whose fraudulence is demonstrated by ¶¶22-33 of appellant's accompanying affidavit. Here, too, in

the interest of economy, these paragraphs from appellant's affidavit are expressly incorporated herein by reference.

MR. SCLAFANI'S POINT IV IS MORE THAN FRIVOLOUS, IT IS FRAUDULENT

Mr. Sclafani's one-paragraph Point IV (p. 15), entitled "Ms. Sassower's Motion is Patently Frivolous", consists of his sixth ground for denying appellants' vacatur/dismissal motion: "Ms. Sassower's motion and the claims and arguments offered therein are substantively meritless" (at p. 3).

The entirety of what Mr. Sclafani has to say is as follows:

> "It is respectfully submitted that Ms. Sassower's arguments and legal and factual analysis defy logic and rationality. They are so patently frivolous as to require no case and verse response. Mr. McFadden rejects and opposes each of Ms. Sassower's claims and statements based upon the objective facts and evidence set forth in his accompanying affidavit." (at p. 15).

This is a brazen fraud upon the Court, demonstrative of Mr. Sclafani's contempt for it, the rule of law, and his obligations as an officer of the Court. Such is established, resoundingly, by this memorandum of law and by appellant's accompanying affidavit, reinforcing her entitlement to ALL the relief sought by her August 13, 2008 vacatur/dismissal motion.

APPELLANT'S ENTITLEMENT TO THE VACATUR/DISMISSAL RELIEF SOUGHT BY HER AUGUST 13, 2008 MOTION

Although the affidavit is "the foremost source of proof on motions", Siegel, New York Practice, §205 (1999 ed., p. 324) – and in dismissal and summary judgment motions it is "the primary source of proof", Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, C3211:43 (1992 ed., p. 60), Siegel, New York Practice, §281 (1999 ed., p. 442) – appellant's vacatur/dismissal motion does NOT rest on affidavit assertions, but on

the irrefutable documentary proof the affidavits annex, entitling dismissal under CPLR §3211(a)(1): "a defense is founded upon documentary evidence" and summary judgment as "a matter of law" pursuant to CPLR §3212(b), both embracing dismissal pursuant to CPLR §3211(a)(2) "the court has not jurisdiction of the subject matter of the cause of action". Additionally, this documentary proof supports relief under CPLR §5015(a)(3): "fraud, misrepresentation, or other misconduct of an adverse party" and under CPLR §5015(a)(4): "lack of jurisdiction to render the judgment or order" – relief "The court which rendered [the] judgment or order" wrongfully refused to entertain upon being presented with a motion, making same reviewable pursuant to CPLR §5704, cited by Mr. Sclafani.

The irrefutable documentary proof now before this Court, dispositive of the vacatur/dismissal relief sought by motion and the appeal it is intended to obviate, consists of:

(1) Judge Friia's July 3, 2008 decision & order – annexed as Exhibit A-2 to appellant's July 30, 2008 order to show cause for a stay pending appeal;

(2) Judge Friia's July 21, 2008 judgment of eviction, signed unchanged from the draft submitted by Mr. Sclafani – annexed as Exhibit C-1 to appellant's July 30, 2008 order to show cause for a stay;

(3) Judge Friia's July 21, 2008 warrant of removal, signed unchanged from the draft submitted by Mr. Sclafani – annexed as Exhibit C-2 to appellant's July 30, 2008 order to show cause for a stay;

(4) Mr. McFadden's March 27, 1989 Petition – annexed as Exhibit B to appellant's July 30, 2008 order to show cause for a stay AND as Exhibit A-1 to appellant's August 13, 2008 affidavit;

(5) the October 30, 1987 contract of sale and occupancy agreement – annexed as Exhibit A to Mr. McFadden's August 8, 2008 affidavit AND, again, as Exhibit A to Mr. McFadden's August 18, 2008 affidavit;

(6) the August 1988 complaint in the federal action in which Mr. McFadden was a co-plaintiff – annexed as Exhibit F to appellant's accompanying September 2, 2008 affidavit;

(7) Mr. McFadden's November 25, 1991 summary judgment motion – annexed as Exhibit N to his August 8, 2008 affidavit AND, again, as Exhibit N to his August 18, 2008 affidavit.

Mr. McFadden's affidavit completely fails to confront ANY of this documentary evidence – and Mr. Sclafani has provided no affirmation in justification of his proposed judgment of eviction and warrant of removal, which he presented to Judge Friia for signature and which she signed unchanged. Instead, they have each inundated the Court – Mr. McFadden, by his affidavit, and Mr. Sclafani, by his memorandum of law – with a torrent of conclusory and inflammatory characterizations of the record, appellant and her family, which are again, and again, and again, materially false and knowingly so.

