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

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JOHN McFADDEN,

Petitioner,

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

-against-

NOTICE OF MOTION

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents-Appellants.

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PLEASE TAKE NOTICE that upon the accompanying affidavit of Respondent ELENA SASSOWER, sworn to on August 13, 2008, the exhibits annexed thereto and her accompanying July 18, 2008 order to show cause, which White Plains City Court Judge Jo Ann Friia refused to sign, and upon all the papers and proceedings heretofore had herein, Respondent 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 August 21, 2008 at 9:30 a.m., or as soon thereafter as the parties or their counsel can be heard for an order:

(1) vacating Judge Friia's July 3, 2008 decision & order and her July 21, 2008 judgment of eviction and warrant of removal for "fraud, misrepresentation, or other misconduct of an adverse party", pursuant to CPLR §5015(a)(3), and for "lack of jurisdiction to render the judgment or order", pursuant to CPLR §5015(a)(4);

(2) dismissing Petitioner JOHN McFADDEN's underlying March 27, 1989 Petition based on documentary evidence and lack of subject matter jurisdiction, pursuant to CPLR §§3211(a)(1) & (2) and CPLR §3212(b);

(3) granting such other and further relief as may be just and proper, including:

(a) referring Petitioner and his counsel, Leonard A. Sclafani, Esq., 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;

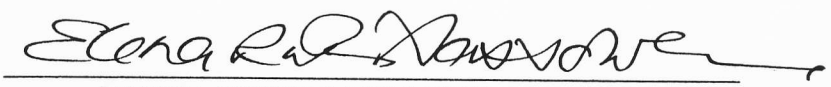
(b) imposing monetary sanctions and costs upon Petitioner and his counsel for litigation misconduct proscribed by 22 NYCRR §130-1.1 *et seq.*, and;

(c) assessing damages against Petitioner's counsel for deceit and collusion proscribed under Judiciary Law §487(1) as a misdemeanor and entitling Respondents to treble damages.

Answering affidavits, if any, are requested to be served upon Respondent ELENA SASSOWER so that they are received by her at least two days prior to the return date.

Dated: White Plains, New York
August 13, 2008

Yours, etc.,



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SUPRME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: SECOND JUDICIAL DEPARTMENT

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JOHN McFADDEN,

Petitioner,

-against-

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents-Appellants.

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SP 651/89
(SP-2008-1474)

Affidavit in Reply, In Further Support of Stay, & in Support of Vacatur/Dismissal Motion

STATE OF NEW YORK
COUNTY OF WESTCHESTER) ss:

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

1. I am the respondent-appellant herein whose order to show cause for a stay pending appeal, signed on July 30, 2008 by Justice Edward G. McCabe, is before this Court. I am fully familiar with all the facts, papers, and proceedings heretofore had.

2. This affidavit is submitted in reply to the August 8, 2008 opposing affidavit of petitioner John McFadden which substitutes maligning and knowingly false claims for argument that is responsive and relevant to the narrow issue that is before this Court: whether I have a meritorious appeal entitling me to the granting of a stay pending appeal.

3. This Court's form-affidavit required me to summarize the "merit" of my appeal at ¶"FOURTH". I did this in 3-1/2 single-spaced pages, succinctly presenting three grounds of appeal: (1) "Lack of Jurisdiction"; (2) "Fraud, Misrepresentation and other misconduct of an adverse party"; and (3) "Denial of Constitutional Due Process".

4. Mr. McFadden's 38-page affidavit does not respond until page 33 under the

title heading "Appellant's Motion". To the limited extent he there confronts my grounds of appeal, his argument is knowingly false, misleading and unsupported. Such not only warrants that the Court grant a stay pending appeal, but that it obviate the appeal entirely by vacating Judge Friia's July 3, 2008 decision & order and her July 21, 2008 judgment of eviction and warrant of removal[1] for "fraud, misrepresentation, or other misconduct of an adverse party", pursuant to CPLR §5015(a)(3), and for "lack of jurisdiction to render the judgment or order", pursuant to CPLR §5015(a)(4); and by dismissing Mr. McFadden's underlying March 27, 1989 Petition based on "documentary evidence" and lack of subject matter jurisdiction, pursuant to CPLR §§3211(a)(1) & (2) and CPLR §3212(b).

To further protect the integrity of the judicial process, additional relief is also warranted, including: (a) referring petitioner and his counsel 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 petitioner and his counsel for litigation misconduct proscribed by 22 NYCRR §130-1.1 *et seq.*, and; (c) assessing damages against petitioner's counsel for deceit and collusion proscribed under Judiciary Law §487(1) as a misdemeanor and entitling respondents to treble damages.

5. Although the Court's form-order to show cause which Justice McCabe signed provides for "other and further relief...as may be deemed just and proper", I am nonetheless serving and filing a formal notice of motion, for which I also submit this affidavit in support.

