

**\*Case No. 2008-1427 WC**

**\*Case No. 2009-148 WC**

To be Argued by:  
Elena Sassower  
(15 minutes requested)

APPELLATE TERM OF THE SUPREME COURT  
NINTH & TENTH JUICIAL DISTRICTS

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JOHN McFADDEN,

Respondent,

-against-

DORIS L. SASSOWER,


Respondent,

ELENA SASSOWER,

Appellant.

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APPELLANT'S REPLY BRIEF  
to the Solicitor General's  
"Brief for Non-Party Respondent Patricia Lupi"



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**\*Appeal 3: Judge Jo Ann Friaa's July 3, 2008 Decision & Order  
July 21, 2008 Judgment of Eviction  
July 21, 2008 Warrant of Removal**

**\*Appeal 4: Judge Jo Ann Friaa's October 14, 2008 Decision & Order**

**(Westchester City Court #SP-651/89 & #SP-2008-1474)**

**TABLE OF CONTENTS**

Table of Authorities .....i

INTRODUCTION.....1

MS. WINTERS’ DECEITFUL & FRAUDULENT “PRELIMINARY STATEMENT  
(unmarked p. 1) .....6

MS. WINTERS’ DECEITFUL & FRAUDULENT “QUESTIONS PRESENTED”  
(p. 2) .....8

MS. WINTERS’ DECEITFUL & FRAUDULENT “STATEMENT OF THE CASE”  
(pp. 2-4).....10

MS. WINTERS’ DECEITFUL & FRAUDULENT “ARGUMENT”  
(pp. 4-6).....14

CONCLUSION .....19

## **TABLE OF AUTHORITIES**

### **Cases Cited**

*Matter of De Milio v. Borghard*, 55 NY2d 216, 219 (1982)

*Matter of McDonnell*, Determination of the NYS Commission on Judicial Conduct, February 5, 2009

### **Statutes**

Executive Law §63(1)

Public Officers Law §18

F.O.I.L.

C.P.L.R. Article 78: §§7801, 7804(b)

Uniform Justice Court Act, §§107, 2019

### **Rules & Regulations**

Appellate Division, Second Department Rule 730.3(g)

Chief Administrator's Rules Governing Judicial Conduct, §100.3(C)(2), §100.3D(2)

22 NYCRR §130-1.1 *et seq.*

22 NYCRR §200.23 (Recordkeeping Requirements for Town and Village Courts)

New York Rules of Professional Conduct for Attorneys

### **Treatises**

II John Henry Wigmore, Evidence §278 at 133 (1979)

## INTRODUCTION

This reply brief of appellant Elena Sassower [Sassower] responds to the “Brief for Non-Party Respondent Patricia Lupi” – Chief Clerk of White Plains City Court – signed by Assistant Solicitor General Diana R.H. Winters, acting “of counsel” to New York State Attorney General Andrew Cuomo.

Such timely-filed reply brief (Exhibit R-4)<sup>1</sup>, which Sassower was burdened to prepare and which this Court is now burdened to review, is the result of Ms. Winters’ failure to withdraw her frivolous, indeed fraudulent, non-party brief – as Sassower demanded she do on May 26, 2009, by copy of a letter of that date addressed to this Court’s Clerk (Exhibit R-1).

As Sassower’s May 26, 2009 letter embraces the threshold issue as to whether the Attorney General’s representation of Clerk Lupi before this Court is lawful, as, likewise, whether it was lawful before the White Plains City Court in #SP-1474-2008 & #SP-651/89, the letter is reproduced herein, in pertinent part:

“Dear Mr. Kenny:

“...the Attorney General’s May 12, 2009 non-party brief, signed by Assistant Solicitor General Diana R.H. Winters, is based on flagrant falsification and omission of material facts. This requires either that Ms. Winters withdraw her non-party brief – as I am hereby demanding she do by copy of this letter to her – or that I be burdened with a reply brief lest her materially false and deceptive non-party brief mislead the Court.

