

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

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JOHN MCFADDEN

Appellate Term Docket#  
2008-1427 WC

Petitioner

Index #SP651/89  
#SP-2008-1474

-against-

DORIS SASSOWER and  
ELENA SASSOWER

**REPLY AFFIRMATION**

Respondents- Appellants.

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Leonard A. Sclafani hereby affirms under penalty of perjury  
as follows:

1. I am an attorney duly admitted to practice law before  
the courts of the State of New York. I am a member of the  
firm of Leonard A. Sclafani P.C., attorneys for John McFadden,  
petitioner in the landlord-tenant holdover proceeding in the  
Court below and respondent on appellant Elena Sassower's above  
captioned appeal. As such, I am fully familiar with the facts  
and circumstances surrounding this matter and hereinafter set  
forth.

2. I submit this Reply Affirmation in connection with Mr.  
McFadden's instant application for an order directing the

Clerk of the Court to accept for filing, nunc pro tunc, Mr. McFadden's paper's in opposition to the motion of Elena Sassower for "vacatur/dismissal" of the underlying proceedings ~~and other proceedings against her in the City Court of the~~ City of White Plains (a copy of which papers is annexed as Exhibit "A" to Mr. McFadden's pending application) or, in the alternative, granting an adjournment of Ms. Sassower's said motion so that Mr. McFadden's opposition papers will have been timely served and in order that Mr. McFadden can file them with the Court on Ms. Sassower's said motion.

3. On September 2, 2008, Ms. Sassower caused to be delivered to your affirmant's law office and, apparently, filed with the Court, two documents: the first, entitled "Affidavit In Response to Petitioner's August 21, 2008 Order to Show Cause, & in Reply to His Opposition to Respondent's August 13, 2008 Vacatur/Dismissal Motion & in Further Support of Dismissal/Vacatur Motion" (emphasis in original); and, the second, entitled "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."

4. The first of the two identified documents consists of a thirty-three page affidavit of Ms. Sassower with supporting exhibits virtually the entirety of which is devoted to Ms.

~~Sassower's attempt to reply to the papers that Mr. McFadden~~

served upon her in opposition to her motion for "vacatur/dismissal" but that the Clerk of the Court refused to accept for filing because the time of service was one day later than CPLR §2214(b) required.

5. At paragraph 7 of her said affidavit, Ms. Sassower expressly states that she does not oppose Mr. McFadden's instant application.

6. The second of Ms. Sassower's two above described documents is expressly limited by its own title and by its entire contents to Ms. Sassower's attempt to reply to the papers served upon her in opposition to her motion for "vacatur/dismissal" that the Court Clerk refused to accept for filing.

7. Because Ms. Sassower does not oppose Mr. McFadden's application, it should be granted and the Clerk of the Court

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directed to accept, nunc pro tunc, the papers that were served upon Ms. Sassower in opposition to her motion for "vacatur/dismissal".

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8. The Court should also grant Mr. McFadden's application because Ms. Sassower suffered no prejudice as a result of our failure to comply with the strict requirements for the timing of service of Mr. McFadden's opposition papers and justice will not have been served if Ms. Sassower's motion is suffered to be submitted without opposiiton.

9. In this regard, as set forth in your affirmant's affirmation in support of Mr. McFadden's instant application, Mr. McFadden's opposition papers were served on Ms. Sassower by overnight courier one day before the return of her motion so that, as of 10:00 on the morning of the return date of her motion, she had received Mr. McFadden's opposition papers.

10. Mr. McFadden's papers would have been timely served under CPLR §2214(b) had he served them by regular mail on the day before he actually served them by overnight courier.

11. However, had such been done, Ms. Sassower would not have received Mr. McFadden's opposition papers until well after the return date of her motion so that she would have had ~~no opportunity at all either to have submitted reply papers or~~ to have requested more time to do so. At the same time, the Clerk of the Court would have been required to accept Mr. McFadden's opposition papers as timely and properly served under the statute even though Mr. Sassower would not have received them either by the return date of her motion or by the time that she actually did receive them.