6. In substantiation of such motion – and, alternatively, of my entitlement to a

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[1] Judge Friia's July 3, 2008 decision & order is annexed to my July 30, 2008 order to show cause for a stay as Exhibit A-2. Her July 21, 2008 judgment of eviction and warrant of removal are annexed thereto as Exhibits C-1 and C-2, respectively.

stay pending appeal – the most important of my grounds of appeal which Mr. McFadden does not confront are the five grounds based on "Fraud, Misrepresentation and other misconduct of an adverse party". These are set forth by my ¶"FOURTH" as follows:

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

7. Mr. McFadden's pretense for not responding is that such are "frivolous, harassing, and vexatious to all concerned", "rambling" and "vitriolic" (¶¶116-119), which is

the same pretense he uses for not responding to my "Lack of Jurisdiction" ground of appeal based on Judge Friia's disqualification, phrased as follows:

> "**Judge Friia is disqualified for pervasive actual bias and interest, as established by my legally-sufficient July 18, 2008 order to show cause for her disqualification, transfer, and for disclosure, which she refused to sign on July 21, 2008**, in favor of the proposed judgment of eviction and warrant of removal of petitioner's counsel, that she signed on that date without change" (bold in the original).

This is also his pretense for not responding to my ground of appeal based on "Denial of Constitutional Due Process", listed by my ¶FOURTH with 16 particulars in substantiation of my summarizing preface that:

> "Judge Friia's warrant of removal and judgment of eviction (Exhibits C-1 & C-2), and her underlying July 3, 2008 decision & order (Exhibit A-2) are unsupported by law, insupportable by law, and 'so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause' of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).' They are fashioned on knowing and deliberate omission and falsification of the material facts dispositive of my rights both in this proceeding and in #1502/07, entitling me to summary judgment, *as a matter of law*..."

As to all these grounds – the bulk of my appeal – Mr. McFadden does NOT deny or dispute ANY of the factual particulars I have set forth, ALL of which he conceals.

8. It is because Mr. McFadden's Petition is a "verifiable fraud", as set forth by my ¶FOURTH, that his 38-page affidavit nowhere identifies its allegations. Rather, his affidavit creates the false impression that his Petition has something to do with the October 30, 1987 occupancy agreement, contract of sale, and the Co-Op board's disapproval thereof. It does this by its untitled first section whose ¶¶9-19 purport to describe the contract of sale and occupancy agreement, the Co-Op board's disapproval, and the subsequent federal action, annexing the contract of sale and occupancy agreement as its Exhibit A. This sets the stage

for the affidavit's next section entitled "The prior Proceedings", whose ¶22 states:

> "The proceedings that I commenced against the Sassowers sought their eviction as holdovers following the termination of my contract of sale with them, the Occupancy Agreement that was a part thereof and their continued occupancy of the Apartment thereafter on a month to month basis."

9. This is false as to his Petition herein, false as to his Petition in #504/88, and false as to his Petition in #652/89. All three Petitions identically purport that respondents "entered in possession [of the subject premises] under a month to month rental agreement", specifying no date of the agreement, specifying no "rent", and annexing no copy. All three Petitions are documentarily rebutted by the contract of sale and occupancy agreement – Mr. McFadden's Exhibit A. As Mr. McFadden has not annexed copies of any of these Petitions to his affidavit, they are herewith annexed as Exhibits A-1, A-2, and A-3. Exhibit A-1 is the Petition herein, the same as is Exhibit B to my July 30, 2008 order to show cause for a stay pending appeal.

10. As Mr. McFadden's ¶32 acknowledges that Exhibit B annexed to my order to show cause is his Petition herein, there is no question as to what his Petition commencing this proceeding actually says. Such content is NOT identified by Judge Friia's July 3, 2008 decision & order and is NOT what her July 21, 2008 warrant of removal represents it to be.

11. No appellate court can uphold a decision awarding summary judgment to a petition alleging that respondents "entered in possession [of the subject premises] under a month to month rental agreement" for which there is not only NO evidentiary proof, but which is rebutted by evidentiary proof. Nor can an appellate court uphold a warrant of removal that "completely falsifies" the allegations of the petition for which summary judgment was given and "materially alters" its caption. Nor can it allow a judgment of

eviction that "materially diverges" from the decision it purports to implement, including by omission of respondents' Answer. All these are readily-verifiable from what is now before this Court, making the requested vacatur/dismissal relief of my motion not only immediately appropriate, but matters of elementary law. No appeal is necessary to resolve these straight-forward, documentarily-established issues. They can be resolved expeditious, now.

12. Just as the contract of sale and occupancy agreement suffice for vacatur for "fraud, misrepresentation, or other misconduct of an adverse party" pursuant to CPLR §5015(a)(3), as well as dismissal of the Petition pursuant to CPLR §§3211(a)(1) based on "documentary evidence" and CPLR §3212(b), so they also suffice for vacatur for "lack of jurisdiction to render the judgment or order", pursuant to CPLR §5015(a)(4) and dismissal of the Petition pursuant to CPLR §§3211(a)(2) that "the court has not jurisdiction of the subject matter". This, because the contract of sale and occupancy agreement also establish the truth of my second ground of appeal based on "Lack of Jurisdiction". As stated by my ¶FOURTH:

> **"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 in the original).

