State of New York
Court of Appeals

CENTER FOR JUDICIAL ACCOUNTABILITY, INC. AND ELENA RUTH SASSOWER, INDIVIDUALLY AND AS DIRECTOR OF THE CENTER FOR JUDICIAL ACCOUNTABILITY, INC., ACTING ON THEIR OWN BEHALF AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK & THE PUBLIC INTEREST,

SSD 23

Plaintiffs-Appellants,

-against-

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW YORK, JOHN J. FLANAGAN, IN HIS OFFICIAL CAPACITY AS TEMPORARY SENATE PRESIDENT, THE STATE OF NEW YORK STATE SENATE, CARL E. HEASTIE, IN HIS OFFICIAL CAPACITY AS ASSEMBLY SPEAKER, THE NEW YORK STATE ASSEMBLY, ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, THOMAS P. DINAPOLI, IN HIS OFFICIAL CAPACITY AS COMPTROLLER OF THE STATE OF NEW YORK, AND JANET M. DIFIORE, IN HER OFFICIAL CAPACITY AS CHIEF JUDGE OF THE STATE OF NEW YORK AND CHIEF JUDICIAL OFFICER OF THE UNIFIED COURT SYSTEM,

Defendants-Respondents.

MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION TO STRIKE AND FOR OTHER RELIEF

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants-Respondents
The Capitol
Albany, NY 12224-0341
(518) 776-2317
Frederick.Brodie@ag.ny.gov

VICTOR PALADINO
Senior Assistant Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
of Counsel

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PRELIMINARY STATEMENT

Respondents submit this memorandum and the accompanying affirmation of Frederick A. Brodie ("Brodie Aff.") in opposition to the motion of plaintiffs-appellants Center for Judicial Accountability, Inc. ("CJA") and Elena Sassower to strike the opposition memorandum filed by respondents on June 27, 2019 ("June 27 memorandum") and for other relief.

The motion should be summarily denied. The June 27 memorandum was not fraudulent, but rather was filed in subjective good faith after an objectively reasonable process of research and preparation. Plaintiffs' disagreement with (seemingly) everything respondents say does not make respondents' papers sanctionable.

ARGUMENT

PLAINTIFFS' MOTION SHOULD BE DENIED

A. The Court should not strike the June 27 memorandum.

The New York courts have recognized a "strong public policy favoring the resolution of cases upon their merits." *Matter of Walker v. Buttermann,* 164 A.D.3d 1081, 1083 (3d Dep't 2018); *accord Strong v. Delemos,* 172 A.D.3d 940, 941-42 (2d Dep't 2019); *Kadah v. Byrd,*

148 A.D.3d 1811, 1814 (4th Dep't 2017); *Washington v. Alco Auto Sales,* 199 A.D.2d 165, 165 (1st Dep't 1993).

That policy applies here. Striking a party's filing is an "extreme and drastic penalty." *Sayomi v. Rolls Kohn & Assocs.,*16 A.D.3d 1069, 1070 (4th Dep't 2005); *accord, e.g., Batra v. Office Furniture Service, Inc.,* 275 A.D.2d 228, 231 (1st Dep't 2000); *Mohammed v. 919 Park Place Owners Corp.,* 245 A.D.2d 351, 352 (2d Dep't 1997); *Mushatt v. Tompkins Community Hosp.,* 228 A.D.2d 925, 926 (3d Dep't 1996). The record before this Court presents no support for striking the June 27 memorandum as plaintiffs request (Notice of Motion ¶ 1).

1. The June 27 memorandum complied with the rules.

The filing, form, and timing of the June 27 memorandum complied with applicable procedural rules and Court orders. Plaintiffs do not contend otherwise.

2. Plaintiffs misapprehend the concept of "fraud."

The June 27 memorandum is not fraudulent. As explained therein (June 27 mem. at 18-19), plaintiffs misunderstand the nature of advocacy in the adversary system, and consequently err in labeling as "fraudulent"

any argument by respondents that (a) does not repeat plaintiffs' claims verbatim; or (b) takes a legal position that plaintiffs oppose.

Respondents' counsel are free—indeed, expected—to prepare legal papers that support their case, and need not repeat or even address every one of plaintiffs' arguments. The absence of fraud in the June 27 memorandum is underscored, among other things, by the fact that counsel "urged" this Court to read "plaintiffs' papers and the record." (June 27 mem. at 19.) Because plaintiffs' papers and the record are before the Court, and respondents' counsel have urged the Court to read them,[1] nothing has been concealed.