The standards governing dismissal and summary judgment motions – as at bar – are known to Mr. McFadden and Mr. Sclafani. Appellant set them forth, repeatedly, in the record of #1502/07, to support her entitlement to dismissal of Mr. McFadden's diametrically-conflicting Petition therein[3] and to summary judgment on her Counterclaims. The following is taken essentially *verbatim* from appellant's previous presentations[4]:

"An affidavit must state the truth, and 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); Corpus Juris Secundum, Vol. 2A, § 47 (1972 ed., p. 487). "False swearing in either an affidavit or CPLR 2106 affirmation constitutes perjury under Chapter 210 of the Penal Law", Siegel, New York Practice, §205 (1999 ed., p. 325).

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[3] Annexed as Exhibit A-4 to appellant's August 13, 2008 affidavit.

[4] See, appellant's September 5, 2007 cross-motion (fn. 3); appellant's September 11, 2007 affidavit (¶¶10-15); appellant's November 9, 2007 order to show cause (¶16); appellant's November 26, 2007 affidavit (¶9).

In *Zuckerman v. City of N.Y*, 49 NY2d 557 (1980), our highest state court articulated the strict requirements on summary judgment motions:

> "To obtain summary judgment it is necessary that the movant establish his cause of action... 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally, if the opponent is to succeed in defeating a summary judgment motion, he must make his showing by producing evidentiary proof in admissible form... We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form...or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions...or unsubstantiated allegations or assertions are insufficient" (*Alvord v. Swift & Muller Constr. Co.,* 46 NY2d 276, 281-282; *Fried v. Bower & Gardner*, 46 NY2d 765, 767; *Platzman v. American Totalisator Co.*, 45 NY2d 910, 912; *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290)." at 562

"[T]he basic rule followed by the courts is that general conclusory allegations, whether of fact or law, cannot defeat a motion for summary judgment where the movant's papers make out a prima facie basis for the grant of the motion", Vol. 6B, Carmody-Wait 2d, §39:66 (1996 ed., p. 219). "A party opposing a motion for summary judgment cannot rely on mere denials, either general or specific...it is not enough for the opponent to deny the movant's presentation. He must state his version and he must do so in evidentiary form." *Id.* §39:56 (pp. 163-4). The party seeking to defeat summary judgment "must avoid mere conclusory allegations and come forward to lay bare his proof...", Siegel, New York Practice §281 (1999 ed., p. 442). "[M]ere general allegations will not suffice", Vol. 6B Carmody-Wait 2d §39:52 (1996 ed., p. 157). "[T]he burden is on the opposing party to rebut the evidentiary facts and to present evidence showing that there exists a triable issue of fact. Such party must assemble, lay bare, and reveal his proofs...some evidentiary proofs are required to be put

forward", *Id.*, §39:53 (pp.159-60); *Stainless, Inc. v. Employers Fire Ins. Co.*, 418 NYS2d 76, *affd.* 49 NY2d 924, as well as Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16).

Failing to respond to a fact attested in the moving papers...will be deemed to admit it", Siegel, New York Practice, §281 (1999 ed., p. 442) -- citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975), itself citing *Laye v. Shepard*, 265 N.Y.S.2d 142 (1965), aff'd 267 N.Y.S.2d 477 (1st Dept. 1966) and Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it" *id.* (1992 ed., p. 324). "[I]f answering affidavits are not produced, the facts alleged in the movant's affidavits will usually be taken as true", 2 Carmody-Wait §8:52 (1994 ed., p. 353). Where answering affidavits are produced, they "should meet traversable allegations" of the moving affidavit. "Undenied allegations will be deemed to be admitted, *id*, citing *Whitmore v. J. Jungman, Inc.*, 129 NYS 776, 777 (S.Ct., NY Co. 1911).

Additionally, relevant is *Ellen v. Lauer*, 620 N.Y.S.2d 34 (1st Dept., 1994) – cited in 6B Carmody-Wait 2d (1996) §39:54 (at p. 161):

> "A court reviewing a motion for summary judgment will tend to construe the facts 'in a light most favorable to the one moved against, but this normal rule of summary judgment will not be applied if the opposition is evasive, indirect, or coy.'", citing *Siegel*, New York Practice §281 and *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 170 A.D.2d 108, 573 N.Y.S.2d 981 (1st Dept. 1991), *aff'd* 80 N.Y.2d 377, 590 N.Y.S. 831.

Additionally, and as also set forth at the outset of this memorandum of law:

> "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secundum, Vol. 31A, 166 (1996 ed., p. 339).