13. It deserves emphasis that nowhere in his 38-page affidavit does Mr. McFadden even claim that Judge Friia was a fair and impartial judge, that her adjudications were consistent with the rudimentary legal principles and the evidentiary facts, and that I did not have a basis in fact and law for presenting a legally-sufficient order to show cause for her

disqualification. Nor does he disclose the grounds of my contention that Judge Friia was not fair and impartial, as for instance, by his ¶99, wherein he states:

> "During the course of the proceedings Ms. Sassower moved for the disqualification of...Judge Friia and for the transfer of the case out of the City Court on the grounds that the Court and the Judges therein were biased and had committed misconduct and fraud as against her."

14. Neither does Mr. McFadden deny or dispute ANY of the 16 particulars of my "Denial of Constitutional Due Process" ground of appeal, itemized by my ¶FOURTH in substantiation of its summarizing preface, ALL establishing Judge Friia's pervasive actual bias, ALL of which he conceals.

15. Notwithstanding these uncontested grounds of appeal overwhelmingly meet the standard for a stay pending appeal, I am furnishing further substantiating proof of the merit of my appeal: my July 18 2008 order to show cause for Judge Friia's disqualification for pervasive actual bias and interest, described by my ¶FOURTH as legally-sufficient – and which my ¶FIFTH identifies as containing a 51-page analysis of Judge Friia's decision, particularizing its material omissions and falsifications, including the 16 listed by my ¶FOURTH.[2] Such is additionally furnished in refutation of the endlessly false recitation of what Mr. McFadden purports to be the "relevant facts" at pages 2-33 of his affidavit which not only materially falsifies the procedural background to Judge Friia's July 3, 2008 decision & order so as to make it appear that it resulted from the "urging" of both Mr. McFadden's counsel and [my]self in this proceeding (¶87), and that I "sought consolidation" of #651/89 with #1502/07 (¶101), but apparently does not deem "relevant" ANY discussion of the content of the July 3, 2008 decision & order. Indeed, the extent of what Mr. McFadden has

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[2] My 51-page analysis is prefaced by a Table of Contents, appearing at page 8 of my affidavit in support of my July 18, 2008 order to show cause for Judge Friia's disqualification.

to say about its content is at ¶¶88 and 107:

> "The City Court, by its decision and order of July 3, 2008 granted your affirmant's summary judgment motion, awarding a judgment of possession to your affiant and directing the issuance of a warrant of eviction as against the Sassowers."
>
> "Upon its consideration of your affirmant's motion, the Court granted it by and through the July 3, 2008 decision and order from which Ms. Sassower now appeals."

As for the content of Judge Friia's July 21, 2008 judgment of eviction and warrant of removal, signed without change, from Mr. McFadden's attorney's proposed judgment and warrant, Mr. McFadden's affidavit says nothing at all.

16. Insofar as Mr. McFadden does address my grounds of appeal, they are the first two of my jurisdictional grounds. As to these, Mr. McFadden's ¶¶109-117 materially fails to identify them as jurisdictional.

17. As to the first of my jurisdictional grounds of appeal: "Upon information and belief, #651/89 is closed and petitioner's March 27, 1989 Petition was dismissed for want of prosecution at some point during the past 15 years of dormancy", Mr. McFadden's ¶112 concedes that "the Court opened a new docket number for this 1989 proceeding, #SP-2008-1474". He provides no explanation for why this was done and conceals my assertion at ¶FOURTH that a new docket number would not have been opened unless #651/89 was closed – which he does not deny or dispute.

18. Although Mr. McFadden contests that #2008-1474 was assigned "surreptitiously and without notice to the parties", purporting at his ¶112 that this is:

> "disproved by the fact that the Court included the Index # at issue on the notice for the parties to appear in the matter on June 30, 2008 and is otherwise unsupported by any facts or evidence",

the notice he describes,[3] but does not annex, is not one informing the parties that docket #2008-1474 is being assigned to #651/89.[4] As for further "facts or evidence", one need look no further than Judge Friia's July 3, 2008 decision & order and the judgment of eviction and warrant of removal she signed on July 21, 2008, unchanged from the proposed documents of Mr. McFadden's attorney, which neither bear #2008-1474 or explain its assignment – as would otherwise be expected.

19. Clearly, the best evidence as to whether, during the 15 years of its dormancy, the White Plains City Court Clerk's Office closed #651/89 is its docket sheet and other records pertaining thereto and to the opening of #2008-1474. Mr. McFadden has provided none of these.

20. Annexed is my hand-delivered July 30, 2008 letter to White Plains City Court Clerk Patricia Lupi for such documents and information, to which there has been no response (Exhibit B-1), as well as my follow-up hand-delivered August 7, 2008 letter, to which there has also been no response (Exhibit B-2). Should Clerk Lupi continue to fail to respond – which has been her custom, countenanced by Judge Friia – I will apply to this Court for a subpoena so that the dockets, records, and other information essential to establishing the status of this proceeding and the other related proceedings can be accurately determined and the jurisdictional issues with respect thereto resolved.

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[3] It is unclear if this is the same notice as is referred to by Mr. McFadden's ¶103, which fails to include the 2008-1474 docket number as being on the calendar for June 30, 2008.

[4] Mr. McFadden does not annex the notice to which he refers. However, on July 21, 2008, I discovered a trial notice of that description upon reviewing what the White Plains City Court Clerk's Office purported to be the file of #651/89. At the same time, I found a form notice of appearance, which Mr. McFadden's attorney had filled out and dated June 30, 2008 for a case he entitled *John McFadden v. Elena Sassower, John Doe*, as to which he provided no index number. This is recounted by my July 30, 2008 to White Plains City Court Clerk Lupi (Exhibit B-1).

