

Case No. 2008-1427 WC  
Case No. 2009-148 WC

Oral argument by:  
*DIANA R.H. WINTERS, ESQ.*

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION—SECOND DEPARTMENT

JOHN McFADDEN,

Petitioner-Respondent,

-against-

APPELLATE TERM  
9<sup>TH</sup> & 10<sup>TH</sup> JUDICIAL DISTRICTS

DORIS L. SASSOWER,

City Court, White Plains  
Index No. SP 1474/08

Respondent,

ELENA SASSOWER,

Respondent-Appellant.

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**BRIEF FOR NON-PARTY RESPONDENT PATRICIA LUPI**

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Dated: May 12, 2009

## TABLE OF CONTENTS

PRELIMINARY STATEMENT .....	1
QUESTION PRESENTED .....	2
STATEMENT OF THE CASE.....	2
ARGUMENT.....	4
THE CITY COURT LACKED JURISDICTION OVER SASSOWER'S MOTION TO COMPEL THE CHIEF CLERK TO PERFORM HER DUTIES.....	4
CONCLUSION.....	7

## PRELIMINARY STATEMENT

This brief is filed on behalf of non-party respondent Patricia Lupi, the Chief Clerk of the City Court of the City of White Plains. Appellant Elena Sassower challenges several orders of the City Court in *McFadden v. Sassower*, a landlord/tenant dispute that began more than two decades ago. Among other things, she appeals an order dated October 14, 2008, which denied Sassower's motion to compel the Chief Clerk to produce certain documents to this Court, and to refer the Chief Clerk for disciplinary and criminal investigation.

The City Court correctly found that it lacked subject matter jurisdiction over Sassower's motion to compel. Because the motion sought to compel the Chief Clerk to perform duties required by law, it must be adjudicated in a C.P.L.R. article 78 proceeding brought in Supreme Court. A city court lacks jurisdiction to hear such an action, and there is no basis for referring the Chief Clerk for disciplinary or criminal proceedings.

## QUESTION PRESENTED

Did the City Court have jurisdiction to hear a motion to compel the Chief Clerk to produce documents when that motion should have been brought as an article 78 proceeding in Supreme Court?

The City Court answered in the negative.

## STATEMENT OF THE CASE

The *McFadden* litigation has been ongoing in the City Court for at least two decades. See App. Br. at 1. It stems from the Sassower family's residence in an apartment owned by McFadden pursuant to a temporary occupancy agreement. The agreement ended in May 1988, when the Sassowers' application to purchase the apartment was disapproved by the Board of Directors of the building. The City Court litigation was dormant for fifteen years pending the outcome of a federal case brought by the Sassowers against the Board and the Cooperative Corporation of the building. (Compendium of Exhibits to Appellant's Brief ("Ex."), Ex. C-1).

In July and August 2008, Sassower sent letters to the Chief Clerk requesting copies of various documents and access to microfilm and

microfiche records. Sassower also asked the Chief Clerk to explain certain actions that Sassower alleged had been taken by the clerk's office. *See App. Br. at 53-56.*<sup>1</sup>

The Chief Clerk responded to these letters on August 7, 2008, explaining that Sassower had been "afforded full and reasonable access to the complete court record on all matters requested," and that court records transferred to microfilm had been previously provided in their entirety.<sup>2</sup> Sassower sent two more letters to the Chief Clerk later that month, repeating her requests and alleging various deficiencies in the record. *See App. Br. at 56-58.*

In September 2008, Sassower moved under the docket numbers of the *McFadden* litigation to compel the Chief Clerk to provide various documents to this Court. Sassower also moved to compel the Chief Clerk to provide "an explanation for her failure to respond" to Sassower's letters, and asked the court to refer the Chief Clerk for disciplinary and criminal investigation. *See App. Br. at 59-60.*

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<sup>1</sup> All of Sassower's letters to the Chief Clerk were appended as exhibits to her September 18, 2008 motion, but none were included in her Compendium of Exhibits.

<sup>2</sup> This letter, which was attached to Sassower's September 18, 2008 Motion to Compel, is attached as an addendum.

The Chief Clerk, represented by the Attorney General under Executive Law § 63(1), cross-moved to dismiss the motion on the ground that the City Court lacked subject matter jurisdiction over the claim. On October 14, 2008, the court denied Sassower's motion and granted the Chief Clerk's cross-motion. The court found that because the relief Sassower sought could only be furnished through an article 78 proceeding brought in Supreme Court, it lacked jurisdiction to hear the motion to compel.

This appeal followed.

## ARGUMENT

### **THE CITY COURT LACKED JURISDICTION OVER SASSOWER'S MOTION TO COMPEL THE CHIEF CLERK TO PERFORM HER DUTIES**

Sassower moved in the City Court for an order compelling the Chief Clerk to furnish various documents to this Court. That motion alleged that an officer of the City Court failed to perform a duty that she was enjoined to do by law. For example, in opposing the Chief Clerk's cross-motion to dismiss, Sassower argued that the Chief Clerk was required by law to produce the documents she requested (Ex. O,

p.8). Thus, her motion was in the nature of a petition for mandamus to compel. See *Matter of De Milio v. Borghard*, 55 N.Y.2d 216, 220 (1982) (mandamus to compel “lies to compel the performance of a ministerial act enjoined by law”). A proceeding seeking that relief must be brought under article 78 of the C.P.L.R. See C.P.L.R. 7801; *Matter of De Milio*, 55 N.Y.2d at 219 (“the article 78 proceeding was designed to replace the three prerogative writs formerly known as certiorari, mandamus and prohibition”).

As the City Court recognized here, a city court does not have jurisdiction to entertain Sassower’s claim because article 78 proceedings must be brought in Supreme Court. See C.P.L.R. 7804(b); 6 N.Y. Jur. Article 78 and Related Proceedings § 172 (“Article 78 proceeding may not be brought in . . . a City Court”). In *Matter of Buffalo News v. Himelein*, 262 A.D.2d 1072 (4th Dep’t 1999), for example, the court dismissed a petition seeking to compel a County Court Judge to release a transcript, because the petitioners had initially brought their motion to compel in the county court. The Appellate Division explained that petitioners should have commenced an article 78 proceeding in Supreme Court instead of moving in county court, which had no

jurisdiction. *See also Matter of Byrnes v. County of Monroe*, 122 A.D.2d 549, 550 (4th Dep't 1986) (motion for an order to compel the Monroe County Director of Finance to pay attorney's fees is in the nature of mandamus to compel and must be commenced under article 78 in Supreme Court, not county court). The City Court therefore properly denied Sassower's motion to compel.

The court also properly declined to refer the Chief Clerk to disciplinary and criminal authorities for her failure to perform the duties of her position, a request Sassower renews on appeal. *See App. Br. at 77-78*. Whether the Chief Clerk failed to perform her duties must be adjudicated in an article 78 proceeding, as explained above. While Sassower relies on the Chief Administrator's Rules Governing Judicial Conduct, *see App. Br. at 76-77*, these rules only apply to the conduct of judges, and to the extent Sassower has such a complaint, it should be brought to the New York State Commission on Judicial Conduct. *See New York State Commission on Judicial Conduct, Filing a Complaint*, [http://www.scjc.state.ny.us/filing\\_a\\_complaint.htm](http://www.scjc.state.ny.us/filing_a_complaint.htm).



**CONCLUSION**

For the reasons set forth above, this Court should affirm the City Court's order denying Sassower's motion to compel.

Dated: New York, New York  
May 12, 2009

Respectfully submitted,

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