As illustrative, Ms. Winters’ non-party brief claims that White Plains City Court Clerk Lupi was ‘represented by the Attorney General under Executive

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<sup>1</sup> The exhibits annexed hereto continue the sequence of Sassower’s two-part compendium of exhibits which accompanied her appellant’s brief, which were A-L and M-Q.

Law §63(1)' when she cross-moved in White Plains City Court to dismiss my September 18, 2008 motion. This appears at page 4 of her non-party brief – a copy of which is enclosed for your convenience.

The foregoing assertion – for which Ms. Winters furnishes NO record reference – is without denying or disputing page 62 of my appellant's brief, a copy of which I also enclose. I there state:

'the Attorney General's appearance on behalf of Clerk Lupi was unlawful, as Clerk Lupi was not a party to the proceeding for which representation was available to her under Public Officers Law §18. Nor was her challenged conduct 'in the interest of the state', nor even alleged to be – the predicate for representation under Executive Law §63.1.<sup>fn.50</sup>, (underlining added).

My annotating footnote 50 identified my attempts to ascertain the basis for the Attorney General's representation of Clerk Lupi, including by F.O.I.L. correspondence with the Attorney General's Office. Such F.O.I.L. correspondence, which I annexed as Exhibit P to my compendium of exhibits accompanying my appellant's brief, sought:

(1) any and all publicly available records pertaining to the Attorney General's approval of Clerk Lupi's request for representation – 'including any and all records establishing that the Attorney General made the predicate determination that Clerk Lupi's requested representation was 'in the interest of the state', as Executive Law §63.1 expressly requires, or that the Attorney General's representation of Ms. Lupi fell within some other statutory provision.' (Exhibit P-2: my November 5, 2008 letter, underlining in the original); and

(2) any and all publicly available records in support of MY request, pursuant to Executive Law §63.1, 'for the Attorney General's representation &/or intervention 'in ensuring the integrity of court records and the proper functioning of the White Plains City Court Clerk's Office'' (Exhibit P-2: my November 5, 2008 letter, underlining in the original).

The Attorney General's Office asserts it has no records pertinent thereto – as may be seen from its letters responding to my F.O.I.L. correspondence,

annexed as part of that Exhibit P and by its subsequent April 29, 2009 letter to me, annexed hereto.

I, therefore, demand that Ms. Winters IMMEDIATELY substantiate the bald claim in her non-party brief that the Attorney General's representation of Clerk Lupi in the White Plains City Court was pursuant to Executive Law §63.1 and that she state, under oath, with accompanying documentary proof, that the Attorney General made the requisite determination that it was Clerk Lupi, and not me, who was advancing 'the interest of the state'.

Absent her doing so and withdrawing her non-party brief, as she is duty-bound to do because it is a fraud on this Court and itself *prima facie* proof that the Attorney General's representation of Clerk Lupi is contrary to 'the interest of the state', I will ask this Court for sanctions and costs against Ms. Winters and her superiors at the Solicitor General's Office, pursuant to this Court's Rule 730.3(g), and that it make disciplinary and criminal referrals of them, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.

Tellingly, Ms. Winters' May 12, 2009 non-party brief fails to include a certification pursuant to 22 NYCRR §130-1.1 that its content is not frivolous, unlike my April 17, 2009 appellant's brief which so-certifies." (underlining, capitalization, and italics in the original).

No response has been received from Ms. Winters, let alone one attesting to and furnishing proof as to the legal authority for the Attorney General's representation of the non-party Clerk Lupi, either here or below. Consequently, Ms. Winters' representation of Clerk Lupi is unauthorized, and her non-party brief must be rejected, *as a matter of law*, for the reasons set forth by Sassower's May 26, 2009 letter (Exhibit R-1), which Sassower so-requests.