21. Finally, contrary to Mr. McFadden's claim at ¶¶110-111 that I previously contended that #651/89 is open and "identical" to his proceeding under #1502/07 and that, therefore, am now "estopped" from claiming it is closed "or that subsequent events over the past many years, that it has been pending preclude [him] from obtaining judgment on the matter", I never contended that his Petition in #1502/07 is "identical" to his Petition herein. Nor would I, as his two Petitions are – as stated by my ¶FOURTH – "diametrically different". Indeed, they are more accurately described as diametrically conflicting, as Mr. McFadden's Petition in #1502/07 rebuts his Petition herein (Exhibit A-1), as likewise in #504/88 and #652/89 (Exhibits A-2, A-3), as to respondents having "entered in possession [of the apartment] under a month to month rental agreement". Since Mr. McFadden has also not annexed that Petition to his affidavit, consistent with his practice of hiding the actual allegations of his Petitions[5], a copy is annexed hereto as Exhibit A-4 in further substantiation of my dismissal/vacatur motion

22. It must be noted that although Mr. McFadden's ¶¶110-111 provides no record reference for where and when I allegedly contended that his Petitions in #1502/07 and #651/89 were "identical", his ¶¶97, 104 purport that it was "through [my] answer, and through a subsequent motion for dismissal of the proceedings" and during the court proceedings on June 30, 2008. This is another falsehood. Such does not appear in my Answer in #1502/07, which Mr. McFadden annexes as his Exhibit V – and he conspicuously gives no citation to where therein or where in my dismissal motion I claimed that the two proceedings were "identical", which, if true, he easily could have done. Nor has he annexed

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[5] His ¶96 did concede, however, that his Petition in #1502/07 was "on different grounds and on a different theory than those pled in [his] summary proceeding under Index #651/89".

any transcript of the June 30, 2008 court proceedings.

23. As to my being estopped from now contending that #651/89 is closed – for which Mr. McFadden provides no legal authority – there is no bar to my doing so in face of newly discovered evidence. My discovery that a new docket number had been assigned to #651/89 was unknown to me until July 21, 2008 when the Clerk's Office allowed me to review what it purported to be the file of #651/89. This is recounted by my July 30, 2008 letter to Clerk Lupi (Exhibit B-1).

24. As to my second jurisdictional ground of appeal based on the occupancy agreement, denominating the parties "Sellers" and "Purchasers" and expressly stating "in no way do the parties intend to establish a landlord/tenant relationship", Mr. McFadden purports, at ¶¶113-115, that the City Court "rejected this very argument in its rulings in the prior proceedings", that I did not perfect an appeal from "at least one" of these rulings, and that:

> "More importantly, the grounds on which the White Plains City Court rejected Ms. Sassower's argument are meritorious for the reasons stated in the City Court's various decisions above discussed."

25. Conspicuously, Mr. McFadden's affidavit does not identify the fact, set forth by my ¶FIRST, that simultaneous with my filing of my notice of appeal herein, I filed a notice of appeal in #1502/07, a copy of which I annexed as Exhibit A-3 to my order to show cause. As Mr. McFadden knows, at issue on that appeal is my entitlement to dismissal of his Petition in #1502/07 and summary judgment on my Counterclaims, based on my September 5, 2007 cross-motion, as to which Judge Hansbury wilfully failed and refused to make ANY findings of fact and conclusions of law with respect to my Answer and its Ten Affirmative Defenses and Four Counterclaims. As Mr. McFadden annexed my Answer as his Exhibit V,

he knows that the Third Affirmative Defense is "Lack of Subject Jurisdiction" and states:

> "The Petition fails to state a cause of action. The October 30, 1987 occupancy agreement [], which was pursuant to a contract of sale [], expressly states: 'in no way do the parties intend to establish a landlord-tenant relationship." (¶8).

26. Mr. McFadden's affidavit nowhere discloses the "reasons" given by the City Court's "various decisions" for rejecting my jurisdictional defense that no landlord-tenant relationship exits. Thus, his ¶¶41-43 states that Judge Reap's September 18, 1989 decision "denied, both on procedural grounds and on the merits, each of the Sassowers' claims and arguments with respect to the Court's lack of jurisdiction over the subject matter of these proceedings...". No particulars about this denial are supplied other than that the decision "noted that the Sassowers had made identical arguments in the earlier summary proceedings..., each of which the Court had denied by and through its January 25, 1989 'Consolidated Decisions'".

As for this January 25, 1989 decision, also by Judge Reap, Mr. McFadden's affidavit also gives no particulars. The entirety of what he says on the subject, by his ¶26, is: "Through its January 25, 1989 'Consolidated Decisions', the Court considered, and rejected, on the merits, most of the claims and arguments that the Sassowers subsequently raised in the proceedings below."

27. Thereby concealed is the baldness and falsity of Mr. McFadden's claim that these decisions were "meritorious" in their rejection of respondents' motions to dismiss based "on the argument that the 1987 Occupancy Agreement under which she originally took possession of the Apartment so provided." (¶¶113-115).

