

SUPREME COURT OF STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

----- X
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,

Plaintiffs-Appellants,

October 18, 2018

**Moving Affidavit in Support of
Appellants' Order to Show Cause to
Strike Respondents' Brief, to
Declare the Attorney General's
Appellate Representation of
Respondents Unlawful, & for Other
Relief**

-against-

App. Div. 3rd Dept. Docket #527081
Albany Co. Index # 5122-16

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 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.

-----X
STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the unrepresented individual plaintiff-appellant in this citizen-taxpayer action
appeal, fully familiar with all the facts, papers, and proceedings heretofore had, and submit this
affidavit in support of appellants' accompanying order to show cause to strike respondents' brief, to
declare unlawful the attorney general's appellate representation of respondents, and for other relief.

2. Appellants proceed by order to show cause, consistent with the command of State Finance Law §123-c(4), whose purpose is to safeguard taxpayer monies from unconstitutional and illegal disbursement, as here at issue.¹ To enable the Court to set the shortest appropriate return date, a full copy of this unsigned order to show cause is being e-mailed to the attorney general today and mailed from the post office.

3. Incorporated herein by reference is appellants' October 4, 2018 reply brief, which I wrote and to whose accuracy I attest. It demonstrates that the September 21, 2018 respondents' brief, signed by Assistant Solicitor General Frederick Brodie, on behalf of Attorney General Barbara Underwood, and additionally bearing the name of his direct supervisor, Assistant Solicitor General Victor Paladino, is, "from beginning to end, 'a fraud on the court'"².

¹ State Finance Law §123-c(4) reads:

"An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts."

"Whenever a statute or rule requires that a given motion be made "on such notice as the court may direct," or uses words to that effect, that is another legislative way of requiring that the motion be brought on by order to show cause..." McKinney's Consolidated Laws of New York Annotated, Book 7B, Practice Commentaries by Patrick Connors: C2214:25 – "What is a Proper Case?"

² Over and over again, appellants furnished the attorney general with the definition of "fraud on the court" by their memoranda of law, both in this citizen-taxpayer action [R.474-475; R.925-926; R.1331] and its predecessor [R.1126-1127], as follows:

"'Fraud on the court' is defined by Black's Law Dictionary (7th ed. 1999) as:

'A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding.'

See, also *CDR Creances S.A.S. v Cohen, et al.*, 23 N.Y.3d 307 (2014):

"Fraud on the court involves willful conduct that is deceitful and obstructionist, which injects misrepresentations and false information into the judicial process 'so serious that it undermines . . . the integrity of the proceeding' (*Baba-Ali v State*, 19 NY3d 627, 634, 975 N.E.2d 475, 951 N.Y.S.2d 94 [2012] [citation and quotations omitted]). It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting 'a wrong against the institutions set up to protect and

4. Before being put to the burden of drafting the 55-page reply brief, I gave NOTICE to Assistant Solicitor General Brodie by a September 21, 2018 e-mail that I also sent to Attorney General Underwood, Assistant Solicitor General Paladino, and other high-ranking supervisory/managerial attorneys in the attorney general's office, of their duty to withdraw the respondents' brief, stating that I would otherwise furnish the Court with:

“a particularized analysis..., setting forth its multitudinous deceits and falsehoods, in support of relief against all of [them], pursuant to 22 NYCRR §130-1.1, Judiciary Law §487, and §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.” (Exhibit A-1).

5. The only response I received was from Assistant Solicitor General Brodie, by a September 21, 2018 e-mail, which he simultaneously sent to Attorney General Underwood and Assistant Solicitor General Paladino, *et al.* It stated:

“I stand by the arguments in respondents' brief, and do not withdraw them.

You are entitled to file a reply brief in the form required under 22 N.Y.C.R.R. sec. 1250.8(d), within the time frame set by the Appellate Division's August 7, 2018 order.” (Exhibit A-2).

6. In compliance with the Court's August 7, 2018 order, I timely-filed appellants' reply brief. However, so voluminous were the frauds, deceits, and falsehoods of the respondents' brief that I could not fit analysis of them into a reply brief limited to the 7,000 words set by §1250.8(f)(2) of the Appellate Division rules. I, therefore, had to seek leave to file an oversized reply brief (Exhibit B-1) – which I obtained (Exhibits B-2, B-3). Even still, the resulting reply brief, with 12,555 words, though comprehensive, could not, and did not, chronicle all the deceits.

safeguard the public' (*Hazel-Atlas Glass Co. v. Hartford-Empite*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 [1944]; *see also Koschak v Gates Const. Corp.*, 225 AD2d 315, 316, 639 N.Y.S.2d 10 [1st Dept 1996][‘The paramount concern of this Court is the preservation of the integrity of the judicial process’]).”