In any event, Ms. Winters' seven-page non-party brief is no opposition to Sassower's appeal, *as a matter of law*. Essentially confined to Judge Friia's October 14, 2008 decision & order (Exhibit D) – and, like it, improperly bearing only a single White Plains index

number “SP 1474/08” – Ms. Winters’ brief does not deny or dispute any of the facts, law, or legal argument of Sassower’s brief establishing the October 14, 2008 decision & order to be void *ab initio* as the product of a self-interested and biased judge and insupportable in fact and law. Indeed, Ms. Winters’ brief is completely non-responsive to even the limited portions of Sassower’s 97-page brief which she was duty-bound to confront if she was to file a brief for “SP 1474/08”, urging this Court to uphold the October 14, 2008 decision, *to wit*:

- the first, second, and fifth “Questions Presented” of Sassower’s brief (pp. vi-vii, ix);
- the supporting facts particularized by pages 53-67 of Sassower’s “Statement of the Case”;
- the corresponding “Argument” – in particular Point I (pp. 68-74), Point II (pp. 74-79), and Point V (pp. 92-96) of Sassower’s brief.

That Ms. Winters does not confront any of the facts, law, and legal argument therein makes her non-party brief, urging affirmance of the October 14, 2008 decision, frivolous *per se*. Indeed, when compared to the above-cited pages of Sassower’s brief, Ms. Winters’ brief is utterly deceitful. As hereinafter shown, it consists of her own circumscribed “Question Presented” (at p. 2) predicated on a premise that is both self-serving and meaningless, followed by a skimpy and knowingly false and deceitful “Preliminary Statement”, “Statement of the Case” (pp. 2-4) and “Argument”. Such further reinforces the merit of Sassower’s appeal under applicable legal principles:

‘It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party’s falsehood or other fraud in the preparation and presentation of his cause...and all

similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.' II John Henry Wigmore, Evidence §278 at 133 (1979)."

This conduct, violative of New York's Rules of Professional Conduct for Attorneys, is even more egregious when committed by a government attorney – and when its consequence is to cover-up the manipulations of case records by a city court clerk, at the instance of a city court judge, preventing this Court from having before it the documents and information essential to its appellate review. Under such circumstances, maximum sanctions and costs are warranted against Ms. Winters and her superiors at the Solicitor General's Office, pursuant to this Court's Rule 730.3(g)<sup>2</sup>, as well as disciplinary and criminal referrals of them, pursuant to this Court's mandatory "Disciplinary Responsibilities" under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct<sup>3</sup>, which Sassower hereby requests.

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<sup>2</sup> "Any attorney or party to a civil appeal who, in the prosecution or defense thereof, engages in frivolous conduct as that term is defined in 22 NYCRR subpart 130-1.1(c), shall be subject to the imposition of such costs and/or sanctions as authorized by 22 NYCRR subpart 130-1 as the court may direct."

<sup>3</sup> "A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."



**Ms. Winters' Deceitful & Fraudulent "Preliminary Statement" (unmarked p. 1)**

Ms. Winters' "Preliminary Statement" is two paragraphs.

Her first paragraph begins by stating that her brief is "on behalf of non-party respondent Patricia Lupi, the Chief Clerk of the City Court of the City of White Plains". No legal authority is identified nor even a bald claim that the representation is lawful.

Ms. Winters next asserts that "*McFadden v. Sassower*" is "a landlord/tenant dispute that began more than two decades ago", without providing any of the index numbers from "two decades ago". Indeed, nowhere does her brief provide these index numbers, including on its cover, where only a single White Plains City Court index number appears: "SP 1474/08".

Ms. Winters offers no explanation as to how a "landlord/tenant dispute that began more than two decades ago" has a 2008 index number. She conceals the material fact – detailed and discussed by Sassower's brief – that on or about May 30, 2008, Clerk Lupi assigned index number "SP 1474/08" to #SP-651/89, without notice or explanation, presumably because #SP-651/89 was closed, and apparently at Judge Friia's instance.

Whether #SP-651/89 is open or closed is a threshold issue on Sassower's appeals. It is her first "Question Presented" and integral to her second "Questions Presented" – neither of which are identified or discussed by Ms. Winters, although they are dispositive.