28. As Mr. McFadden's affidavit annexes copies of the January 25, 1989 and September 18, 1989 decisions as its Exhibits B and E, this Court can verify for itself that

these so-called "meritorious" rulings are insupportable, legally and factually .

29. Thus, Judge Reap's September 18, 1989 decision stated:

> "To dismiss for lack of subject matter jurisdiction. Denied, because Petitioner's theory is that this is a hold over proceeding pursuant to RPAPL 711(1). Paragraphs 3 and 4 of our consolidated decision dated 1/25/89 in the companion cases under Index No. 434/88, 504/88 and 500/88 apply..." (at p. 2).

30. Aside from the fact that Mr. McFadden's Petition herein does not cite RPAPL 711(1) (Exhibit A-1), his "theory" is rebutted by respondents' April 24, 1989 dismissal motion, a copy of which Mr. McFadden annexes as Exhibit C to his Affidavit. Such dismissal motion annexed the contract of sale and occupancy agreement, establishing that there is no landlord-tenant relationship, the predicate for RPAPL 711. Yet, as admitted by Judge Reap's decision, he made no adjudication in deference to Mr. McFadden's "theory".

31. Nor does ¶3 of Judge Reap's January 25, 1989 consolidated decision "apply", as that paragraph is also legally and factually insupportable in denying that branch of my motion in #504/88 to dismiss Mr. McFadden's Petition therein for lack of jurisdiction based on the language of the occupancy agreement. Thus, ¶3 stated:

> "To dismiss for lack of jurisdiction: Denied. This is a holdover proceeding wherein it is alleged that an occupancy agreement expired and an ensuing month-to-month tenancy was terminated. The petitioner has the burden of proof on these issues which are properly matters for trial, not a motion to dismiss. Among other things we note the occupancy agreement terminated on its face on May 1, 1988, and it is alleged the new relationship of McFadden to the Sassowers existing thereafter was as a Landlord-Tenant on a month-to-month basis in exchange for regular monthly payments of rent. **If that be so**, Petitioner's theory is holdover jurisdiction lies under RPAPL 711, subdivision 1..." (pp. 3-4, underlining and bold added).

32. Mr. McFadden's Petition in #504/88 (Exhibit A-2) – identical to his Petition herein (Exhibit A-1) – itself rebuts this paragraph. It did NOT allege that "an occupancy

agreement expired and an ensuing month-to-month tenancy was terminated". Rather, it alleged that I and my mother had "entered in possession [of the subject apartment] under a month to month rental agreement", without reference to ANY occupancy agreement – and without any specificity as to the date of the purported "month to month rental agreement, its agreed-to "rent", and with no copy annexed.

33. Nor did "the occupancy agreement terminate on its face on May 1, 1988" – with a "new relationship...existing thereafter". Such assertion was Judge Reap's own *sua sponte* concoction. Indeed, not only did Mr. McFadden's Petition in #504/88 contain no such allegation (Exhibit A-2), it could not by reason of the fact that it omitted the very existence of the occupancy agreement.

34. On its face, ¶1A of the occupancy agreement expressly states:

> "...The parties agree that the Purchasers shall have the right to occupy the premises from November 1, 1987 or sooner, until May 1988, at which time they must vacate if they have elected to cancel the Contract, or if they have not received written notice from Seller thirty (30) days prior thereto, allowing them to continue in occupancy. If they have elected to purchase, they shall have the right to continue in occupancy to the date of closing." (underlining added).

Since respondents elected to purchase the apartment – not cancel the contract – their right to occupy the apartment did not terminate in May 1988, but continued "to the date of closing". It was to achieve this "date of closing" that Mr. McFadden joined respondents, in August 1988, in commencing the federal lawsuit against the Co-Op Board to enforce the contract of sale.

35. The federal lawsuit constituted a written agreement – if not an implied contract – between the parties to maintain and enforce the contract of sale and occupancy so as to effectuate a "date of closing". Indeed, this interpretation is born out by the deceit of Mr.

McFadden's affidavit. Thus, Mr. McFadden not only conceals that he was a co-plaintiff in the federal lawsuit, with causes of action based on the Co-Op's violation of its guidelines, rules, and procedures (¶¶14-15, 18, 47-64) – but purports that he "never authorized [his] attorney to include [him] as a plaintiff" – an assertion he now makes for the first time, but only in footnotes (#2, #5) and without any substantiating documentary proof.

36. Additionally, ¶1F of the occupancy agreement provides

> "The parties agree that if the Purchasers fail to close as provided for in the Contract of Sale or on any adjourned date consented to by the parties, or if the Purchasers elect to cancel the contract as provided the Purchasers shall be allowed to continue occupancy on a month to month basis as provided herein." (underlining added).

The "month to month" occupancy plainly spans to the eventual "date of closing" where there is an "adjourned date consented to by the parties", as represented by the federal lawsuit in which Mr. McFadden and respondents were co-plaintiffs seeking to enforce the contract of sale. Indeed, Mr. McFadden's attorney conceded as much by his affirmation in opposition to respondents' April 24, 1989 dismissal motion. Not only did he omit any mention of the federal lawsuit, but he deceitfully removed the phrase "or on any adjourned date consented to by the parties" in quoting ¶1F of the occupancy agreement. The Court can see this for itself, as Mr. McFadden annexed that affirmation as his Exhibit D (see ¶9 therein).

