To be Argued by:
LEONARD A. SCLAFANI
(Time Requested: 15 Minutes)

Cal. No.: 2008-1433 WC

Westchester County Civil Court No. 1502/07

New York Supreme Court

Appellate Term—Second Department

9th & 10th Judicial Districts

JOHN McFADDEN,

Petitioner-Respondent-Cross-Appellant,

– against –

ELENA SASSOWER,

Respondent-Appellant-Cross-Respondent.

BRIEF FOR PETITIONER-RESPONDENT-CROSS-APPELLANT

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PRELIMINARY STATEMENT

This brief is submitted by respondent-cross appellant John McFadden (hereinafter "McFadden") in opposition to the appeal of Elena Sassower, (hereinafter "Sassower") from a decision and order of the White Plains City Court dated and entered on October 11, 2007 which denied her cross-motion; a) seeking to have this matter referred to the Division of Housing and Community Renewal for the determination as to whether Sassower was a protected tenant under the Emergency Tenants Protection Act (the "Act") or other regulations; b) granting judgment dismissing McFadden's holdover petition under various sections of CPLR §3211; c) granting summary judgment to Ms. Sassower; d) awarding to her costs and sanctions as against McFadden's counsel, and e)referring Mr. McFadden's counsel to "the appropriate Grievance Committee authorities" and "to the Westchester District Attorney's office for criminal prosecution under the Penal Law". This brief is also submitted in support of McFadden's cross-appeal of the lower court's October 11, 2007 decision and order to the extent that it also denied McFadden's motion pursuant to CPLR §3211(b) for an order striking the various affirmative defenses and counterclaims alleged by Sassower in her answer herein.

By the October 11, 2007 Decision and Order, the court below correctly denied Sassower's cross-motion insofar as it sought referral of Sassower's claim that she was a protected tenant under the Emergency Tenants Protection Act, having found that the

issue raised by Sassower was not so complex or unique as to require the "particular expertise of the DHCR". The court also correctly outright denied Sassower's motion as related to petitioner's counsel. Likewise, the court correctly rejected that branch of Sassower's motion pursuant to CPLR §3211 and 3212; however, the court did so on procedural grounds and not on the merits of Sassower's claims as it should have. Here, the court found that the papers submitted by the respective parties, including the "documentary exhibits annexed thereto" disclosed after "a comprehensive review of the motion papers and exhibits" the existence of "triable issues of fact". As for McFadden's motion seeking dismissal on the pleadings of Sassower's affirmative defenses and counterclaims, the lower court's ruling was based entirely on the court's finding that the motion was not supported by the affidavit of a person with knowledge of the facts. The ruling was erroneous.

As hereinafter more fully demonstrated, McFadden's motion was based, in part, on issues of law, rather than issues of fact, in part, on undisputable documentary evidence, such as published decisions of various federal courts in which many of Sassower's claims had already been adjudicated as against her, in part, on Sassower's own allegations and admissions as set forth in her answer and on her cross-motion (which, for the purposes of

McFadden's motion to dismiss, the Court was obliged to deem as true), in part, upon the affirmation of McFadden's counsel who did, himself, have personal knowledge of the facts that supported the dismissal of some of Sassower's defenses and, lastly, upon the affidavit of McFadden, himself; a person who did have personal knowledge of relevant facts.

Thus, as hereinafter more fully set forth, the court below should have granted McFadden's motion and struck Sassower's various affirmative defenses and counterclaims on their merits. It should also have denied outright Sassower's cross-motion on the merits and not on procedural grounds.[1]

STATEMENT OF THE CASE

On August 2, 1983, Mr. McFadden purchased from the sponsor of the then newly completed coop project at 16 Lake Street, White Plains, New York the stock and proprietary lease appurtenant to Apartment 2C in the building known by that address (hereinafter the "Apartment") as and for his principal residence (Pet. @ para. 2). (Pg. 4 of Exhibit "H" to Resp.'s Aff. In Op. to Mot. in Sup. of X-Mot. (hereinafter "Resp.'s Aff.")), (Ex "B" to Pet.'s Reply

[1] The Court also denied that portion of McFadden's motion as sought a default judgment against Sassower for failing timely to answer McFadden's petition; however, as is clear from McFadden's "Reply and Opposition to Cross-motion", McFadden had voluntarily withdrawn that aspect of his motion before the Court decided it.

& Opp. to X-Mot. (hereinafter "Pet's Reply")) Prior to that date, Mr. McFadden had been a tenant in the building. (Pg. 4 of Ex "H" to Resp.'s Aff.)

Thereafter, by contract dated October 29, 1987, (Ex. "A" to Sassower's Answer and Counterclaim-hereinafter "Rep.s Ans.") Mr. McFadden agreed to sell his interest in the Apartment to Sassower and her mother, Doris Sassower. Although the contract did not reflect this fact, it was understood at the time that the Apartment would be occupied only by Elena Sassower and that Doris Sassower was included as a purchaser because of Elena's lack of funds and credit. (Sassower admits at paragraph "16" of "Resp's Aff. that her mother, Doris, did not at any time ever live in the apartment") (See also *Sassower v. Field*, 752 F. Supp. 1182 (S.D.N.Y. 1990); (Sassower v. Field et. al., 138 F.R.D. 369; pg. 373).

As is evident from a review of the contract of sale, the sale was subject to the approval of the Coop Corporation. It specifically provided that it would be cancelled and terminated upon the failure or refusal of the Coop Corporation to consent to the sale. (Ex "A" to Resp.'s Aff., Art. "6") The contract also included an "Occupancy Agreement" under and pursuant to which the parties agreed that the Sassowers could occupy the Apartment for

a monthly sum pending closing on the sale contemplated by the contract. However, the closing did not ever occur as a result of the Coop's refusal to approve the sale. As was proven in the federal legal proceedings hereinafter described, the Coop Corporation had refused its consent to the sale for a laundry list of legitimate reasons including, but not limited to, the wrongful conduct of Elena Sassower's father, George Sassower, who had moved into the Apartment with Elena and had set up shop as an attorney there (Mr. Sassower was, and is, a disbarred attorney), smoked in the building's hallways in violation of its rules, was arrested by the police there and otherwise annoyed other residents of the building and Elena Sassower's lack of financial means and credit. (*Sassower v. Field*, 138 F.R.D. 369 (S.D.N.Y.); aff'd in part, 973 F. 2d (2d Cir. 1992) cert. den. 507 U.S. 1043, 1135 Ct. 1879 reh. den. 508 U.S. 968 1135 Ct. 2952 (1993). Nevertheless, upon the Coop Corporation's refusal of consent to the sale, Elena and Doris Sassower commenced an action in the United States District Court for the Eastern District of New York under, inter alia, the Civil Rights Act and the Fair Housing Act, in which they claimed, inter alia, that the Coop Corporation had discriminated against them on the grounds that they were unmarried Jewish women. (*Sassower v. Field*, 752 F.Supp. 1182).

Since the contract of sale was contingent upon the consent

of the Coop Corporation, which consent had been denied, the contract and the Occupancy Agreement under which Sassower and her father had been occupying it terminated by its terms. Nevertheless, Sassower and her father remained in possession of the Apartment and refused to vacate it or return possession of it to Mr. McFadden. Initially, Mr. McFadden was willing to allow the Sassowers some leeway to attempt, either through negotiation or through their litigation, to obtain the consent of the Coop Corporation for the sale of the Apartment to the Sassowers under their contract, and did not immediately demand that the Sassowers vacate it[2]; however, ultimately he did demand that they vacate the Apartment and return possession of it to him.