Instead, Ms. Winters identifies Sassower as challenging "several orders". She reveals only one, however, Judge Friia's October 14, 2008 decision & order (Exhibit D), which she

describes as having:

“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.” (at unmarked p. 1)

Ms. Winters omits any specification of the “certain documents” sought – or the basis for the requested disciplinary and criminal referral of Clerk Lupi. Both involve Clerk Lupi’s assignment of the index number “SP1474/08” to #SP-651/89, without notice or explanation, as well as other documents and information integral to proper Clerk’s Returns on Appeals and this Court’s ability to determine whether #SP-651/89 and related City Court proceedings are open or closed.

Ms. Winters’ second paragraph of her “Preliminary Statement” purports that Judge Friia “correctly found that [the City Court] lacked subject jurisdiction over Sassower’s motion to compel” – explaining this as follows:

“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...” (at unmarked p. 1).

Ms. Winters does not reveal that Judge Friia’s October 14, 2008 decision essentially adopted the argument of the Attorney General’s “cross-motion to dismiss” – and that Sassower’s October 10, 2008 opposition/reply affidavit detailed the fraudulence of that cross-motion, virtually line-by-line, by a 12-page analysis. A copy of that affidavit is Exhibit O to Sassower’s compendium of exhibits accompanying her appellant’s brief, which she annexed

because it is “dispositive”<sup>4</sup>.

Ms. Winters concludes her “Preliminary Statement” by asserting:

“and there is no basis for referring the Chief Clerk for disciplinary and criminal proceedings” (at unmarked p. 1).

Ms. Winters does not elaborate as to why “there is no basis for referring the Chief Clerk for disciplinary and criminal proceedings” – just as she does not disclose the basis upon which Sassower’s September 18, 2008 motion sought such relief.

**Ms. Winters’ Deceitful & Fraudulent “Question Presented” (p. 2)**

Rather than responding to Sassower’s five “Questions Presented” (at pp. vi-ix), and notwithstanding the Attorney General filed no cross-appeal, Ms. Winters fashions her own “Question Presented” (at p. 2):

“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?”

This question is improper as it incorporates a premise that Sassower’s September 18, 2008 motion “should have been brought as an article 78 proceeding in Supreme Court”. This is itself a question – needing to be asked, not assumed.

Moreover, such question is basically irrelevant as “should have been brought” is not equivalent to “was required to be brought”. So long as Sassower was not required to seek production of the requested documents and information by Article 78, the City Court had jurisdiction.

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<sup>4</sup> Appellant’s brief, p. 3.

Ms. Winters’ “Question Presented” also conceals the nature of the documents and information Sassower’s September 18, 2008 motion sought and the reason therefore. Both are explicit in Sassower’s own second “Question Presented” (at pp. vi-vii), which identifies the motion’s three separate branches, beginning with the first:

“to compel the White Plains City Court Clerk to provide this Court with proper Clerk’s Returns on Appeals, as well as court records and other information necessary to determining the status of #SP-651/89 and related City Court proceedings” (at p. vi).

Ms. Winters’ brief does not deny or dispute – or even identify – that the Clerk’s Returns on Appeals are deficient and that documents and information sought by Sassower’s motion are “necessary to determining the status of #SP-651/89 and related City Court proceedings”.

As for the two additional branches of Sassower’s motion, also encompassed by Sassower’s second “Question Presented”, these are:

“its second branch: to refer the White Plains City Court Clerk to disciplinary and criminal authorities, *inter alia*, for tampering with court records and false statements to Judge Friia as to the status of #SP-651/89 and related cases and/or her complicity in Judge Friia’s misrepresentations as to their status”; and

“its third branch: for such other and further relief as may be just and proper – including sanctions and costs against the New York State Attorney General and [McFadden’s] counsel and their referral to disciplinary and criminal authorities” (at pp. vi-vii).

Ms. Winters’ “Question Presented” encompasses neither of these two branches of Sassower’s motion – reflective of her inability to construct a brief arguing that the City Court

was jurisdictionally barred from granting these two branches and that such was not mandated by the facts and law particularized by Sassower's motion.