Nor could advancing a legal position in opposition to plaintiffs' motions reasonably be called "fraud." For example, respondents made an argument based on *Matter of Maron v. Silver*, 14 N.Y.3d 230, 248-49 (2010). (June 27 mem. at 11.) Plaintiffs disagree with respondents' reading of *Maron,* and therefore call respondents' statement "fraudulent" (8/8/19 Sassower Aff. Ex. B at 23). But the parties' disagreement over

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[1] We also urge the Court to read plaintiffs' papers in support of the instant motion.

Maron's meaning and application is not "fraud"; rather, it is a disputed issue of law that the Court may decide for itself.

3. Plaintiffs' motion to strike is an unauthorized reply memorandum on their two other pending motions.

At multiple points in their moving papers, plaintiffs attempt to refute the June 27 memorandum's arguments by citing their own motions for reargument and leave to appeal in this Court and their two SSD letters. (*See, e.g.*, 8/8/19 Sassower Aff. Ex. B at 5-7, 10-11, 13-14, 16-17, 29-31.) The instant motion therefore amounts to a reply memorandum in support of plaintiffs' previous motions for reargument and leave to appeal.

The time to file a reply memorandum ended on the July 8 return date. Because plaintiffs neither sought nor obtained leave to file a late reply, the reply arguments in their new motion should be disregarded.

4. The June 27 memorandum was prepared in an objectively reasonable manner and in subjective good faith.

The June 27 memorandum was authored by experienced counsel. (Brodie Aff. ¶¶ 8, 13-15.) In drafting the June 27 memorandum, counsel followed an objectively reasonable process to avoid errors, which included

review of plaintiffs' extensive motion papers; review of the relevant case law and statutes; review of the draft by experienced supervising counsel; a separate cite-check by a legal assistant; and transmittal of the draft to respondents' representatives for review. (Brodie Aff. ¶¶ 6-10.)

Respondents' counsel also acted in subjective good faith. Specifically, counsel has no intent to defraud the Court and continues to believe that the arguments in the June 27 memorandum have merit. (Brodie Aff. ¶¶ 17-18.)

5. Striking the June 27 memorandum would prejudice respondents.

Striking the June 27 memorandum would cause respondents unfair and material prejudice. If the June 27 memorandum were stricken, respondents would have no papers on file in opposition to either the reargument motion or the leave motion. The motion to strike should therefore be denied, and respondents' papers should be considered on their merits.

B. Respondents are properly represented by the Attorney General, who should not be disqualified.

Plaintiffs ask that the Attorney General be disqualified from representing respondents, and that her representation be declared "unlawful" and "UNCONSTITUTIONAL." (Notice of Motion ¶ 2; emphasis retained.) There is no ground for doing so.

Disqualification of a party's chosen counsel "conflicts with public policies favoring client choice and restricts an attorney's ability to practice." *Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303, 310 (1994) (reversing disqualification). The Appellate Divisions have therefore characterized disqualification as a "harsh sanction," *Parnes v. Parnes,* 80 A.D.3d 948, 953 (3d Dep't 2011), a "severe remedy," *Mancheski v. Gabelli Group Capital Partners,* 22 A.D.3d 532, 534 (2d Dep't 2005), and a "drastic action," *Cerqueira v. Clivilles*, 213 A.D.2d 202, 202 (1st Dep't 1995). In short, disqualification is "a drastic step which should be avoided, if possible." *Manufacturers Hanover Trust Co. v. Lindenbaum,* 73 A.D.2d 517, 518 (3d Dep't 1979).

As shown below, plaintiffs have failed to establish that the Attorney General should be precluded from representing respondents.

1. The Attorney General has no financial interest in this case.

Plaintiffs argue that the Attorney General has a financial interest in this case because a similar commission subsequently recommended increases in executive-branch pay. (8/8/19 Sassower Aff. Ex. B at 29.) Plaintiffs are incorrect. As explained in the June 27 memorandum (at 3-4), the complaint contained no claims as to any budget year after 2016-17. Plaintiffs' motion for leave to supplement the complaint to add claims based on subsequent years was denied. (Record on Appeal ["R"] 68-69.) The pay raise recommended in the challenged commission report affected only the judiciary. (*See* R1083-1102.)[2] Thus, the Attorney General has no financial stake in this case.