The Sassowers refused his demand.

The Prior Proceedings

Thereafter ensued the commencement of several holdover proceedings in the City Court of the City of White Plains, all aimed at evicting the Sassowers from the Apartment. These proceedings sought the Sassowers' eviction as holdovers following

[2] Initially, Mr. McFadden' attorneys authorized the Sassowers to name Mr. McFadden as a plaintiff in their federal action; however, within the a short period of time, as he observed that case progress and the manner in which the Sassowers were conducting it, and he understood more fully the allegation that they had made therein, he instructed his attorneys to remove him as a party therein and, in fact, he was withdrawn as a party to the suit. (*Sassower v. Field*, supra)

the termination of McFadden's contract of sale, the Occupancy Agreement that was a part thereof and the continued occupancy of the Apartment thereafter by Sassower on a month to month basis. Annexed hereto as Exhibits "A" and "B" are two decisions issued by the White Plains City Court on the cases. They are relevant here because they adjudicated as against Sassower some of the same arguments and claims as she made in the proceedings below. Ultimately, as the annexed decisions show, the Sassowers were successful in exploiting what the court had found to be procedural deficiencies in those proceeding rendering it impossible for the cases to proceed; however, not before the Court rejected patently frivolous motions of the Sassowers to disqualify the City Court of White Plains and each of Judge Reap, Judge Hallman, Judge Friedman and Judge Holden (essentially the entire bench of the White Plains City Court at that time) based on unsupported conclusorily allegations of fraud, bias and other alleged misconduct of each of the various judges who, at any time, had any contact or association with any aspect of the cases brought against the Sassowers.

Those decisions are of no small significance to the proceedings herein. Through its January 25, 1989 "Consolidated Decisions", (Exhibit "A") the Court considered, and rejected, on the merits, many of the claims and arguments that Sassower raised

in the proceedings below.[3] Although Sassower appealed the "Consolidated Decisions" to the Appellate Term of the Supreme Court, she failed to perfect her appeal making the City Court's rulings final and binding as against her such that the doctrines of res judicata, collateral estoppel and issue preclusion precluded, and now preclude, Sassower from raising the same arguments and claims in the proceedings below and before this Court.

Ultimately, all of the above discussed proceedings were either dismissed or withdrawn due to procedural matters that precluded them from advancing any further; (but not on the merits).

The Proceeding Under Index #SP 651/89

It being clear from the March 6, 1989 letter decision of the Court below (Ex "B") that the City Court would not permit Mr. McFadden to proceed with his summary holdover proceeding under Index #504/88 which the Court had found remained viable as to Elena Sassower on the theory set forth in his petition absent

[3] Following a traverse hearing upon the motion of Doris Sassower for dismissal of Mr. McFadden's summary proceeding against her under Index #504/89, the White Plains Cit Court determined that it lacked personal jurisdiction over Doris Sassower (but not Elena). It is for this reason that in summarizing the status of Mr. McFadden's holdover proceeding under Index #504/89, the City Court in its March 6, 1989 letter decision stated that the suit was viable only against Elena Sassower.

joinder of Doris Sassower as a party respondent, on April 4, 1989, he commenced the new summary holdover proceeding in the City Court of the City of White Plains under Index #651/89 (Resp.'s Ans. @ para. "Fourth" - "Fifth"; Ex "C" annexed).

In that holdover proceeding, Mr. McFadden sought eviction of the Sassowers on the same grounds as he had pled in his the prior cases; to wit, the expiration of the term of the Occupancy agreement upon the Coop Corporation's refusal to approve the sale of the Apartment to the Sassowers and subsequent refusal of the Sassowers to vacate the apartment following due service of a Notice to Quit.

The Sassowers' raised several defenses to the petition in their answer in that case, in various motions and in opposition to two separate motions made by Mr. McFadden for summary judgment, each of which, with the exception of their defense based upon their claims in their then pending federal actions, the court below rejected on their merits.

As for that defense, in its decision of December 19, 1991 (Exhibit "C") the court determined to hold Mr. McFadden's motion in abeyance pending the outcome of what the court believed was the Sassowers' appeal of the unanimous jury verdict rendered

against them, but which was, in fact, the Sassowers' appeal of the U.S. District Court's decision granting more then $102,000.00 in sanctions and attorneys fees as against them for the maintenance of their frivolous claims and for the egregious manner in which they had litigated them, and denying their motion for a new trial based, inter alia, on their claims that the judge in the case was biased as against them (*Sassower v Field*, et. al., 138 F.R.D. 369).

In so ruling, the Court noted that the only issue remaining in the case following the Court's prior unappealed rulings was the same issue presented by the Sassowers in their federal litigation and that, as a result, if the Sassowers prevailed on their federal litigation, Mr. McFadden's summary proceedings would be dismissed while, conversely, if the Sassowers failed to prevail on their federal action, summary judgment in favor of Mr. McFadden in the summary proceedings would, and should, be granted.

Thus, the Court ruled as follows:

> In one sense (1) the appeals of the jury verdict and judgment of the U.S. District Court Judge (Hon. Gerald L. Goettel, U.S.D.J.) entered thereon and dated March 20, 1991 and (2) the Judge's decision dated May 16, 1991 are not relevant because there was never any stay of the proceedings in the White Plains City Court ordered in all of the federal litigation. See paragraph III C. of our letter dated March 6, 1989 and

sent to L.J. Glynn, Esq., with copies to petitioner and respondent herein.

In another sense the federal appeals are very relevant because petitioners lost in the Federal District Court and if they also lose in the U.S. Court of Appeals for the Second Circuit our case would be effective terminated. This follows because respondent's claims in the federal action were dismissed and it is those exact claims that form their defenses in City Court summary proceedings. Axiomatic principles of res judicata, collateral estoppel an issue preclusion would apply. In that situation we would grant the instant motion for summary judgment forthwith. Conversely, if the respondent prevail in the federal appellate process, that would mean a denial of the instant motion and ultimately a dismissal of the underlying summary proceeding because respondents' defenses here would have been proven valid and petitioner similarly would be bound by the three principles stated above. (Exhibit "C")

The Court, in the same decision, denied the Sassowers' frivolous request for sanctions and costs.

The Sassowsers did not appeal the City Court's December 19, 1991 decision and order.[4]

By a decision and order dated and entered August 13, 1992, the United States Court of Appeals rejected the Sassowers' appeal of the District Court's decisions and orders, with the exception that, although the Court "conclude[d] that [Judge Goettel] was

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[4] It is critical to note that all of the defenses that the Sassower had raised in their answer in those proceedings with the exception of their claim of discrimination had already been determined against them in prior proceeding as above set forth. The Sassowers were precluded from relitigating the issues. It is for this reasons among others, that the City Court correctly ruled that the only remaining issue in the case before it was whether the Sassowers would prevail on their Federal claims.

entitled to find both [Elena and Doris Sassower] liable for sanctions", it vacated the imposition of joint liability for the full amount upon Elena Sassower in the absence of evidence that she had the financial resources to pay an award of that size and remanded the issue of the sanctions to be imposed against Elena to the U.S. District Court to assess against Ms. Sassower "such portion of the award as is appropriate in light of her resources". 138 F.R.D. 369

The Sassowers subsequently filed a petition for certiorari with the United States Supreme Court; however, that petition was denied. (*Sassower v. Field et. al.*, 507 U.S. 1043, 113 S. Ct. 123 (1993). Incredibly, the Sassowers thereafter sought a rehearing of the Supreme Court's denial of their cert. application for certiorari which was also denied. 508 U.S. 968, 133 S.Ct. 2952(1993).