7. Illustrative of deceptions not fully addressed by the reply brief and germane to the relief here sought are those of Point III-C of respondents' brief (at p. 61). Entitled "Attorney General Underwood Has No Conflict of Interest", its single paragraph reads:

"There is no basis for plaintiff's claim that the Attorney General should be disqualified (Br. iv). Attorney General Underwood has no conflict of interest. She is defending both herself and the other State officers and entities, all of whom are defendants-respondents. Defendants-respondents are united in their interest in defeating plaintiff's claims."

8. Appellants' reply brief (at p. 10) pointed out that this Point III-C was seemingly addressed to their brief's third sub-question, by its "cit[ing] to, without reciting, 'Br. iv'", yet was non-responsive in that it:

"offer[ed] up a single, conclusory four-sentence paragraph, not identifying or rebutting appellants' memoranda of law pertaining to Attorney General Schneiderman's conflict of interest [R.519-520; R.981-982; R.1334] – nor disputing that Judge Hartman's decisions concealed this threshold issue, without adjudication – which is the essence of this subquestion relating to the attorney general's disqualification for conflict of interest."

9. Appellants' reply brief did not identify, however, that respondents' Point III-C:

(a) transposed the conflict of interest issue away from Attorney General Schneiderman to Attorney General Underwood;

(b) falsely declared by its title and then repeated by its content that "Attorney General Underwood has no conflict of interest"; and

(c) falsely implied that such conflict involved not being "united" with fellow defendants-respondents, rather than, as it was and is, betraying the state.

10. As Attorney General Underwood was NOT attorney general when Judge Hartman rendered her November 28, 2017 decision and judgment – the subject of the appeal – the conflicts of interest, *specific to her*, were NOT part of appellants' appeal brief and its third sub-question.

11. Attorney General Underwood's numerous and substantial conflicts of interests, impeding professional discharge of her duties, are recited by my May 30, 2018 letter to her (Exhibit

D) – a letter I wrote because she had not responded to my May 16, 2018 NOTICE to her (Exhibit C) that there was NO legitimate defense to this appeal of Judge Hartman’s November 28, 2017 decision and judgment and that her duty, pursuant to Executive Law §63.1 and State Finance Law §123 *et seq.*, was to be representing appellants or intervening on our behalf. Among the recited conflicts, her personal and professional relationships with Judge Hartman, who, prior to being appointed to the bench in 2015 by defendant Governor Cuomo, had, for many years, been an assistant solicitor general under then Solicitor General Underwood, herself appointed to that position in 2007 by then Attorney General Cuomo and, in 2011, retained by his successor, defendant Attorney General Schneiderman.

12. Attorney General Underwood did not respond to this May 30, 2018 letter, nor dispute its accuracy. This includes when I annexed it as Exhibit J-1 to my July 24, 2018 moving affidavit in support of appellants’ initial order to show cause³, signed by Justice Devine on August 2, 2018⁴, whose second branch was for an order:

“directing that Attorney General Barbara D. Underwood identify who has determined ‘the interest of the state’ on this appeal – and plaintiffs-appellants’ entitlement to the Attorney General’s representation/intervention pursuant to Executive Law §63.1 and State Finance Law, §123 *et seq.*, including *via* independent counsel, and how, if at all, she has addressed her own conflicts of interest with respect thereto”.

13. My uncontested May 30, 2018 letter (Exhibit D) and my further recitation at ¶¶11-23 of my July 24, 2018 moving affidavit in support of this second branch (Exhibit E-1) – also

³ The enclosures to the May 30, 2018 letter, as likewise to the May 16, 2018 NOTICE, were furnished to the Court, with the order to show cause, in accompanying folders marked “Free-Standing Exhibit J” and “Free-Standing Exhibit I (eye)” (Exhibits E-3, E-2).