37. Moreover, clear from the face of the January 25, 1989 decision is that – like the September 18, 1989 decision after it – Judge Reap did not determine respondents' entitlement to dismissal of Mr. McFadden's Petition based on the language of the occupancy agreement disclaiming a landlord/tenant relationship. Rather, wedged between its false recitation as to the Petition's allegation of an occupancy agreement, it states: "The petitioner

has the burden of proof on these issues which are properly matters for trial, not a motion to dismiss." The decision then reinforces that no ruling has been made on respondents' entitlement to dismissal based on the occupancy agreement by stating, "If this be so" with respect to its own *sua sponte* and false recited claims about the agreement.

* * *

38. Time does not permit me to do more than briefly comment on Mr. McFadden's pages 2-33. He there purports to recite "The relevant facts" (at ¶5) – the true purpose of which is to mislead the Court and inflame it against me with baseless characterizations and depictions. Such is evident from the very pretext he gives for his recitation, which he states at his ¶4 as follows:

> "The facts surrounding this matter would not be complex but for the frivolous actions, legal wranglings and maneuverings of Ms. Sassower, her mother Doris and her father, George Sassower, through which the Sassowers have succeeded in hijacking your affiant's coop apartment for Elena Sassower's use for over twenty-one years, to our affiant's extreme detriment and frustration."

39. In actuality, the "relevant facts" are NOT complex at all. Rather, the simplicity of these facts exposes that summary judgment could not be granted to Mr. McFadden on his Petition because it is a fraud, as to which respondents promptly made a motion to dismiss for lack of jurisdiction based on the occupancy agreement and contract of sale – thereafter encompassing that objection in their Answer. Indeed, because respondents' Answer not only precluded the granting of summary judgment to Mr. McFadden but entitled them to summary judgment in their favor pursuant to CPLR §3212(b), Mr. McFadden's recitation of "relevant facts" simply eliminates their Answer as even existing (see ¶¶40-46, 65). He thereby replicates precisely what his counsel, Leonard Sclafani, Esq., did in the proposed judgment of eviction, which Judge Friia signed – the subject of one of my grounds

for appeal for "Fraud, Misrepresentation and other misconduct of an adverse party", itemized by my ¶FOURTH.

40. Annexed hereto as Exhibit C-1 is respondents' Answer, timely filed on June 26, 1990 – as verifiable from its back, bearing a date stamp from White Plains City Court, and Judge Reap's April 12, 1990 letter extending respondents' time to answer until June 27, 1990 (Exhibit C-2). Among the Answer's noteworthy – and decisive – Affirmative Defenses:

> "Lack of jurisdiction...Respondent's are Contract-Vendees in possession under a written agreement...which specifically disclaims a landlord-tenant relationship."
>
> "Collateral estoppel: Prior to commencement of this proceeding, Petitioner filed an action in Federal Court under Index No. 88 Civ. 5775 in which Petitioner was Co-Plaintiff with Respondents, suing 16 Lake Street Owners, Inc., its Board of Directors, et. al. for its discriminatory and wrongful conduct in refusing to give its approval to his application to sell his proprietary shares in the subject apartment to Respondents."

41. Mr. McFadden devotes much of his affidavit to impugning myself and my family[6] and our defense of the litigations against us in the White Plains City Court, as well as our federal action (commenced with Mr. McFadden as a willing co-plaintiff). However, the record of these litigations establishes the legitimacy of our claims, in fact and law, and the

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[6] Mr. McFadden's claim, by his ¶9, that at the time the October 30, 1987 contract of sale was made, "it was understood...that the apartment would be occupied only by Elena Sassower" is false, as is his implication, at ¶13, that my father improperly moved into the apartment. Indeed, on October 27, 1987, he signed the Co-Op's required sublet agreement with my mother, for a year's lease, which identified "the Persons Who Will Reside in Apartment" as myself and my father. Such document is referred-to at ¶¶10 and 24 of my Answer –and is Exhibit B-1 thereto. Exhibit B-2 thereto is the Co-Op Board's approval of occupancy for Doris Sassower, Elena Sassower and including "members of the immediate family".

As for Mr. McFadden's repulsive attempt, by his ¶13, to purport that the Co-Op's reasons for rejecting the purchase were "legitimate" and, by his ¶18, to purport that there was anything "egregious" in the "manner" of our "litigating [our] claims and attempting to obtain the Coop Corporation's consent" is also documentably false.

proper and professional manner in which we pursued them. Indeed, none of Mr. McFadden's denigrating and disparaging characterizations concerning our defense of the City Court proceedings are borne out by the copies of our submissions in #651/89 that he has annexed as his Exhibits C, O, R, U, or by the copy of my Answer with Affirmative Defenses and Counterclaims in #1502/07 that he has annexed as his Exhibit V. These submissions are all appropriate and reasoned and they are amply particularized as to the facts forming the good and sufficient basis for our requests for sanctions against Mr. McFadden and his counsel for misconduct.[7] Nor were these submissions deemed frivolous or abusive by Judge Reap, whose decisions Mr. McFadden annexes as his Exhibits B, E, P, T.