Following these federal court decisions, McFadden once again moved the City Court for summary judgment, reminding the City Court of its ruling that McFadden would be entitled to summary judgment in the event that the Sassowers were not successful in overturning the jury verdict against them. However, it was not until July 3, 2008, virtually sixteen years after McFadden had filed his summary judgment motion, that the City Court ruled on

it, granting to McFadden a judgment of possession. (Ex "D" annexed)

As this Court is well aware from the extensive litigation before it under Index #2008-1427 WC, Sassower has appealed that judgment but has not, as of the date hereof, perfected her appeal.

The City Court finally determined to rule on McFadden's summary judgment motion in no small part as a result of his commencement of the proceedings below and of Sassower's claims, arguments and defenses raised in these proceedings.

In this regard, the following occurred:

The Proceedings Below

During the course of the earlier proceedings above discussed before the City Court, McFadden and the Sassowers agreed that the Sassower would pay, and McFadden could accept without prejudice to his claims, the sum of $1,000.00 per month as and for use and occupancy; and the City Court approved the arrangement.

Over the course of the next fourteen years, while McFadden's

motions for summary judgment in the 651/89 City Court case remained pending, McFadden and Sassower made and entered into several oral agreements under which Sassower agreed to increases in her monthly payments so that, as of the date that McFadden filed his holdover petition in the proceedings below, Sassower had agreed to pay, and was, until June, 2007 paying, $1,660.00 per month, and had been doing so since the middle of 2006. (See Resp.'s Ans., Ex. C-1, C-2, C-4)

In late 2006, a leak in the plumbing in the building from above McFadden's apartment caused significant damage to the Apartment. (See Ex's "F-4" through "F-28" of Resp.'s Ans.)

As the exhibits to Sassower's Answer plainly show, the Coop Corporation, through its insurance carrier, agreed to make the necessary replacements of flooring and cabinets and other repairs of the Apartment; however, Sassower refused the Coop and McFadden's contractors access to the apartment claiming that she continued to have a right to purchase the apartment despite the decisions of the federal courts and that, as such, she should be the sole arbiter of what work was to be performed and the manner and timing of its performance. She also made frivolous complaints to the Coop Corporation's insurance carrier to the effect that the Coop and McFadden were committing fraud in making

the insurance claims because, she alleged, the repairs that the insurance company had agreed to pay for were not necessary.

From these events, it became patently clear to McFadden that he could no longer wait for the City Court to rule on his long pending motion for summary judgment and that some other action was required.

Certain that, if he was successful in compelling the City Court, by mandamus or otherwise, to rule on his then sixteen year old motion for summary judgment in the pending proceeding under Index No. 651/89, Sassower would contend that his subsequent agreements with Sassower that raised the monthly use and occupancy payments from Sassower to McFadden would preclude the City Court from granting summary judgment on McFadden's pending summary proceeding, McFadden determined to commence a new proceeding based upon the termination of the month to month arrangements to which the parties had agreed over the course of the preceeding sixteen years.

Accordingly, on April 23, 2007, McFadden caused to be served upon Sassower at the Apartment a thirty day Notice of Termination requiring that Sassower vacate the apartment and tender possession on May 31, 2007. (The said notice and due proof of

service thereof is annexed as an exhibit to the Petition herein).

When Sassower refused to remove herself from the apartment on May 31, 2007, McFadden commenced the proceedings below by filing his petition with the City Court and thereafter by serving upon Sassower his Notice of Petition and Petition herein.

By his petition, McFadden essentially claims entitlement to a judgment of possession based upon Sassower's failure to remove herself from the premises following the expiration of the thirty day notice period set forth in the above described April 23, 2007, Notice of Termination.

On July 16, 2007, the matter came on to be heard before the White Plains City Court. As of that date, Sassower had neither answered the petition nor moved with respect to it. During the course of the proceedings before the Court, McFadden, through his counsel, advised the Court that Sassower had tendered checks in the amount of her monthly payments for the months of June and July, 2007, each of which McFadden refused to cash and each of which had been returned to Sassower. (Resp.'s Aff., Ex. I-1) Counsel sought, and obtained, an order requiring Sassower to replace the returned checks with new ones and to continue to pay use and occupancy monthly, the acceptance by McFadden of which

service thereof is annexed as an exhibit to the Petition herein).

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would be without prejudice to his case. The court also granted Sassower a brief extension of her time to answer or otherwise move with respect to McFadden's petition. (Ex. "I" to Resp.'s Aff., pg.'s 16-19)

Thereafter, by letter to the court, a copy of which she failed to serve upon McFadden's counsel, Sassower sought an additional extension of her time which, unbeknownst to McFadden or his counsel, the court granted.

On August 20, 2007, Sassower served her "Verified Answer with Affirmative Defenses and Counterclaims" through which she purported to pled ten "affirmative defenses" and four separate "counterclaims". The first of her affirmative defenses was her claim that the procedures under Index No. 651/89 above discussed were still open and that McFadden's claims herein were the same claims as he had pled in the present proceedings such that the earlier proceedings were a bar to his maintenance of the present case. She also vehemently denied that she had made any new agreement with McFadden claiming, instead, that her possession was, and remained, pursuant to the occupancy agreement that was part of her 1987 contract of sale. She continued to claim that she was entitled to purchase the apartment under the purchase agreement despite the federal court decisions as against her.

This outlandish claim also formed the basis for the first of her four "Counterclaims".

Under her second Counterclaim, she asserted that McFadden was guilty of fraud and extortion by virtue of his failure to sell to her the Apartment in 2006 following alleged notification from her that she was "ready, willing and able" to purchase it; once again ignoring the federal judgment and decisions against her and their clear import. Sassower claimed that she was paying the monthly charges to which she had agreed "in the good faith belief that [McFadden] would be negotiating with her [a new] contract of sale for the submission to the Coop Board. (Ans. at para. 86) and that, somehow, McFadden's acceptance of the monthly payments and subsequent refusal to negotiate such a contract constituted "extortion" and/or "fraud".

By the third of her Counterclaims, Sassower purported to plead a claim sounding in "retaliatory eviction", arguing that McFadden had commenced the instant proceedings based upon what has occurred in 2006 with respect to the leaks in the apartment above discussed. It mattered not at all to Sassower that she had not been evicted and was still in occupancy and possession of the apartment.

McFadden's Underlying Motion

On August 27, 2007, McFadden moved the City Court for an order striking each of Sassower's affirmative defenses and counterclaims. He also sought a default judgment on the ground that Sassower had filed her answer belately; however, in his reply papers, he withdrew that aspect of the motion having subsequently learned that the court had granted Sassower's ex-parte application for additional time to file her answer through her ex-parte letter. McFadden also sought judgment against Sassower based upon her disobedience of the court's direction to pay use and occupancy.

Sassower opposed the motion and cross-moved for an order referring petitioner's counsel to the appropriate Grievance Committees and to the Westchester County District Attorney's office based upon wild, unsupported and vitriolic claims of attorney misconduct, perjury, fraud, deceit and the like.

The court decided McFadden's motion and Sassower's cross-motion by its October 11, 2007 Decision and Order herein appealed from the Order is described fully in McFadden's within Preliminary Statement.

For the reasons herein stated, this Court must not only sustain that portion of the City Court's decision and order as denied Sassower's cross-motion and each part thereof but must reject her claims hereunder on their merits. Likewise, this Court must reverse that portion of the City Court's decision and order as denied petitioner's motion to strike Sassower's affirmative defenses and counterclaims.