In any event, having a financial interest in winning a case is not a ground for disqualifying an attorney. Every lawyer who takes a matter on contingency has a financial interest in the outcome. *See* N.Y. Rule of Professional Conduct 1.5(c). To be sure, an attorney shall not take a case if her personal interests would adversely affect her "professional

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[2] Because this case is limited to the 2016-17 budget year, the Attorney General is not obligated to send the Court a "status report" on litigation involving subsequent recommendations by other commissions as plaintiffs demand (8/9/19 ltr. from Elena R. Sassower to John P. Asiello, Esq. at 2-3).

judgment on behalf of a client." N.Y. Rule of Professional Conduct Rule 1.7(a)(2). But here, as the Third Department found, the Attorney General's interests and those of her clients are "united." (Brodie Aff. Ex. 2 at 4.) Plaintiffs do not contest the point. (*See* Sassower Aff. Ex. B at 28.) And the clients themselves have not objected to the Attorney General's representation, the March 26 letter urging that the Court dismiss the appeal sua sponte (the "March 26 SSD letter"), or the June 27 memorandum. (*See* Brodie Aff. ¶¶ 4, 9, 12.)

2. The Attorney General's representation of respondents fulfills her statutory and constitutional function.

Under the Constitution, the Attorney General is "head ... of the department of law." N.Y. Const. Art. V, § 4. In that role, Executive Law § 63(1) empowers her to "have charge and control" over the legal business of all "departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel." Respondents—the Governor, the Senate and its President, the Assembly and its Speaker, the Chief Judge, the Attorney General, and the Comptroller—all fall within that grant of authority. Thus, rather than violating the

Constitution, the Attorney General's actions here fulfill her constitutional function.

Moreover, the Attorney General is specifically empowered to litigate "in support of the constitutionality" of the State's statutes. Exec. Law § 71(1). Plaintiff's underlying appeal challenged the constitutionality of a statute that created and empowered a Commission on Legislative, Judicial and Executive Compensation. *See* L. 2015, ch. 60, § E. The Attorney General is entitled to defend that law.

3. The Office of the Attorney General has determined that representing respondents is in the interest of the State.

Plaintiffs argue that Executive Law § 63(1) requires a determination that the Attorney General's representation of respondents is in "the interest of the state." (8/8/19 Sassower Aff. Ex. B at 31-32.) Although it is unnecessary to do so, respondents have provided evidence that such a determination was made. (Brodie Aff. ¶ 3.) In any event, although Executive Law § 63(1) allows the Attorney General to "participate or join" in certain litigation "if in [her] opinion the interests of the state so warrant," it does not confer on plaintiffs the right to compel or block the attorney general's actions.

4. The Attorney General cannot represent plaintiffs.

Plaintiffs are not entitled to a declaration that the Attorney General's representation "belongs to" them (*see* Notice of Motion ¶ 2). The Attorney General is not authorized to represent private parties like plaintiffs. (*See* June 27 mem. at 16-17 and cases cited.) Plaintiffs' causes of action under the citizen-taxpayer statute are personal in nature. *See* State Finance Law § 123 (stating that "each individual citizen and taxpayer of the state has an interest" in proper disposition of state funds); *id.* § 123-b (providing that "any person" may "maintain an action" under citizen-taxpayer statute). Plaintiffs' bare assertion that they, themselves, represent the "public interest" (Sassower Aff. Ex. B at 31) does not change the law on this point.

C. The June 27 memorandum is not sanctionable.

Because the June 27 memorandum is not fraudulent (*see supra* § A[2]), it provides no occasion for sanctions (*see* Notice of Motion ¶ 3), "investigation and prosecution" (*see* Notice of Motion ¶ 5), or impeachment of the Attorney General (*see* Notice of Motion ¶ 6).

Conduct is "frivolous," and therefore sanctionable, if among other things it "is completely without merit in law and cannot be supported by

a reasonable argument for an extension, modification or reversal of existing law" or "asserts material factual statements that are false." 22 N.Y.C.R.R. § 130-1.1(c)(1), (3). "[T]he standard for such a showing is high." *W. Hempstead Water Dist. v. Buckeye Pipeline Co., L.P.*, 152 A.D.3d 558, 558-59 (2d Dep't 2017). Plaintiffs cannot meet it here.

The legal arguments in the June 27 memorandum are based on the statutes, case law, and other legal authorities cited therein. (Brodie Aff. ¶ 18.) Similarly, the memorandum's factual statements are supported by citations to the record. (Brodie Aff. ¶ 18.) The memorandum falls well within the boundaries for permissible advocacy in this Court.

Indeed, respondents prevailed on the merits (a) in Supreme Court before Justice McDonough; (b) in Supreme Court before Justice Hartman; (c) in the Appellate Division when it denied the merits relief sought in plaintiffs' four motions; and (d) in the Appellate Division when it decided plaintiffs' appeal. The fact that two Supreme Court Justices and eight different Justices of the Appellate Division agreed with respondents' position is a strong indication that the Attorney General's arguments are not frivolous.