⁴ There is a VIDEO of Justice Devine’s signing of the order to show cause, which was at the August 2, 2018 oral argument of the TRO – and I presented significant argument, at that time, as to the threshold issue of the “interest of the state”, Executive Law §63.1, and the lawfulness of the attorney general appearing before the Court. The VIDEO is posted on appellant Center for Judicial Accountability’s website, here: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/8-2-18-oral-argument.htm>.

uncontested by Attorney General Underwood in opposing the August 2, 2018 order to show cause⁵— resoundingly put the lie to the bald declaration of respondents’ Point III-C (at p. 61) that “Attorney General Underwood has no conflict of interest”.

14. The Court’s August 7, 2018 decision and order on motion did not responsively adjudicate ANY of the relief sought by appellants’ August 2, 2018 order to show cause, including this second branch. Instead, in the complete absence of any evidence, or even a claim, that Attorney General Underwood’s appellate representation of respondents was based on a determination that it was in “the interest of the state, pursuant to Executive Law §63.1, and over my vigorous assertion and dispositive showing that it was NOT – the Court gave Attorney General Underwood until September 21, 2018 to file respondents’ brief.

15. Needless to say, respondents’ brief, by its fraudulence, not only manifests the conflicts of interest it falsely proclaims Attorney General Underwood does not have, but proves, *prima facie*, that the only determination an unconflicted attorney general could have made, pursuant to Executive Law §63.1, is that “the interest of the state” rests with appellants. Under such circumstances, it is not enough for the Court to simply strike Attorney General Underwood’s respondents’ brief. It must further protect the appellate process by declaring her appellate

⁵ Attorney General Underwood’s opposition to the order to show cause was unsupported by any affidavit or affirmation from her or from Mr. Brodie. Even still, Mr. Brodie’s July 23, 2018 letter, urging the Court not to sign the order to show cause, skipped the conflict of interest issue pertaining to Attorney General Underwood. Likewise, he made no mention of same at the August 2, 2018 oral argument of the TRO. As for his August 3, 2018 memorandum in opposition, it put forward text (at p. 3) that be repeated, virtually *verbatim*, by his September 21, 2018 respondents’ brief:

“Attorney General Underwood has no conflict of interest. She is defending both herself and the other State officers and entities, all of whom are united in their interest in defeating appellants’ claims.”

See, also, my August 6, 2018 reply affidavit, whose Exhibit DD “legal autopsy”/analysis of Mr. Brodie’s August 3, 2018 memorandum discusses its opposition to the second branch of appellants’ order to show cause at pp. 4-7. For the convenience of the Court, it is annexed hereto as Exhibit G.

representation of respondents as violative of Executive Law §63.1 and unlawful – and that such taxpayer-paid representation belongs to appellants.

16. Suffice to note that respondents’ brief (at pp. 20-21) under a Point I-E heading “Plaintiff is Not Entitled to Representation by the Attorney General” does a similar job of transposition, concealment, and fraud as to what was before Judge Hartman with respect to appellants’ entitlement to the attorney general’s representation/intervention pursuant to Executive Law §63.1 and State Finance Law §123 *et seq.* – also part of the third sub-question of appellants’ brief (at iv-v).

17. Here, too, appellants’ reply brief (at pp. 10-11) furnishes rebuttal, with much more that might have been said. Most significant, that this respondents’ Point I-E, by its omission of the first sentence of the two-sentence Executive Law §63.1, was replicating Mr. Brodie’s deceit by his June 27, 2018 e-mail to me – quoted at ¶16 of my July 24, 2018 moving affidavit in support of the second branch of appellants’ order to show cause, with rebuttal at ¶17 (Exhibit D) – to which his opposition to this second branch was both NON-RESPONSIVE and deceitful and so-demonstrated by the “legal autopsy”/analyses annexed to my August 1, 2018 reply affidavit (Exhibit Z, at pp. 23-25) and my August 6, 2018 reply affidavit (Exhibit DD, at pp. 4-7). For the Court’s convenience, the rebutting pages of these “legal autopsy”/analyses, with their interpretive discussion of Executive Law §63.1 and State Finance Law §123 *et seq.*, are annexed hereto (Exhibits F and G).