POINT I

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "FIRST AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

As and for her first affirmative defense, and through her cross-motion, Sassower asserted that McFadden's petition should be dismissed because of "prior eviction proceedings against respondent in White Plains City Court under Index No.'s 504/88 and 651/89, only the latter of which Sassower claimed remained "open". (Ans. at para. "Fourth", "Fifth"). The clear import of the above quote language contains Sassower's acknowledgement that the prior proceedings under Index #504/88 were closed. She did not claim to have obtained a judgment in her favor or the merits in either of the two cases; nor does she so claim on her appeal. At the same time, she fails to provide any cogent reason as to why the admittedly closed proceedings would have constituted a

bar to McFadden's commencement and maintenance of the proceedings below.

As for the pendency of McFadden's 651/1989 summary proceeding, McFadden did not depute, indeed he most strenuously agreed, that that case was still open; however, as he argued on the motion underlying this appeal and cross-appeal, although the 651/89 proceeding and the proceedings herein in the Court below sought the same relief; to wit, the eviction of Elena Sassower from McFadden's apartment, the theories and facts under which the cases proceeded were not the same.

As the files in the two cases revealed, McFadden's 1989 summary proceeding sought eviction based upon the expiration of the term of the 1986 occupancy agreement, when the Coop Corporation refused to approve the sale of the Coop to the Sassowers, and based upon the subsequent service of a Notice to Quit in 1989. By his petition in the proceedings below, McFadden asserted that he was entitled to a judgment of possession based upon his service, in April, 2007, of a Thirty Day Notice of Termination and by the passage of time set forth in that notice for Sassower to vacate the apartment.

Thus, the two cases were not identical and did not proceed on

identical facts such that the pendency of McFadden's 1989 summary proceeding was not a bar to his commencement or maintenance the proceedings below as a matter of law.

Although she did not so state either in her Answer or on her cross-motion, it would appear that Sassower's "First Affirmative Defense" is premised upon CPLR §3211(a)(4) which permits a party to move for judgment dismissing one or more causes of action when "there is another action pending between the same parties for the same cause of action".

As above noted, Mcfadden's petition in the proceedings below did not plead the same cause of action, based upon the same facts as were plead in McFadden's 1989 special proceedings. The plain language of the statute and the case law interpreting it make it clear that, under these circumstances, Sassower was not entitled to dismissal of McFadden's petition in the proceedings below based upon the pendency of McFadden's 1989 special proceeding. See *Bofinger v. Bofinger*, 107 Misc. 2d 573, 435 N.Y.S. 2d 652 (1981).

Moreover, the statute is explicit that, even if the parties, the relief requested and the causes of act raised in two proceedings are identical, the court need not dismiss one of the

proceedings but may "make such order as justice requires", including, but not limited to, consolidation of the two cases as Judge Hansbury directed in his October 11, 2007 order. See *Thompson v. Thompson*, 103 A.D. 2d 772, 477 N.Y.S. 2d 405 (2nd Dept., 1984); *Northfork Bank v. Grover*, 3 Misc. 3rd 341, 773 N.Y.S, 2d 231 (2004).

Based upon the foregoing, the court below properly denied that portion of Sassower's cross-motion as sought dismissal of McFadden's petition on the ground of the pendency of McFadden's 1989 summary proceedings. Likewise, based upon the foregoing, the court below erred in failing to grant that portion of McFadden's motion as sought an order striking Sassower's "First Affirmative Defense".

Contrary to the court's decision, no affidavit of a person with knowledge was required for the lower court to have reached this conclusion. Its own files, as well as the documentary evidence in the form of its files in the two cases which were before it on McFadden's motion and Sassower's cross-motion as well as McFadden's verification of his pleadings were sufficient for the court to have ruled on the merits of his claims for dismissal of Sassower's "First Affirmative Defense" even if he had not submitted an affidavit attesting to the facts supporting

his motion as a person with first hand knowledge of them, as he did.

POINT II

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "SECOND AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

As her "Second Affirmative Defense", Sassower asserted that McFadden's petition should have been dismissed because he did not allege in the petition that he had returned the checks that Sassower had tendered as and for the monthly payments due for the months and June and July, 2007. It is respectfully submitted that no such allegations are required to sustain a holdover petition. However, McFadden did expressly allege in his petition that he had not received payment for the June and July rents.

Submitted in support of McFadden's motion was the affirmation of petitioner's counsel who averred that McFadden had not accepted the tender of the two checks prior to the commencement of his proceeding but, instead, had caused them to be returned to Sassower. Counsel alleged that it was he who returned the checks to Sassower under cover of his letters to her, each of which was included as Exhibit "C" to his affirmation in support of Mr. McFadden's motion. Under these circumstances, counsel was certainly a person with personal knowledge of the relevant facts

sufficient to support McFadden's claim such that the court's refusal to strike Sassower's "Second Affirmative Defense" on the sole ground that McFadden's motion was not supported by an affidavit of a person with personal knowledge was erroneous.

Notably, Sassower includes as Exhibit "I" to her answer the transcript of the proceedings before the City Court on July 16, 2007 in which counsel also advised the Court that Sassower's checks had not been accepted, but had been returned to her. Sassower denied that she had received the checks; however, in subsequent proceedings before the court, Sassower was asked to provide evidence that the checks had been cashed and could not do so. Nor did she do so on her cross-motion.

In the face of the allegations in McFadden's verified petition, McFadden's own affidavit attesting to the accuracy of his counsel's allegations, his counsel's affirmation as above set forth and the exhibits annexed thereto, and in the absence of any objective evidence provided by Sassower that refuted McFadden's and his counsel's assertions and evidence, the court should have granted McFadden's motion to the extent of striking Sassower's "Second Affirmative Defense".

Needless to say, the court correctly refused to deny

Sassower's motion seeking dismissal of the proceedings based upon her defense that McFadden's petition was defective in that it did not specifically allege that McFadden had returned Sassower's June and July, 2007 checks.

At this point, it is significant to note that, despite the court's direction, even as of the date hereof, Sassower has failed to tender the full amount of the use and occupancy that the lower court directed her to pay for the months of June and July. When, ultimately and belatedly, she tendered payments for those months, she deducted therefrom what she claimed was the costs for placing "stopped payments" on the two checks that she had previously tendered. Although she belatedly sought the permission of the court to do so, such permission was never granted.

POINT III

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "THIRD AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

By Sassower "Third Affirmative Defense", she alleged that the court below lacked subject matter jurisdiction over the proceeding because the October 30, 1987 "temporary occupancy agreement" into which she had entered with McFadden provided that "in no way do the parties intend to establish a landlord-tenant

relationship".

Sassower's claim was unavailing as a matter of undisputed fact and as a matter of law. No affidavit of a person with personal knowledge was required for the court to have reached that conclusion.

In the first instance, as McFadden affirmatively set forth in his verified petition, and as it is also above discussed, in the proceedings below, McFadden sought eviction of Sassower as a holdover based upon the passage of time after service of a notice of termination in 2007; years after the expiration of the term of the October 30, 1987 occupancy agreement, and not under that agreement.

Notably, the monthly amounts that Sassower admits that she had been paying as of the commencement of the proceedings were $1,660.00 while the "temporary occupancy agreement" in question called for payment of only $1,000.00. Sassower conceded in her Answer that the increase was as a result of agreements made between the parties long after her right to remaining occupancy of the premises under the occupancy agreement had expired and long after the contract containing the said agreement was canceled.

As is evident from her answer and failure to deny the allegation of paragraph 6 of McFadden's petition, the temporary occupancy agreement was part of a written contract of sale entered into between McFadden as seller and Sassower and her mother Doris Sassower as purchasers. The contract at paragraph 17 provided, expressly, that the agreement "can not be changed, discharged or terminated orally". It was also made subject to the Coop board's approval of the sale (para. 6 of the contract).