> "It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." II John Henry Wigmore, Evidence §278 at 133 (1979).

By these blackletter, rudimentary standards, appellant's entitlement to the dismissal/summary judgment relief sought by her motion is, *as a matter of law*. Indeed, it is evident from the law that Mr. Sclafani's proposed warrant of removal, signed unchanged by Judge Friia, was not in conformity with RPAPL §749, in that it was not "directed to the marshal of the city" and deviates dramatically in content from the forms for warrants, as these do not include information as to the course of the proceedings, including the content of the petition (NY CLS RPAPL §749 (Matthew Bender/LexisNexis, 2008, p. 23); Rausch's Landlord & Tenant , §46.5: Form of Warrant;).

Mr. Sclafani's proposed judgment of eviction, signed unchanged by Judge Friia, also deviates dramatically from the form for judgments in NY CLS RPAPL §747 (Matthew Bender/LexisNexis, 2008, pp. 19-20) that recite "the grounds for the proceeding" as appearing in the petition, whether an answer was filed, and, if so, "the nature of the issue raised". Likewise, it dramatically deviates from the forms in Rausch's Landlord & Tenant (§45.16: Forms of Decision and Judgment) for a "Tenant holding over" – as purportedly at bar – which recite the date on which the petitioner leased the premises, the period of the lease, and that it was under this agreement that the tenant "entered into possession".

More than 90 years ago, in *Lamphere v. Lang,* 213 N.Y. 585, 588; 108 N.E. 82 (1915), the Court of Appeals stated:

> "The law on the subject is clear. 'Pleadings and a distinct issue are essential to every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose.' (*Romeyn* v. *Sickles*, 108 N. Y. 650, 652.) 'The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, '*secundum allegata et probata*,' is fundamental in the administration of justice. Any substantial departure from this rule is sure to produce surprise, confusion and injustice." (*Day* v. *Town of New Lots*, 107 N. Y. 148, 154; *Northam* v. *Dutchess Co. Mut. Ins. Co.*, 177 N. Y. 73.)" Also quoted in *Cohen v. City Company of New York et al.*, 283 N.Y. 112, 117; 27 N.E.2d 803 (1940)

A similar statement of the law, even more relevant, appears in *Gordon v. Ellenville and Kingston Railroad Company*, 119 A.D. 797, 802; 104 N.Y.S. 702 (Appellate Division, 3rd Dept., 1907):

> "...to permit a recovery would be to allow the plaintiff to allege one cause of action and recover upon another. The effect would be not only to change the action from one cause to another and different ground of action, but it would authorize a recovery upon evidence which disproves the cause of action alleged in the complaint."

That is precisely what has happened here. The warrant of removal predicates recovery on a petition alleging that "on or abut the 30th day of October, 1987", Mr. McFadden granted possession of the subject premises to respondents "under a written occupancy agreement incident to a contract of sale". This "disproves the cause of action alleged in the [actual Petition]", *to wit*, that respondents "entered in possession...under a month to month rental agreement", on no specified date and for no specified rent.

"The burden of proving jurisdiction rests with the party asserting it. *Preferred Electric & Wire Corp. v. Duracraft Products, Inc.,* 114 AD2d 407, 494 N.Y.S.2d 131 (2d Dept. 1985)", *Certain Underwriters at Lloyd's of London v Bellettieri, Fonte & Laudonio, P.C.*, 19

Misc. 3d 1136A (Westchester Co. Supreme Court/Justice Scheinkman 2008). Mr. McFadden never met that burden. His Petition contained none of the requisite substantiating details about the "month to month rental agreement" by which he respondents allegedly "entered in possession" of the subject premises and was insufficient on its face, in addition to being a flagrant fraud concocted to bootstrap jurisdiction, which Mr. McFadden knew he did not have by reason of the contract of sale and express language of the occupancy agreement, which his Petition dishonestly concealed.

APPELLANT'S ENTITLEMENT TO THE "OTHER AND FURTHER RELIEF" SPECIFIED BY HER AUGUST 13, 2008 MOTION: DISCIPLINARY & CRIMINAL REFERRALS, MONETARY SANCTIONS & COSTS, & DAMAGES

Appellant's August 13, 2008 motion specifies "other and further relief" – whose purpose is stated by ¶4 of her August 13, 2008 affidavit as "to further protect the integrity of the judicial process". Such consists of (a) referring Mr. McFadden and Mr. Sclafani for disciplinary and criminal investigation, as likewise, Judge Friia, consistent with this Court's mandatory "Disciplinary Responsibilities" under §100.3(D) of the Chief Administrator's Rules Governing Judicial Conduct; (b) imposing monetary sanctions and costs upon Mr. McFadden and Mr. Sclafani for litigation misconduct proscribed by 22 NYCRR §130-1.1 *et seq.*, and; (c) assessing damages against Mr. Sclafani for deceit and collusion proscribed under Judiciary Law §487(1) as a misdemeanor and entitling respondents to treble damages.