**Ms. Winters' Deceitful & Fraudulent "Statement of the Case" (pp. 2-4)**

Ms. Winters' inadequate, deceitful, and fraudulent two-page "Statement of the Case" is obvious from comparison with Sassower's own 64-page "Statement of the Case" and, in particular, the 13 pages of Sassower's brief spanning from pages 53-67.

Ms. Winters begins by falsifying and obscuring the facts relating to whether #SP-651/89 was closed during its 15 years of dormancy – the subject of Sassower's first "Question Presented" and integral to her second "Question Presented".

Thus, Ms. Winters begins by asserting:

"The *McFadden* litigation has been ongoing in the City Court for at least two decades." (at p. 2, underlining added),

citing, as a record reference, page 1 of Sassower's brief. This is false and Sassower's brief could not have been clearer in asserting – in the very first sentence of its own "Statement of the Case" –

"The 1989 case, *John McFadden v. Doris L. Sassower and Elena Sassower*, #SP-651/89, was dormant for approximately 15 years and likely dismissed by White Plains City Court for want of prosecution." (underlining added).

Ms. Winters' pretense that "The *McFadden* litigation has been ongoing for at least two decades" is followed, three sentences later<sup>5</sup>, by her assertion that it was "dormant for 15

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<sup>5</sup> The intervening two sentences purport to describe the "*McFadden* litigation" and are materially false and misleading, quite apart from being irrelevant to any issue on appeal #2009-148-WC. Most significantly, *McFadden's* March 27, 1989 Petition in #SP-651/89 (Exhibit E) does not allege "a temporary occupancy

years pending the outcome of a federal case” (underlining added). Aside from contradicting her first sentence, the implication is that the federal case took 15 years to resolve. This is false. The federal case concluded in 1993 at the U.S. Supreme Court – a fact reflected by Ms. Winters’ cross-reference to Sassower’s Exhibit C-1, which is Judge Friia’s July 3, 2008 decision & order (Exhibit C-1). It neither uses the word “dormant” nor states that #SP-651/89 remained open throughout the 15-plus years after the federal case ended.

Nor does Ms. Winters expressly state that #SP-651/89 remained open. Indeed, her “Statement of the Case” goes out of its way to conceal that foremost among the documents and information sought by Sassower’s September 18, 2008 motion, and, prior thereto, by her letters to Clerk Lupi, were those that would establish whether #SP-651/89 was open or closed, as likewise the related cases, #SP-652/89 (*McFadden v. George Sassower*), and #SP-454/88 and #SP-500/88 (*16 Lake Street Owners, Inc. v. John McFadden and Doris L. Sassower and Elena Sassower*) – and that these are integrally part of proper Clerk’s Returns on Appeals.

Thus, the second paragraph of Ms. Winters’ “Statement of the Case” (pp. 2-3) disingenuously describes Sassower’s letters to Clerk Lupi in the most conclusory terms:

“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.”

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agreement” and “application to purchase”. Likewise, these are not alleged by his April 3, 1989 Petition in #SP-652/89 (Exhibit H) and December 5, 1988 Petition in #SP-504/88 (Exhibit G). Nor did the temporary occupancy agreement “end in May 1988” – a fact detailed by Sassower’s uncontested analysis of the language of the agreement, highlighted by her brief (at p. 9).

(underlining added).

Similarly, in the third paragraph of Ms. Winters' "Statement of the Case" (at p. 3):

"Sassower sent two more letters to the Chief Clerk...repeating her requests and alleging various deficiencies in the record." See App. Br. at 56-58." (underlining added).\*

Likewise, the fourth paragraph of Ms. Winters' "Statement of the Case":

"In September 2008, Sassower moved under the docket numbers of the McFadden litigation to compel the Chief Clerk to provide various documents to the 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." (underlining added).

Ms. Winters' "Statement of the Case" also provides no particulars as to the basis upon which Sassower's motion sought "disciplinary and criminal investigation" of Clerk Lupi – although the second branch of Sassower's motion stated it clearly:

"tampering with court records and false statements to Judge Friia as to the status of #651/89 and related cases and/or her complicity in Judge Friia's misrepresentations as to those cases". (underlining added).