Assuming arguendo that McFadden was proceeding on the basis of a claim that Sassower was a holdover under the written temporary occupancy agreement contained in the October 30, 1987 contract annexed to Sassower's answer as Sassower alleges, and not under the subsequent agreement, that McFadden alleges, then, even if no "landlord-tenant relationship" existed between the parties by virtue of the provision in the contract to that effect, such would still not bar the instant proceeding or render it jurisdictionally defective. RPAPL §713 specifically provides that a special proceeding may be maintained by the vendor against a vendee under a contract of sale, the performance of which is to be completed within 90 days after its execution, where the vendee is in possession of all or part of the premises and has defaulted in the performance of the terms of the contract of sale and remains in possession without permission of the vendor.

In the instant matter, the contract of sale set a closing date of 60 days from the date of the contract's execution. Sassower remained in possession of the premises that would have been sold under the contract despite that the contract was conditioned on the approval of 16 Lake Street Owners, Inc., the Coop Corporation, which approval was denied.

Under the occupancy agreement, Sassower was to have vacated the premises in such event, but she failed and refused to do so.

Notably, the Court below ruled against Sassower on this very issue in its decision dated September 18, 1989 in the preceding between her and McFadden under Index No. 651/89 (Exhibit "E") annexed)

In any case, Sassower was subsequently in possession without the permission of McFadden, McFadden having demanded that respondent vacate the premises on or before May 30, 2007 as per his notice of termination which was included as an exhibit to his verified petition.

Thus, whether or not the proceedings below were pursuant to claims under the written occupancy agreement as Sassower claims or pursuant to those that McFadden argues they are, McFadden had,

and has the right to maintain these proceedings and the court had and has subject matter jurisdiction over them such that Sassower's defense to the contrary should have been stricken outright.

The court correctly refused to grant judgment to Sassower dismissing the petition based upon her claim in this regard.

POINT IV

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "FOURTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

Sassower claimed, as her "Fourth Affirmative Defense", that McFadden's petition should be dismissed because Sassower's mother, Doris Sassower, who was originally a party to, and signatory of, the October 30, 1987 contract of sale and temporary occupancy agreement, "is a necessary party to the proceeding". However, there was no merit to this contention.

In her Affidavit in Opposition to Petitioners' Motion and in Support of Cross-Motion (at para. "76"), Sassower expressly conceded that her mother had never lived in the apartment. Likewise the United States District Court found that Doris was made a party to the contract and occupancy agreement solely for

the purpose of providing, to Sassower, who was to have actually occupied the Apartment with her father, financial backing sufficient for the purchase. *Sassower v. Field*, 138 F.R.D. 369, 370-71, 373. Since these facts were conceded by Sassower, herself, and were binding against her under the doctrines of res judicata and collateral estoppel inasmuch as they had already been determined in Sassower's federal litigation, there was need for the affidavit of a person with personal knowledge for the court below to have granted McFadden's motion insofar as it sought the striking of Sassower's "Fourth Affirmative Defense".

Moreover, although Doris Sassower was a signatory to the original contract of sale and occupancy agreement she was not, nor did McFadden claim in his petition that she was, a party to the oral agreement that McFadden alleges formed the basis for his petition in the proceedings below.

As above set forth, McFadden's petition below seeks removal of Elena Sassower as the only person in possession of the subject premises as a result of the expiration of the term under which she maintained possession of the Apartment under an agreement that McFadden asserts he reached between himself and Sassower only, many years after the term of the written occupancy agreement had expired. The correspondence and communications

between the parties, including those in Sassower's own. Answer make it clear that the only parties to various dealings relating to Sassower's possession and occupancy of the subject premises that McFadden sought to terminate after the Board rejected the Sassower's purchase application were McFadden and Sassower.

Accordingly, the lower court correctly refused to dismiss McFadden's petition upon Sassower's "Fourth Affirmative Defense". It erred, however, in failing to strike that defense outright.

POINT V

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "FIFTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

Sassower's "Fifth Affirmative Defense", purportedly sounding in "equitable estoppel" and "unjust enrichment" should have been dismissed as a matter of law. As McFadden argued on his motion, the allegation set forth in Sassower's answer in support of those purported defenses do not satisfy the elements of such claims or defenses as a matter of law. The court did not require the affidavit of a person with knowledge of the facts to have reached this conclusion, although such an affidavit was provided in the form of Mr. McFadden's affidavit and verified pleading. All that

was required was for the court to have considered Sassower's allegations in the context of the applicable law.

As McFadden argued on his motion, the essential elements of equitable estoppel are: (1) an act by the party charged constituting concealment of the facts or false misrepresentations; (2) the intention or expectation by the party charged that such will be relied upon by the other party; (3) an actual or constructive knowledge of the true facts by the wrongdoer; and (4) reliance by the innocent party causing him to change his/her position to his/her substantial detriment. *Gratton v. Divo Realty Co.*, 89 Misc. 2d 401, 391 N.Y.S. 2d 954, aff'd 63 A.D. 2d 959, 405 N.Y.S. 2d 1001 (2nd Dept., 1977).

Sassower's allegations in support of her defense of equitable estoppel fail to satisfy any of those elements.

Sassower essentially claimed in her Answer and on her cross-motion that McFadden should have been, and should now be, required to complete the sale of his coop apartment to her despite the Coop Board's refusal to approve the sale and despite that she was unsuccessful in her federal litigation against the Board and other seeking relief from that refusal. She claimed that petitioner should be equitably estoppped from bringing the

proceeding below on the basis of his failure to complete the sale. However, estoppel may not be invoked to compel performance of an act which is beyond the power of the other party to perform. *Ossining v. Larkin*, 5 Misc. 2d 1024, 160 N.Y.S. 2d 1012. Moreover, where a contract governing the respective obligations of the parties is made, no claim can be brought seeking enforcement of rights other than those set forth in the contract under a theory of an "implied contract". *Clark Fitzpatrick, Inc. v. L.I.R.R. Co.*, 70 N.Y.2d 382, 581 N.Y.S.2d 653(1987).

In the case at bar, McFadden was unable to complete the sale of his apartment to Sassower because 16 Lake Street Owner's, Inc., the Coop Corporation, refused to approve Sassower's purchase and the contract of sale provided that it, and McFadden's obligation to sell the apartment to Sassower, were expressly conditioned on the Coop Board's approval of the sale.

In her Answer, Sassower alluded to her five years of litigation over the matter. She also contended on her cross-motion that she was entitled to purchase the apartment under her contract, ignoring the facts that the federal court not only dismissed her claims to that effect but found them to be frivolous enough to have supported the award of over $102,000.00

in sanctions and legal fees.

Sassower's defense of "unjust enrichment" also should have been stricken in that, in the first instance, her allegations make clear that McFadden was never unjustly enriched. The only monies that he received, as conceded by Sassower, were those that Sassower herself agreed by her acts and words were fair and reasonable for her month to month use, enjoyment, occupancy and possession of McFadden's apartment.

The essential inquiry in determining the merits of any claim for unjust enrichment is whether it is against equity and good conscience to permit one to obtain what is sought to be recovered. *Paramount Film Distributing Corp. v. State*, 30 N.Y. 2d 415, 334 N.Y.S. 2d 388, remittur amd 31 N.Y. 2d 678, 336 N.Y.S. 2d 911 (1972).