These legal provisions are known to Mr. McFadden and Mr. Sclafani. Appellant set them forth, repeatedly, in the record of #1502/07 so that she – and the judicial process – might be protected from the perjury and deceit pervading each of their submissions,

beginning with the Petition therein[5]. The following is taken essentially *verbatim* from appellant's previous presentations[6]:

22 NYCRR §130-1.1 *et seq.* requires that all papers filed or submitted to the Court must be signed. Such signature

> "certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper of the contentions therein are not frivolous as defined in subsection (c) of the section 130-1.1"

Pursuant to that subsection, conduct is "frivolous" if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."

Mr. McFadden's affidavit and Mr. Sclafani's memorandum of law, each signed, meet all three definitions of frivolous. As demonstrated herein and by appellant's accompanying affidavit, these documents put forward scores of "material factual statements that are false", are almost entirely unsupported by law, advance no "reasonable argument" with respect thereto, and are interposed to delay and prolong this litigation by requiring a needless appeal, to which – as evident from their submissions on the motion -- they will have no defense.

Yet, their signed legal papers are not merely "frivolous". Over and again, they are "fraudulent" and a "fraud on the court" – as those terms are defined by Black's Law

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[5] Such Petition, identified by ¶21 of my August 13, 2008 affidavit as "diametrically conflicting" with the Petition herein, is annexed thereto as Exhibit A-4.

[6] See, *inter alia*, appellant's September 5, 2007 cross-motion (¶¶185, 187-189); appellant's November 26, 2007 affidavit (fn. 4).

Dictionary (7th ed. 1999) and New York's Disciplinary Rules of the Code of Professional Responsibility. The Code's definitions section specifies "fraud" as involving:

> "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another", 22 NYCRR §1200.1(i)

As such they warrant Mr. Sclafani's referral to disciplinary authorities for violation of Code provisions proscribing a lawyer from "Engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation" (22 NYCRR §1200.3(a)(4)) and from "Knowingly mak[ing] a false statement of law or fact" on behalf of his client 22 NYCRR §1200.33(a)(5). Additionally, they warrant referring him and Mr. McFadden to criminal authorities. Penal Law §210.10, pertaining to perjury, makes it a felony for a person to swear falsely when his false statement is:

> "(a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved."

Judiciary Law §487 makes it a misdemeanor for an attorney to be "guilty of any deceit or collusion or [to] consent[] to any deceit or collusion, with intent to deceive the court or any party".

. Such disciplinary and criminal referrals would represent the "appropriate action" mandated by this Court's "Disciplinary Responsibilities" under §100.3(D) of the Chief Administrator's Rules Governing Judicial Conduct, which requires:

> "(2) 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."[7] (emphasis added).

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[7] This reporting duty has been reiterated by the Advisory Committee on Judicial Ethics, *See*, *inter alia*, Op. 89-54, 89-74, 89-75; 91-114. Its importance is further underscored in the ABA/BNA Lawyers'

This memorandum of law and appellant's accompanying affidavit provide this Court with "information indicating" more than a "substantial likelihood" of "substantial violation" by Mr. Sclafani. It is the "hard evidence" of an unremitting pattern of substantial Code violations by him – for which "appropriate action" is essential. As stated by the New York Court of Appeals:

> "the courts are charged with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct...Conduct that tends to reflect adversely on the legal profession as a whole and to undermine public confidence in it warrants disciplinary action (see *Matter of Holtzman*, 78 NY2d 184, 191, cert denied, __US__, 112 S.Ct 648; *Matter of Nixon*, 53 AD2d 178, 181-182; cf., *Matter of Mitchell*, 40 NY2d 153, 156).'" *Matter of Rowe*, 80 N.Y.2d 336, 340 (1992).

ELENA RUTH SASSOWER

White Plains, New York
September 2, 2008

Manual on Professional Conduct: "It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency. Failure to render such reports is a disservice to the public and the legal profession. Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies." (*See*, "Standards for Imposing Lawyer Discipline, Preface, 01-802) *See also*, *People v. Gelbman*, 568 N.Y.S.2d 867, 868 (Just. Ct. 1991) "A Court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney's Canon on Ethics... . ... A Court cannot stand idly by and allow a violation of law or ethics to take place before it.".