Between Ms. Winters' skeletal and inadequate description of Sassower's September 18, 2008 motion and her two-sentence description of Judge Friia's October 14, 2008 decision, is a single sentence:

"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."

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\* These cited pages of Sassower's brief summarize Sassower's August 22, 2008 and August 28, 2008 letters to Clerk Lupi – and suffice to establish the deceit of Ms. Winters' fn. 2, annexing, as "an addendum" to her brief, Clerk Lupi's August 7, 2008 letter. Such serves no purpose but to flagrantly mislead the Court.

This is materially false and misleading in several respects. First – and as pointed out by Sassower’s May 26, 2009 letter (Exhibit R-1) – the Attorney General, in appearing for Clerk Lupi, never claimed to be doing so pursuant to Executive Law §63.1, there is no evidence that would support such claim, and ALL evidence is to the contrary and supports a finding that Sassower was and is entitled to representation and/or intervention by the Attorney General pursuant to Executive Law §63.1. Second, the Attorney General amended its so-called cross-motion “to dismiss” by a cross-motion “to deny”.<sup>6</sup> Third, the cross-motion was legally unauthorized, insupportable and factually fraudulent – and so demonstrated by Sassower’s October 10, 2008 opposition/reply affidavit (Exhibit O, ¶¶7-25), detailing that there was no jurisdictional bar to the City Court’s granting of the relief sought by Sassower’s motion.

Ms. Winters’ “Statement of the Case” omits mention of Sassower’s October 10, 2008 opposition/reply affidavit – and, thereby, does not deny or dispute its showing of her entitlement to sanctions and costs against the Attorney General and his referral to disciplinary and criminal authorities for his fraudulent cross-motion – relief expressly sought by Sassower’s October 10, 2008 affidavit (Exhibit O, ¶¶2, 7-25) and encompassed by the third branch of her motion.<sup>7</sup>

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<sup>6</sup> See Sassower’s October 10, 2008 opposition/reply affidavit (Exhibit O, ¶14).

<sup>7</sup> Sassower’s October 10, 2008 opposition/reply affidavit (Exhibit O, ¶¶26-38) also demonstrated her entitlement to sanctions/costs against, as well as disciplinary/criminal referrals of, McFadden’s counsel, Leonard Sclafani, Esq., for his fraudulent September 25, 2008 affirmation in opposition to her September 18, 2008 motion. Ms. Winters’ “Statement of the Case” omits mention of Sclafani’s opposing affirmation.



As for Ms. Winters' two-sentence description of Judge Friia's October 14, 2008 decision, it is as follows:

“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 sought could only be furnished through an article 78 proceeding brought in Supreme Court, it lacked jurisdiction to hear the motion to compel.” (at p. 4).

The first sentence is materially misleading as Judge Friia's October 14, 2008 decision (Exhibit D) expressly limited its granting of the Attorney General's cross-motion “to the extent that the City Court is without subject matter jurisdiction to entertain [Sassower's] application”.<sup>8</sup> The second sentence is outrightly false. The decision does NOT find that “the relief sought could only be furnished through an Article 78 proceeding brought in Supreme Court.” (underlining added).

**Ms. Winters' Deceitful & Fraudulent “Argument” (pp. 4-6)**

Ms. Winters' “Argument” (pp. 4-6) – entitled “The City Court Lacked Jurisdiction Over Sassower's Motion to Compel the Chief Clerk to Perform her Duties” – is factually false, misleading, and irrelevant, with citations of law having nothing to do with the relationship between a court and its clerk, as here at issue.

Ms. Winters begins by purporting (at p. 4) that Sassower's September 18, 2008 motion “alleged that an officer of the City Court failed to perform a duty that she was enjoined to do by law” – citing not her September 18, 2008 motion, but her October 10, 2008

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<sup>8</sup> This qualification is twice reflected by Sassower's brief: pp. 1, 63.

opposition/reply affidavit (Exhibit O). Ms. Winters gives no paragraph or page reference for the October 10, 2008 affidavit, confining herself to the assertion (at p. 4) “Sassower argued that the Chief Clerk was required by law to produce the documents she requested.” This is a truncation.