In the case below, the City Court should have decided in favor of McFadden striking Sassower's affirmative defense of unjust enrichment. There is no dispute that Sassower originally entered into occupancy of the Apartment under a "temporary occupancy agreement", that there is no dispute that that agreement was part of a contract of sale of the Apartment which sale was subject to approval of the Coop Corporation. Likewise, there is no issue

here that the Coop Corporation refused to grant its approval of the sale or that Sassower engaged in a litigation against the Coop Corporation in a manner, and by raising claims, that the United State District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit each found were frivolous enough to result in the imposition of over $102,000.00 in sanctions. These facts were, and are, binding against Sassower as a result of the decisions of the federal courts herein cited and which were included as exhibits on McFadden's motion and Sassower's cross-motion.

There was, and is, no issue in this case that Sassower failed and refused to remove herself from McFadden's apartment during the pendency of her federal litigation nor, based upon the exhibits in Sassower's own answer was, or is, there any issue that, over the course of the next fifteen years, Sassower voluntarily agreed to pay increased amounts monthly for her use, occupancy, possession and enjoyment of Mr. McFadden's apartment.

Even ignoring that the petition herein was verified by McFadden and that he did submitted his affidavit on his motion, the objective, irrefutable evidence, including Sassower's own admissions and documentary evidence proves that her claims of equitable estoppel and unjust enrichment were meritless as a

matter of law. Accordingly while the court properly refused to grant judgment to Sassower based upon these "defenses", it erred in failing to dismiss the defenses outright.

POINT VI

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "SIXTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

Sassower's "Sixth Affirmative Defense" of detrimental reliance" was undermined by her own factual allegations set forth in support of her defense and her cross-motion. The acts and actions attributed to McFadden by Sassower in support of her claimed defense having occurred almost twenty years before she raised them, the defense was barred by the applicable statute of limitations; to wit, CPLR §213. McFadden so argued on his motion for dismissal of the affirmative defense (Pl.'s "Aff. In Supp. Of Mot." at para. 94).

The lower court thus in erred in refusing to strike the affirmative defense on the ground that it was not supported by the affidavit of a person with personal knowledge of the facts supporting it. Here, McFadden's motion proceeded on the proposition that, even if Sassower's allegations in support of the defense were true, she was time barred from raising the

defense such that it should have been stricken.

Sassower's factual allegations were also legally insufficient to support a claim of "detrimental reliance". Once again, Sassower utterly disregarded that courts of competent jurisdiction had already ruled that the Coop Corporation was justified in refusing to approval the sale of McFadden's Apartment to her. Under these circumstances, Sassower could not reasonably have relied to her detriment on any alleged promise made by McFadden subsequent to the decisions of the federal courts.

Likewise, the fact that she was paying monthly sums below the fair market rental value for her use and occupancy of the Apartment can hardly support a claim that she made the payments to her detriment or only because she believed that she was to have been permitted to purchase the apartment.

POINT VII

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "SEVENTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

For the same reasons that Sassower's "Fifth" and "Sixth" "Affirmative Defenses" should have been dismissed and/or Sassower's cross-motion relating to them denied on their merits,

so too Sassower's "Seventh Affirmative Defense" purportedly sounding in "implied contract", "detrimental reliance" and "fraud" are also barred by the applicable statute of limitations and insufficient to support the defense as a matter of law. The court below should have stricken the defenses outright and correctly refused to grant judgment to Sassower based upon her claims thereunder.

None of the rambling allegations pled by Sassower in support of her "Seventh Affirmative Defense" bears any relationship to, or provides any basis for, any of the defenses that she purports to plead under her "Seventh Affirmative Defense". As is her wont, Sassower simply failed to acknowledge the objective facts documented by court decisions and the exhibits annexed to her own Answer and Cross-Motion that preceded the petition below. Instead, Sassower's "Seventh Affirmative Defense" is a transparent attempt to re-litigate matters already decided in prior litigations that she lost.

Sassower's allegations are so far removed from any claim or defense sounding in "implied contract", detrimental reliance" or "fraud" that any detailed analysis of her allegations in the context of defenses is impossible. Sassower's answer was large on broad sweeping vitriolic accusations, twisted reasoning and

self righteous banding about of catch phases such as "fraud" , "fraudulent", "deceit", "deceitful", "contemptuous", "biased", "frivolous", and the like; it was short on specific facts that would support her defensnes. Sassower cited no specific representations allegedly made to her by McFadden that reasonably could be viewed as actually and/or actionably "false" or "misleading"; nor did she cite any acts of McFadden that reasonable could have implied an agreement by him to do something or to provide something to her that he did not do or provide and on which she reasonably could have relied in acting to her detriment. There was nothing fraudulent, misleading, deceptive or wrongful about any of the McFadden's representations. The exhibits to Sassower's answer and McFadden's moving papers establish this clearly despite Sassower's self-serving characterization.

Under the circumstances surrounding this matter, that Mr. McFadden failed or refused to negotiate the sale of his Apartment to her following the federal courts' decisions and her conduct subsequent could not, as a matter of law, support any claim of "fraud", "detrimental reliance" or "implied contract". Moreover, Sassower failed to provide any indication as to how she acted to her detriment other than that she continued to pay use and occupancy during the pendency of McFadden's 1989 summary

proceeding seeking to evict her from the apartment. *Caracas Reality Corp. v. Jeremias*, 31 Misc.2d 1074, 221 N.Y.S.2d 181 (1961); *Sager v. Friedman*, 270 N.Y. 472, reh. Den. 271 N.Y. 617 (1936)

Rather, Sassower herself specifically alleged that she relied only on "petitioner's good faith" when she agreed to pay the increases that McFadden demanded from time to time for her use, enjoyment, possession and occupancy of his apartment.

Sassower also alleged that after [she] lost her federal litigation against the Coop, McFadden somehow "fostered in respondent the belief that he was honoring the terms of the October 30, 1987 occupancy agreement" essentially by waiting as long as he did for the City Court to decide his then outstanding motions for summary judgment and by collecting the monthly charges that Sassower had agreed to pay. These allegations fail to establish the defense of detrimental reliance, fraud or implied contract. *Cor? v. United Auto Services*, 108 A.D.2d 63, 485 N.Y.S.2d 264 (1987)

Moreover, the occupancy agreement by its terms did not permit for Sassower to remain in possession of the Apartment indefinitely, and, in any event, its terms had long since expired

once the Coop Board refused to approval Sassower's purchase. Thus, the very contract which Sassower hails as the lynchpin to her claims and defenses precludes her defense of implied contract and undermines her claims of fraud and detrimental reliance.

Sassower could not have reasonably expected that McFadden would sell her the Apartment even if it could be found that McFadden's mere failure more aggressively to seek to evict her after she lost her federal litigation and to demand that she make monthly payments as long as she continued to enjoy the possession and occupancy of his apartment implied an agreement on his part to sell the apartment to her.

As a result, Sassower's defense of "implied contract" "detrimental reliance" and "fraud" could not be sustained as a matter of law . The City Court should properly have dismissed the defense on McFadden's motion.

The court below did not require any affidavits of anyone other than what was before it to have reached this conclusion. Sassower's own admissions in her answer and on her cross-motion, the exhibits submitted therein and on McFadden's motion and the applicable law required that Sassower's cross-motion be denied and her "Seventh Affirmative Defense" stricken.

For the same reasons, the court correctly refused to grant Sassower's cross-motion on the basis of her "Seventh Affirmative Defense".