42. Insofar as the federal action, the strength of that case and the proper and professional manner in which we pursued it would be clear had Mr. McFadden annexed to his affidavit the most critical document therein, the federal complaint, or any of our motion papers or appellate submissions, rather than the federal decisions whose fraudulence our appeal papers meticulously chronicled. Suffice to say, that the federal complaint and our most important appellate submissions to the Second Circuit Court of Appeals and to the U.S. Supreme Court were all readily-available to Mr. McFadden from the record in #1502/07, as I had annexed them as exhibits to my September 5, 2007 cross-motion. This, to counter the litigation-by-defamation tactics of Mr. McFadden's attorney therein, Mr. Sclafani, and in substantiation of my entitlement to summary judgment on my Answer, a number of whose Affirmative Defenses and Counterclaims relate to the good and meritorious nature of the

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[7] McFadden falsely asserts, at ¶102, that my submissions in #1502/07 are "abusive, vitriolic and so overly bulky as to prevent [him] from burdening this Court with their reproduction here." In fact, my submissions therein establish my entitlement to dismissal of Mr. McFadden's Petition therein and summary judgment on my Counterclaims – as identified by my ¶FOURTH.

federal action, which Mr. McFadden sabotaged, in collusion with the Co-Op. These include my Sixth Affirmative Defense for "Detrimental Reliance", which is as follows:

> "SIXTEENTH: In 1988, after the Co-Op board's illegal, discriminatory, and wrongful rejection of the contract of sale, petitioner was a co-plaintiff with respondent and her mother in federal litigation against the Co-Op board and other defendants. Such federal lawsuit was based on its violation of guidelines requiring it to give contemporaneous reasons upon its rejection of single women and minority purchasers and its subsequent proffer of a reason which respondent demonstrated to be flagrantly false. It was also based on non-compliance with, and violation of, other Co-Op policies, practices, and procedures – including those enabling purchasers to obviate objections to their applications, as well as a rule enabling shareholders to override a disapproval and convene a special meeting.
>
> SEVENTEENTH: Over respondent's objection, petitioner withdrew from the federal lawsuit in 1990 before completion of discovery due to the oppressive cost of the prolonged litigation and the intimidation of sanction threats by defense counsel and the federal court. This was fatal to the success of the case, as petitioner was not only the owner of the cooperative shares, but president of the Co-Op board when the contract of sale was entered into and rejected – a position he had held for four of the five years on which he had served on the board.
>
> EIGHTEENTH: As a result of petitioner's withdrawal from the federal lawsuit, the Co-Op raised a lack of standing defense in an eve-of-trial motion to amend their answer, granted by the federal judge, thereby forcing respondent and her mother to drop their causes of action for corporate non-compliance, the merit of which they had already demonstrated by a motion for summary judgment.
>
> NINETEENTH: On repeated occasions before and after defendants' eve-of-trial motion to amend, respondent and her mother sought from petitioner an assignment of rights, which he failed to provide, even after they had furnished him with a copy of their summary judgment motion on the corporate non-compliance causes of action.
>
> TWENTIETH: Petitioner's withdrawal also compromised respondent's discrimination causes of action, which relied on written guidelines that petitioner and his attorney for the apartment sale – who was also the Co-Op's attorney – had represented to respondent had been approved and disseminated as part of the purchase application package, but which the Co-Op disavowed as ever having been approved and disseminated. The jury made an express finding that the guidelines had not been adopted by the Co-Op board.

TWENTY-FIRST: Respondent's lawsuit additionally relied on a written approval of occupancy by the Co-Op board (Exhibit B-2), which the Co-Op, in defending the federal litigation asserted that petitioner been improperly procured through his attorney for the apartment sale, also the Co-Op's attorney.

TWENTY-SECOND: Upon information and belief, petitioner's manipulative, self-centered personality and high-handed tactics as Co-Op board president contributed to the board's rejection of the contract of sale and its irrational and intransigent refusal to resolve matters not only with respondent, but with petitioner, who the board threatened and then sued in City Court to take away his propriety lease (index numbers 434/88 and 500/88)."

It also includes my First Counterclaim, entitled "Prior Proceedings", which is as follows:

"EIGHTY-FIRST: Respondent repeats, realleges, and reiterates paragraphs FIRST through EIGHTIETH, as if fully set forth herein, and especially paragraphs SIXTEENTH through TWENTY-SECOND.

EIGHTY-SECOND: Respondent and her mother, Doris L. Sassower, as contract-vendees of the subject premises, had a meritorious federal action against the Co-Op and other defendants, which petitioner knowingly and deliberately compromised, undermined, and sabotaged, both while he was their co-plaintiff therein and after his withdrawal. Such included collusion with the Co-Op both with respect to his initiation and pursuit of eviction proceedings against them in White Plains City Court, timed to be the most prejudicial, and his wilful and repeated failure to assign his shareholder rights to respondent and her mother so as to maintain their corporate non-compliance causes of action.

EIGHTY-THIRD: Respondent seeks compensatory and punitive recovery from respondent for all ensuing damages, including, but not limited to, the legal fees, costs, and disbursements expended by her and her mother in the aforesaid federal action, as well as in defending against petitioner's harassing City Court proceedings during the pendency thereof."