Sassower’s October 10, 2008 opposition/reply affidavit “argued” (at ¶¶15-25) that both with respect to mandatory duties required by law and discretionary acts, a City Court has jurisdiction over its own clerk’s office, which exists to serve it by handling its administrative needs and responsibilities. Indeed, the Attorney General’s cross-motion had not purported otherwise, nor claimed that the City Court could not order Clerk Lupi’s compliance with the relief sought by Sassower’s September 18, 2008 motion within this landlord-tenant proceeding. Such was set forth at ¶15 of Sassower’s October 10, 2008 affidavit – and repeated at Point II of Sassower’s brief (at p. 75) as follows:

“As pointed out at ¶15 of Sassower’s October 10, 2008 affidavit (Exhibit O), the Attorney General did not purport that the City Court did not have jurisdiction over its own Clerk or that it could not order her compliance with the relief requested by Sassower’s motion within this landlord-tenant proceeding. Nor did Judge Friia’s October 14, 2008 decision make such claim in asserting that because the requested relief could be sought by way of Article 78, therefore ‘The City Court is without jurisdiction to entertain respondent’s application’, citing CPLR §7804(b).<sup>[fn]</sup> Such is wholly inapplicable as Sassower’s ‘application’ was not by Article 78 – nor did it have to be.

A court has jurisdiction over its own clerk’s office, which exists to serve it by handling its administrative needs and responsibilities. Indeed, it is a cause for discipline for a judge to fail ‘to supervise his court clerk and otherwise administer the court in an appropriate manner, resulting in, among other things, poor record keeping and poor case management’, *Matter of McDonnell*, Determination of the NYS Commission on Judicial Conduct,

February 5, 2009, at pp. 3, 7 citing §100.3(C) of the Chief Administrator's Rules Governing Judicial Conduct.<sup>fn.62</sup>

§100.3C(2) of the Chief Administrator's Rules Governing Judicial Conduct states:

'A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.'

Sassower's October 10, 2008 affidavit (Exhibit O) cited §100.3(C)(2) of the Chief Administrator's Rules in its ¶¶24-25 pertaining to the jurisdiction of White Plains City Court judges over Clerk Lupi..."

Ms. Winters does not deny or dispute that "A court has jurisdiction over its own clerk's office, which exists to serve it by handling its administrative needs and responsibilities". Nor does she deny or dispute that Clerk Lupi is among the "staff, court officials, and others subject to [Judge Friia's] direction and control" and that Sassower's September 18, 2008 motion demonstrated the necessity that such "direction and control" be exercised.

Ms. Winters' assertion (at p. 5) that mandamus, embodied by Article 78, "lies to

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<sup>fn.62</sup> As stated by the Commission in *Matter of McDonnell*:

"The record also indicates a pervasive failure to maintain complete and accurate records of cases, making it difficult to reconstruct case histories and status reports as to the matters. Sections 107 and 2019 of Uniform Justice Court Act require a judge to keep legible and suitable records of all civil and criminal proceedings. Section §200.23 of the Recordkeeping Requirements for Town and Village Courts (22 NYCRR §200.23) requires the court to maintain case files that *inter alia* include papers filed, minutes or notes made by the court...[The judge's] disregard of these record-keeping requirements is a violation of administrative responsibilities and, standing alone, constitutes misconduct."

compel the performance of a ministerial act enjoined by law” does not mean, as she there purports (at p. 5), that “A proceeding seeking that relief must be brought under Article 78 of the C.P.L.R.” (underlining added). Ms. Winters’ supporting citations, CPLR 7801 and *Matter of De Milio v. Borghard*, 55 NY2d 216, 219 (1982), do not stand for the proposition that Article 78 is an exclusive remedy, rather than an available one.<sup>9</sup>

To claim – as Ms. Winters does – that the only way a court can enforce compliance by its clerk with the requirements of a Clerk’s Return on Appeal is if a litigant goes to the effort and expense of initiating an Article 78 proceeding against the clerk would render trial courts and this appeals court virtually incapable of protecting the appellate process from wayward clerks.<sup>10</sup> Indeed, Ms. Winters does not deny or dispute the assertion in Sassower’s brief (at pp. vi, 1, 4, 74-75) that at issue are proper Clerk’s Returns on Appeals and other documents and information necessary for this Court’s appellate review.