POINT VIII

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "EIGHTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

The bald allegations in Sassower's "Eighth Affirmative Defense", to wit, "Malice and Extortion" are unsupported by any appropriate facts and constitute little more than evidence of her unreasonable pique that McFadden did not see fit to answer questions that she unreasonably, at various times, posed to him. He had no duty to respond to Sassower's questions or to accept various offers that she had made to purchase his apartment after it was clear that no such sale was possible. This is particularly so in light of the history of Sassower's dealings and the federal courts' rulings in this matter.

Because Sassower's own factual allegation disproved her defense of "malice" or "extortion" the lower court was required to grant McFadden's motion seeking to strike the affirmative defense and to deny outright Sassower's cross-motion seeking to dismiss the petition. The court erred in determining that it

required an affidavit of a person with knowledge in order to consider McFadden's motion. It also erred in determining that a trial was required to determine the merits of Sassower's defenses. Even if Sassower proved beyond a shadow of a doubt all of the wild, vitriolic allegations that she made in connection with the defenses, they would not have been sufficient as a matter of law to support them.

POINT IX

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "NINTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

In Sassower's "Ninth Affirmative Defense", she alleges that McFadden breached a "covenant of good faith and fair dealing" by refusing to sell her his apartment following the outcome of her federal litigation. The dealings to which she refers were in the context of her failure and refusal to permit contractors and the Coop's insurance carriers entry into the apartment to make needed repairs following a flood, and continued claims to be the rightful owner of the Apartment entitled to make decision as to how it should be repaired. Her "ludicrous" allegations is once again, the documentary evidence before this Court left no genuine issue as to the lack of merit of Sassower's "Ninth Affirmative Defense". Indeed, once again, Sassower's own factual allegations undermine the defense such that the court below should have

stricken it upon McFadden's motion, It should obviously, have also denied on its merits Sassower's cross-motion to the extent that it relied on the defense.

POINT X

THE COURT ERRED IN REFUSING TO STRIKE SASSOWER'S "TENTH AFFIRMATIVE DEFENSE"; SASSOWER WAS NOT ENTITLED TO JUDGMENT ON THE BASIS OF THAT DEFENSE

Sassower's "Tenth Affirmative Defense" is no less absurd than those that it follows. Sassower's allegations in support of her defense, even if true, fail as a matter of law support any of her claims of "fraud", "retaliatory eviction" or "intentional infliction of emotional distress". Assuming arguendo that all of the allegations set forth in Sassower's pleading and on her motion were true, such would evidence only that she was a difficult person who failed and refused to act reasonably and in accordance with her contracts and agreements. Once again, Sassower's allegations are so far removed from any of the type that could support any of her claims and defenses that any analysis of the allegations in the context of such defenses is impossible.

Likewise, once again, there need not have been submitted any further affidavit of any person with more knowledge than was provided for the court below to have reached the same conclusion.

Thus, although the City Court correctly refused to grant judgment to Sassower on her cross-motion insofar as it was based upon her "Tenth Affirmative Defense" and the allegations thereunder, it erred in failing to grant McFadden's motion and/or to strike the affirmative defense outright.

POINT XI

SASSOWER'S FIRST COUNTERCLAIM SHOULD PROPERLY HAVE BEEN STRICKEN; THE COURT CORRECTLY REFUSED TO GRANT SUMMARY JUDGMENT BASED UPON IT

Sassower's "First Counterclaim" is premised on the proposition that she had "a meritorious federal action against the Coop and other defendants". She make this claim notwithstanding the determinations of the United States District Court for the Southern District of New York, which was subsequently affirmed by the Unites States Court of Appeals for the Second Circuit and, by the United States Supreme Court's denial of certiorari.

Sassower continues to attempt to re-litigate the merits of her claims of discrimination and violations of the Fair Housing Act by the Coop Corporation in the face of the federal courts decisions against her. That she seeks money damages under her "First Counterclaim" against McFadden in the face of those decisions and/or because, although he originally agreed to be a plaintiff in that litigation, he subsequently withdrew as such

upon his recognition of the friviolity of the claims shows nothing but McFadden's good judgment and common sense, and Sassower's lack of same and does not provide any basis to support Sassower's claims as against him.

All that the court below needed to draw this conclusion was Sassower's own allegations, the documents that Sassower provided in her answer and a review of the federal court decisions that it had been provided. The fact that it did not was error, at the same time that the fact that it refused to grant summary judgment to Sassower was proper.

POINT XII

SASSOWER'S "SECOND COUNTERCLAIM" SHOULD HAVE BEEN DISMISSED AND HER MOTION FOR SUMMARY JUDGMENT BASED UPON IT SHOULD HAVE BEEN DENIED OUTRIGHT

Sassower's "Second Counterclaim" purports to plead a claim against McFadden sounding in "fraud". For the same reasons that Sassower's affirmative defenses of "fraud" were, and are, not vialable as a matter of law, all as above set forth, her "Second Counterclaim" also is not vialable as a matter of law based upon her own allegations and the documentary evidence surrounding this matter.

POINT XIII

SASSOWER'S "THIRD COUNTERCLAIM" SHOULD HAVE BEEN DISMISSED AND HER MOTION FOR SUMMARY JUDGMENT BASED UPON IT SHOULD HAVE BEEN DENIED OUTRIGHT

Sassower's "Third Counterclaim", to the extent that it can be deciphered at all appears to be that McFadden was guilty of "fraud" "intimidation" and "wrongful eviction", when, having allegedly promised to discuss the sale of his apartment to her in 2006 in consideration for her agreement to allow the Coop's workers and insurance company into the apartment to make needed repairs following a flood, he ultimately determined, after discussion with Sassower and her sister, that he did not wish to sell Sassower the Apartment.

Sassower does not allege that McFadden actually agreed to sell the apartment to her at any time other than under the 1987 contract; and, in fact, such an agreement would have been futile because the Coop Board, whose approval of the sale would have been required, had already refused its approval.

Additionally, such an agreement was refuted by the correspondence between the parties that Sassower, herself, included as Exhibits "F" and "G" to her answer. This correspondence makes clear that McFadden fulfilled his alleged promise and committed no fraud against Sassower.

In any case, Sassower had a legal obligation to allow the Coop's workers to repair the damage to McFadden's apartment without McFadden's alleged promises. The court should recall Sassower's "Eight Affirmative Defense" under which she claims that McFadden was guilty of "extortion". Sassower's own answer plainly demonstrates it is Sassower who was guilty of such crime

In short, the facts even as Sassower alleges them to be simply do not support any claim of "fraud" "intimidation" or "retaliatory eviction". This is particularly true in light to the fact that Sassower was not evicted from the apartment at the time that she filed her answer; nor has she been evicted on the basis of any judgment or action against her in the proceedings below.

Consequently, Sassower's claim of entitlement to money damages based upon any "retaliatory eviction" could not be supported as a matter of law. The court below therefore should have granted McFadden's motion, struck the counterclaim on its merits and denied, Sassower's cross-motion rather than determine, as it did, that a trial was needed on the counterclaim.

POINT XIV

THAT PORTION OF SASSOWER'S CROSS-MOTION AS SOUGHT TO HAVE THE QUESTION OF HER STATUS UNDER THE EMERGENCY TENANT PROTECTION ACTION REFERRED TO THE OFFICE OF RENT ADMINISTRATION OF THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL WAS PROPERLY DENIED; THE COURT BELOW SHOULD HAVE DENIED THE CLAIM ON ITS MERITS

On her cross-motion, Sassower claimed that an issue existed as to whether she was protected as a tenant under the Emergency Tenants Protection Act. She sought an order referring the issue to the DHCR for adjudication. In its October 11, 2007, the court correctly determined that the issue was not so complex as to have precluded the court from, itself, determining it. It also found that it had concurrent jurisdiction with the DHCR to do so citing, in support of its decision, the case of *Davis v. Waterside Housing Co., Inc.*, 182 Misc. 851. However, based upon the documentary evidence that Sassower submitted in opposition to her cross-motion, the court should not only have denied Sassower's request for referral of the matter to the DHCR but it should have determined the issue as against her on its merits.