12. On the basis of the foregoing, it is submitted, Mr. McFadden's application should be granted.

13. At the same time, the Clerk of the Court should have refused to accept, and the Court should not now consider, either of the two documents that Ms. Sassower delivered to your affirmant's office and, apparently, filed with the Court on September 2, 2008, either in connection with Mr. McFadden's pending application or in connection with Ms. Sassower's motion for "Vacatur/Dismissal".

14. The Order to Show Cause embodying Mr. McFadden's pending application contains a specific order staying "all proceedings in connection with the motion of Elena Sassower presently noticed for August 21, 2008 [Ms. Sassower's motion for "Vacatur/Dismissal"]" "[p]ending a hearing and determination of [Mr. McFadden's pending application]".

15. As a result, Ms. Sassower was enjoined from filing papers in support of her August 21, 2008 motion for "Vacatur/Dismissal" and the Clerk of the Court was enjoined from receiving them.

16. Moreover, because the Clerk of the Court had refused to accept Mr. McFadden's opposition papers in connection with Ms. Sassower's "Vacatur/Dismissal" motion, there were no papers before the Court on her motion to which Ms. Sassower was entitled to reply.

17. Lastly, unless and until this Court directs a nunc pro tunc adjournment of the return date of Ms. Sassower's "vacatur/dismissal" motion, her papers are not timely filed or served insofar as they were offered for filing in connection

with Ms. Sassowser's "vacatur/dismissal" motion.

18. On September 2, 2008, Ms. Sassowser was entitled to file papers only in opposition to Mr. McFadden's pending application, to which, she has advised, she has no opposition, and not for any other purpose.

19. Thus, to the extent that the Court Clerk has accepted Ms. Sassowser's papers for filing and/or this Court determines to consider them at all, it is respectfully submitted that the Court's consideration of them should be limited to its determination as to whether to grant Mr. McFadden's pending application and for no other purpose.

20. Because of the stay order contained in the Order to Show Cause embodying Mr. McFadden's pending application and because Mr. McFadden and your affirmant recognize that the only proceedings before this Court in which either party has any right to submit papers as of this time is Mr. McFadden's presently pending application for an order directing the Clerk of the Court to accept his late served opposition papers as above set forth, Mr. McFadden will not respond herein to the

allegations, claims and arguments set forth Ms. Sassower's above described papers which do not address the issue as to whether Mr. McFadden's pending application should be granted;

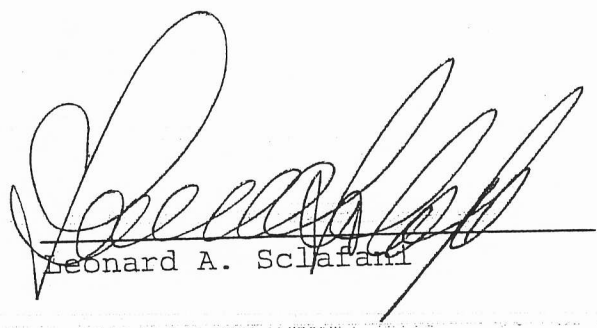
however, should the Court determine to accept Ms. Sassower's papers as a reply to Mr. McFadden's rejected opposition papers or to consider them in connection with Ms. Sassower's motion for "Vacatur/Dismissal", this Court should, first, grant Mr. McFadden's pending application and direct that he be permitted to file his opposition papers and, then, also grant to Mr. McFadden the right to respond to Mr. Sassower's papers.

WHEREFORE, your affirmant on behalf of John McFadden respectfully requests a) that Mr. McFadden's application herein be granted in its entirety; b) that the Clerk of the Court be directed to accept for filing, nunc pro tunc, Mr. McFadden's opposition to the motion of Elena Sassowser above described or, in the alternative, grant an adjournment of Ms. Sassower's above described motion so that Mr. McFadden's said opposition papers will have been timely served, thereby permitting the Clerk of the Court to accept them; c) that the Court reject and/or refuse to consider in connection with her above described "Vacatur/Dismissal motion" the papers filed by Ms. Sassower with



this Court on September 2, 2008 except in connection with Mr. McFadden's pending application or, in the alternative, grant Mr. McFadden time to respond to them; and d) grant to Mr. McFadden ~~such other and further relief as this Court deems just and~~ appropriate.

Dated: September 3, 2008  
New York, New York



Leonard A. Sclafani