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<sup>9</sup> Ms. Winters does not reveal that the Attorney General’s position before Judge Friia was that Sassower had no Article 78 remedy. Thus, the Attorney General’s cross-motion claimed, under a title heading “The Motion Fails to State a Claim for Mandamus to Compel”, that Article 78 was unavailable to Sassower because her motion had “not provided any statutory or common law evidence showing that Patricia Lupi, as Chief Clerk of the City of White Plains, was required by law to perform any of the acts” (¶9) and “not provided any evidence that suffices to show that Patricia Lupi has a legal duty to perform any of the acts that were requested” (¶11).

It was in this context that Sassower’s October 10, 2008 opposition/reply affidavit presented law pertaining to Clerk Lupi’s duties – now the basis for Ms. Winters purporting that Sassower’s remedy was by way of Article 78.

<sup>10</sup> This Court has NOT adopted Ms. Winters’ position that deficiencies in Clerk’s Return on Appeals “must be adjudicated in a C.P.L.R. article 78 proceeding” – which she asserted, on behalf of Clerk Lupi, in a May 15, 2009 letter to the Court (Exhibit S-1) in opposition to Sassower’s May 11, 2009 motion to require Clerk Lupi to furnish a proper Clerk’s Return on Appeal for #2009-148-WC. Ms. Winters’ letter referred the Court to her non-party brief herein “For a thorough discussion of this issue”. The Court’s denial of the motion, by an unsigned June 22, 2009 decision of Justices Rudolph and Molia, with Justice Scheinkman “taking no

Ms. Winters ends her “Argument” by reiterating (at p. 6) that Judge Friia “properly declined to refer the Chief Clerk to disciplinary and criminal authorities”, purporting that “Whether the Chief Clerk failed to perform her duties must be adjudicated in an article 78 proceeding, as explained above”. However, her “explained above” does not establish that Article 78 is an exclusive remedy. Nor would the existence of an Article 78 remedy foreclose the City Court from referring its Clerk to disciplinary and criminal authorities where it has evidence that such Clerk engaged in official misconduct rising to criminal levels. This is the case at bar. The evidence particularized by Sassower’s correspondence underlying her September 18, 2008 motion is that Clerk Lupi has tampered with court records in collusion with, or at the direction of, Judge Friia, for purposes of obstructing justice and denying Sassower relief to which she is entitled by law.

Ms. Winters bizarrely purports (at p. 6) that §§100.3C(2) and 100.3D(2) of the Chief Administrator’s Rules Governing Judicial Conduct – relied on by Sassower at pages 76-77 of her appellant’s brief – “only apply to the conduct of judges”. This is just the point. It imposes on judges an obligation to ensure the integrity of the judicial process – and all three branches of Sassower’s September 18, 2008 motion are squarely within the purview of those rules and suffer no jurisdictional bar.

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part”, was without reason (Exhibit S-2).

**CONCLUSION**

WHEREFORE, *as a matter of law*, Assistant Solicitor General Diana Winters' brief on behalf of non-party White Plains City Court Clerk Patricia Lupi must be rejected as legally unauthorized and violative of Executive Law §63.1. Alternatively and/or additionally, by its material omissions, falsifications, and deceit, her non-party brief must be deemed no opposition, *as a matter of law*, and as reinforcing the merit of Sassower's appeal #2009-148-WC.

Maximum sanctions and costs against Ms. Winters and her superiors at the Solicitor General's Office are warranted, pursuant to this Court's Rule 730.3(g), and disciplinary and criminal referrals of them, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.



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ELENA RUTH SASSOWER

New York, New York  
July 6, 2009