D. The June 27 memorandum did not violate Judiciary Law § 487.

Plaintiffs seek relief under Judiciary Law § 487, which permits the assessment of treble damages against lawyers for "deceit or collusion." (*See* Notice of Motion ¶ 4.) A cause of action under § 487 requires proof of intent to deceive. *Dupree v. Voorhees*, 102 A.D.3d 912, 913 (2d Dep't 2013). The attorney's conduct must be "egregious" or "chronic and extreme," and the allegations of fraud must be "stated with particularity." *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (1st Dep't 2015) (citation omitted), *lv. denied*, 28 N.Y.3d 903 (2016). The allegations of deceit and collusion cannot be "conclusory." *Cramer v. Sabo*, 31 A.D.3d 998, 999 (3d Dep't 2006), *lv. denied*, 8 N.Y.3d 801 (2007).

No violation of § 487 can be shown here. Respondents' counsel proceeded in subjective good faith and, additionally, prepared the June 27 memorandum using a process that objectively ensured accuracy. (*See supra* § A[4]; Brodie Aff. ¶¶ 6-10, 17-18.) Counsel's conduct thus amounted to "simple advocacy" for their clients, which cannot support an inference of intent to deceive. *Seldon v. Lewis Brisbois Bisgaard & Smith LLP,* 116 A.D.3d 490, 491 (1st Dep't 2014), *lv. dismissed,* 25 N.Y.3d 985 (2015).

E. Plaintiffs' request to strike the March 26, 2019 SSD letter is moot.

Plaintiffs also ask that respondents' March 26, 2019 SSD letter be stricken. Their request comes more than four months after the March 26 letter was filed, and more than three months after this Court dismissed plaintiffs' appeal. Because the Court has already ruled on the issue to which the letter pertained, plaintiffs' request should be "dismissed as academic," *see People v. Perry,* 29 N.Y.3d 1142, 1142 (2017); *see also Merisel, Inc. v. Weinstock,* 117 A.D.3d 459, 460 (1st Dep't 2014) (where defendants were entitled to judgment, motion to strike answer was properly denied as moot).

Indeed, the Court has already considered—and apparently rejected—plaintiffs' arguments for striking the March 26 SSD letter. On April 11, 2019, plaintiffs sent the Court a 16-page, single-spaced letter arguing that respondents' March 26 letter was a "fraud on the court." The Court took no action in response.

In any event, like the June 27 memorandum, the March 26 SSD letter was prepared through an objectively reasonable process designed to avoid errors. (Brodie Aff. ¶ 12.) The basis for each factual statement in the March 26 SSD letter may be found in the record cites provided, and

the basis for each legal argument may be found in the cases, statutes, and other authorities cited. (Brodie Aff. ¶ 18.) Moreover, the March 26 SSD letter was submitted in subjective good faith. (Brodie Aff. ¶ 18.)

F. The motion should be denied as to CJA because CJA is not represented by counsel.

CJA is a corporation or voluntary organization. (R91.) Under CPLR § 321(a), "a corporation or voluntary association *shall* appear by attorney" (emphasis added). *See, e.g., State Farm Mut. Ins. Co. v. Croyle Enters., Inc.,* 10 N.Y.3d 800, 800 (2008). Supreme Court twice dismissed CJA's claims because it was not represented by an attorney. (R322-323, 530.) The Third Department affirmed that outcome. (Brodie Aff. Ex. 2 at 4.) In its May 2 order, this Court dismissed CJA's purported appeal for the same reason. (Brodie Aff. Ex. 1 at 1.)

Notwithstanding that unbroken string of rulings, plaintiffs have once again filed papers in CJA's name. To the extent the instant motion purports to be brought on CJA's behalf, it must be dismissed because CJA still is not represented by an attorney. And this Court should accept no further filings on behalf of CJA, unless they are made by a licensed attorney in good standing.

CONCLUSION

Appellants' "Motion to Strike as 'Fraud on the Court', to Disqualify the Attorney General, & for Other Relief" should be denied in all respects.

Dated: Albany, New York
August 19, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents

By: _____
FREDERICK A. BRODIE
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224-0341
(518) 776-2317
Frederick.Brodie@ag.ny.gov

VICTOR PALADINO
Senior Assistant
Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
of Counsel

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.13(c)(1), Frederick A. Brodie, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this memorandum, the body of this memorandum contains 2,657 words, which complies with the limitations stated in 22 N.Y.C.R.R § 500.13(c)(1).

Frederick A. Brodie