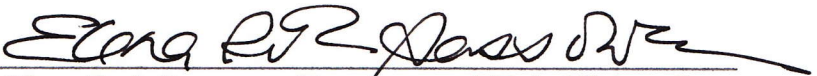
18. This Court may be deemed fully-familiar with 22 NYCRR §130-1.1⁶ and §100.3D(2) of the Chief Administrator’s Rules Governing Judicial Conduct. Discussion of these integrity-

⁶ §1250.1(d) of the Practice Rules of the Appellate Division, entitled “Signing of documents”, expressly states:

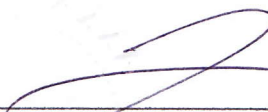
preserving provisions and of Judiciary Law §487 is furnished by appellants' memoranda of law before Judge Hartman, in the record before this Court [R.520-525; R.982-987; R.1376-1381; R.1287-1290]. To this I would add the words of the Appellate Division, Second Department in *Cicio v. City of New York*, 98 A.D.2d 38 (1983) and its quoted legal authorities:

“The function of an appellate brief is to assist, not mislead, the court....; see, also, Thode, *The Ethical Standard for the Advocate*, 39 Texas L Rev 575, 585-586; Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 Hofstra L Rev 729). ‘The process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state’ (*Matter of Greenberg*, 15 N.J. 132, 137-138 [1954]).”

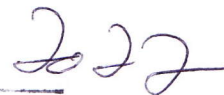
19. Appellants have made no prior application for the same or similar relief, except by the second branch of their initial order to show cause, signed by Justice Devine on August 2, 2018 – disposed of by the Court’s August 7, 2018 decision and order on motion that is currently the subject of an order to show cause for its vacatur, signed by Presiding Justice Garry on September 12, 2018.


Elena Ruth Sassower, Unrepresented Plaintiff-Appellant

Sworn to before me this
18th day of October 2018


Notary Public

JOSEPH SAM MAZZA
Notary Public, State of New York
No. 04MA6045640
Qualified in Westchester County
Commission Expires July 31, _____



“The original of every hard copy document submitted for filing in the office of the clerk of the court shall be signed in ink in accordance with the provisions of section 130-1.1-a (a) of this Title.”

TABLE OF EXHIBITS

- Exhibit A-1: Appellants' September 21, 2018 e-mail to Assistant Solicitor General Frederick Brodie – “NOTICE: Your duty to withdraw your respondents’ brief, as it is ‘a fraud on the court’...”
- Exhibit A-2: Asst. Solicitor General Brodie’s September 21, 2018 e-mail
- Exhibit B-1: Appellants’ October 3, 2018 letter to Appellate Division, Third Department Clerk Robert Mayberger – “Leave to File Oversized Reply Brief”
- Exhibit B-2: October 4, 2018 e-mail and letter from Managing Attorney Erica Putnam Little
- Exhibit B-3: Appellants’ October 4, 2018 e-mail to Managing Attorney Little – “...Appellants’ Oversized Reply Brief”
- Exhibit C: Appellant Sassower’s May 16, 2018 letter/complaint to Attorney General Barbara Underwood – “NOTICE: Corruption and Litigation Fraud by Former Attorney General Eric Schneiderman & his Office – and Your Duty to Take Investigative and Remedial Action, most immediately, in the Citizen-Taxpayer Action...and pursuant to ‘The Public Trust Act (Penal Law §496: ‘Corrupting the government’)”
- Exhibit D: Appellant Sassower’s May 30, 2018 letter to Attorney General Underwood – “What is the Status? – CJA’s May 16, 2018 letter: NOTICE...,
(1) Disclosure of facts giving rise to your duty to secure appointment of independent/outside counsel to investigate and report on your ethical and law enforcement obligations with respect to the May 16, 2018 NOTICE, or a special prosecutor;
(2) FOIL/records request – conflicts of interest; Executive Law §63.11; legislative oversight.”
- Exhibit E-1: ¶¶11-23 of appellant Sassower’s July 24, 2018 moving affidavit in support of the second branch of appellants’ order to show cause – “Threshold Integrity Issues Pertaining to the Attorney General: Plaintiffs’ Entitlement to its Representation/Intervention & its Disqualification on Conflict of Interest Grounds”

Exhibit E-2: Inventory of Free-Standing Exhibit I (eye) to appellant Sassower's July 24, 2018 moving affidavit in support of order to show cause

Exhibit E-3: Inventory of Free-Standing Exhibit J to appellant Sassower's July 24, 2018 moving affidavit in support of order to show cause

Exhibit F: pages 22-24 of appellants' "legal autopsy"/analysis of Asst. Solicitor General Brodie's July 23, 2018 letter –
(Exhibit Z to appellant Sassower's August 1, 2018 reply affidavit)

Exhibit G: pages 4-7 of appellants' "legal autopsy"/analysis of Asst. Solicitor General Brodie's August 3, 2018 memorandum –
(Exhibit DD to Sassower's August 6, 2018 reply affidavit)