43. I incorporate herein by reference my 25-page Answer with its Affirmative Defenses and Counterclaims – annexed as Exhibit V to Mr. McFadden's affidavit – as it provides a comprehensive, evidence-based recitation of the course of the past twenty-one years, rebutting a multitude of his affidavit's outrageously false claims. Among these, Mr.

McFadden's deceit that the subject apartment was "hijacked" to his "extreme detriment and frustration", exposed by my Fifth Affirmative Defense ("Equitable Estoppel and Unjust Enrichment") and by my Seventh Affirmative Defense ("Implied Contract, Detrimental Reliance & Fraud"), as well as his fictional account at ¶¶92-95 of events occurring "In late 2006" leading up to the commencement of his proceeding against me under #1502/07, exposed by my Tenth Affirmative Defense ("Fraud; Retaliatory Eviction; & Intentional Infliction of Emotional Distress") and the subject of my Third Counterclaim ("Fraud & Intimidation in June 2006, Retaliatory Eviction"). Needless to say, none of this fictional account, or any reference to the prior City Court proceedings or federal action, or any reference to his "extreme detriment and frustration" is included in his Petition in #1502/07 (Exhibit A-4) – and it is worth comparing Mr. McFadden's opposing affidavit herein with that Petition.

44. The simple fact is that if Mr. McFadden felt his apartment was "hijacked" – as he repeats in his concluding ¶125 – he could readily have secured my removal 15 years ago, in June 1993, upon the conclusion of the federal action at the U.S. Supreme Court. Instead, and because it was beneficial to him to keep me in occupancy, he took no steps whatever, not even a request to me to vacate the apartment, let alone communications with the City Court as to the status of his summary judgment motion.

45. Insofar as Mr. McFadden's ¶¶65-86 pertains to his two summary judgment motions, it corroborates my #FOURTH as to material deceits in Judge Friia's July 3, 2008 decision.

The most overarching of these deceits is that it was not until 2007 and "motion papers filed in connection with SP 1502/07" that the Court had the information that Judge Reap

"deemed necessary in his decision to reserve on petitioner's motion for summary judgment" – *to wit*, the decision of the Second Circuit Court of Appeals on respondents' appeal. This is Judge Friia's pretext for rendering the July 3, 2008 decision – and it is false. As set forth by Mr. McFadden's ¶76, his second summary judgment motion, filed in City Court, was occasioned by the Second Circuit Court of Appeals' decision, a copy of which was annexed to the summary judgment motion.[8] The July 3, 2008 decision omits Petitioner's second summary judgment motion – as likewise the course of the proceedings therein, including the last document: respondents' affidavit seeking an extension of time to file opposition and reargument/renewal of the order directing their opposition, to which there had been no adjudication by the Court.

A further material deceit of Judge Friia's July 3, 2008 decision is that Mr. McFadden's November 25, 1991 summary judgment motion was unopposed. This is false – and Mr. McFadden's ¶¶67-68 identifies respondents' opposition, annexing a copy as his Exhibit O.

46. Finally, materially false is Mr. McFadden's footnote 4 and ¶¶90-91, attempting to mislead the Court that I have not been paying him monthly occupancy for the apartment, which I have been "enjoy[ing]...at [his] expense" . The facts as to my monthly occupancy payments to Mr. McFadden over these past 21 years – and their rapidly increased and

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[8] Mr. McFadden conceals the dates of his first and second summary judgment motions and makes it falsely appear, by his ¶87-88 and ¶¶106-108, that his counsel sought to have Judge Friia rule on the second summary judgment motion – and that she did so, when it was the first that she ruled on, based on his advocacy. Indeed, the only date Mr. McFadden gives for either of his motions is "November, 1992" (¶106) – which combines the dates of both. His first summary judgment motion was November 25, 1991 and his second summary judgment motion was October 20, 1992 – and they are annexed to his affidavit as Exhibits N and Q.

Over my repeated objection, including on June 30, 2008 before Judge Friia, his counsel consistently ignored the second summary judgment motion, which Judge Friia also ignored in granting him summary judgment based on his November 25, 1991 summary judgment motion.

unexplained amounts – are recited in my Seventh Affirmative Defense ("Implied Contract, Detrimental Reliance & Fraud), as well as in my Eighth Affirmative Defense ("Extortion & Malice") and form the basis of my Second Counterclaim ("Fraud from April 2003 Onward & Extortion") for return of monies due me, and compensatory and punitive damages.

47. I have conscientiously made payments to Mr. McFadden every month except this one – and the reason is because on August 1, 2008, I was served by the White Plains Marshal with Judge Friia's warrant of removal, signed as submitted to her by Mr. McFadden's counsel. In any event, Mr. McFadden's Petition herein alleging that I "entered in possession" under a "month to month rental agreement" specifies no rent – and that is what is due him under the circumstances.

ELENA RUTH SASSOWER

Sworn to before me this
13th day of August 2008

JOSE A. VAZQUEZ
NOTARY PUBLIC STATE OF NEW YORK
NO. 01VA6099382
QUALIFIED IN BRONX COUNTY
COMMISSION EXPIRES 9/29/2011

Notary Public