Based upon the evidence that McFadden in opposition to Sassower's cross-motion, there was no question the Apartment was not subject to the Emergency Tenant's Protection Act; nor was there any question that Sassower was not protected thereunder or under any other rent regulatory statute.

As set forth in McFadden's verified petition, at paragraph 13 thereof, the premises in question are not subject to the Emergency Tenants Protection Act, Rent Control or to the Rent Stabilization Law of 1969, as amended, or to any other rent regulation because the premises is a coop apartment, the shares in the Coop Corporation that owns the premises and that are appurtent thereto having been sold by the Coop's sponsor in an arms length sale to McFadden, who was, at the time, a bona fide purchaser, as and for her actual residence.

In opposition to Sassower's cross-motion, McFadden included as Exhibit "A" to his Reply and Opposition to Cross-Motion hereof, a copy of the Resolution adopted by the Common Council of the City of White Plains, New York on September 9, 1992 entitled "Resolution Removing Owner-Occupied Condominium and Cooperative Units from Regulations Under the Emergency Tenants Protection Act of 1974". The Common Council of the City White Plains was empowered to determine what housing accommodations would be subject to the Emergency Tenants Protection Act or other rent regulation.

As the Resolution makes clear, the Common Council of the City of White Plains determined that:

> [W]ith the exception of units leased to tenants who are income eligible under the federal Section 8 Rental

> Subsidy Program, the regulation of rents for owner that occupy cooperative and condominium housing accommodations pursuant to the Emergency Tenant Protection Act of 1974 does not serve to abate the emergency declared by the Common Council on July 29, 1977 and therefore, the Common Council hereby permanently removes owner occupied cooperative and condominium housing accommodations from regulation under the Act with the exception units leased to tenants who have been certified by the White Plains Section 8 office as being income eligible under the federal Section 8 income eligibility requirements which certification shall be made annually. (Emphasis added)

The Resolution defines an "Owner-Occupied Condominium and Cooperative Unit" as:

> Any condominium or cooperative dwelling unit which has been or is occupied or intended to be occupied by an owner, proprietary leasee or shareholder as his/her primary residence, which unit has been the subject of a closing under a cooperative or condominium offering plan, which closing occurred after the plan was declared effective by the Attorney General and which is now or may be rented to a tenant after the effective date of the cooperative or condominium plan, and in which tenant is not covered as a non-purchasing tenant under General Business Law §352-eee.

The Resolution also defines the terms "Owner" and "Proprietary Leasee", respectively, as follows:

> Any person who is the purchaser, owner or grantee of a condominium deed or the shareholder of a cooperative corporation (or the Proprietary Leasee of any unit in a building owned by such corporation) and who occupies or intends to occupy a condominium or a cooperative unit as his/her primary residence or the immediate family of such person as defined in the EPTA;
>
> and

> Natural person(s) named as such in the proprietary lease to a cooperative unit and all natural person who are legally entitled to occupy the cooperative unit without Board of Director approval under the terms of the proprietary lease.

In the case below, McFadden, through his affidavit, his verified petition and the affirmation of his counsel with supporting documents, including his proprietary lease and stock certificate, demonstrated that he occupied his Apartment in question as his residence before and after he purchased the Apartment in an arms length sale pursuant to the Coop's Offering Plan for the conversion of 16 Lake Street to cooperative ownership that was accepted for filing by the Attorney General on January 17, 1983, and after the plan was declared affective.

McFadden resided in the Apartment until shortly before he determined to sell it to the Sassowers in 1986. McFadden confirmed the truth of the foregoing in his own affidavit submitted in opposition to the cross-motion. He could not have submitted his affidavit on his original motion because the issue of Sassower's status as a protected tenant had not been raised by her in her answer but, rather, was first raised by her cross-motion. In addition to presenting, in opposition to Sassower's motion, copies of his proprietary lease and stock certificate, McFadden also submitted a copy of the Fifth Amendment to the Coop Offering Plan that certified that the plan was accepted for

filing as above set forth.

Sassower made no claim on her motion that she was, or is, certified as income eligible under the Federal Section 8 Rental Subsidy Program; nor did she deny McFadden's assertion that she never had been.

Under these circumstances, there was, and is, no question that Mr. McFadden's apartment was, and is, not subject to the EPTA or other rent regulatory statute; nor has Sassower identified any authority under which she could claim rent regulatory protection.

As McFadden set forth in opposition to Sassower's cross-motion insofar as it sought a referral of the matter to the DHCR the cross-motion was disingenuous best. Sassower had made application to the DHCR upon receipt of McFadden's petition to which she sought an order determining that the Apartment was subject to rent regulation. By decision dated August 28, 2007, a copy of which was submitted as Exhibit "H" to Sassower's own cross-motion, the DHCR declined to do so. Instead, it ruled; "the matter referred to in Sassower's application does not come under the jurisdiction of this office, but you may wish to refer your complaint to a court of competent jurisdiction. The complaint will not be addressed by this office since a court of

competent jurisdiction is now reviewing [Sassower's] case."

Thus, before she had made her cross-motion she had already been informed that the DHCR would defer to the jurisdiction of the City Court on the issue that she raised because it recognized that it lacked jurisdiction over Sassower's complaint. The unrefuted allegations of McFadden and his counsel as well as the documentary evidence submitted by McFadden and by Sassower herself required not only that the court below refuse to grant Sassower's request for referral of the issue of her status under the EPTA to the DHCR but that the court determine the issue against Sassower on its merits.

There was no need for any trial given the facts and evidence before the court; nor was there any need for any further affidavits of any persons with knowledge other than those whose statements were before the court.

POINT XV

SASSOWER'S CLAIMS AGAINST MCFADDEN'S COUNSEL WERE BASELESS AND FRIVOLOUS

That branch of Sassower's cross-motion as sought an order referring McFadden's counsel to the Appellate Division's Grievance Committee and to the Westchester County District

Attorney's office for criminal prosecution was, and is, beyond frivolous. Sassower's pleadings and motion are rambling, vitriolic and hypherbolic at the same time that they are utterly lacking in supportable substance.

As has been her practice, policy and procedure throughout the more than twenty years of litigation between the parties, Sassower has added McFadden's counsel to a long list of those who have dared to oppose her, either as counsel to opposing parties or as judges, or even as court clerks, who must be criminally prosecuted and/or professionally disciplined. She has attempted to personalize each effort by counsel to represent his client and labeled every presentation of facts and evidence other than those that suit her purposes as lies, fraud and deceit.

This tactic is the same as the United States District Court found to have supported the award of monetary sanctions and attorneys fees against Sassower and her mother in the federal litigation above discussed.

Notably, following the court's October 11, 2007 decision appealed from, Sassower moved the court for recusal of the judge who made the decision and order on the grounds of bias for no other reason than that he did not grant her cross-motion.

The decision of the court below denying that aspect of Sassower's motion as related to McFadden's counsel was properly denied without the need for any lengthy discussion as to why such denial was appropriate.

CONCLUSION

Based upon the foregoing, it is respectfully submitted, Sassower's appeal must be rejected in its entirety and an order should issue reversing the lower court's October 11, 2007 decision to the extent that it did not strike outright each of Sassower's affirmative defenses and counterclaims together with the award of such other relief to McFadden as the Court deems appropriate.

Respectfully submitted,

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