

Appellants' Entitlement to the Declarations Sought by the Second Branch of their Motion

Appellants' entitlement to the granting of the first branch of their motion – to strike Mr. Brodie's respondents' brief as “a fraud upon the court” is established, *without more*, by the uncontested particulars of their 55-page reply brief. Likewise, their entitlement to the granting of their motion's third branch (sanctions and costs pursuant to 22 NYCRR §130-1.1), fourth branch (determination pursuant to Judiciary Law §487), fifth branch (disciplinary and criminal referrals pursuant to 22 NYCRR §100.3D(2)), and sixth branch (motion costs pursuant to CPLR §8202).

The only branch of appellants' motion requiring specific rebuttal to the deceits of Mr. Brodie's opposing memorandum is the second branch:

“declaring Attorney General Underwood's appellate representation of respondents unlawful for lack of any evidence – or even a claim – that it is based on a determination pursuant to Executive Law §63.1 that such is in “the interest of the state”, with a further declaration that such taxpayer-paid representation belongs to appellants” (underlining in the original).

Mr. Brodie opposition to this second branch consists of the ten paragraphs of his memorandum under the section heading “Respondents are Properly Represented by the Attorney General, Who Cannot Represent Plaintiffs” (at pp. 4-9). As hereinbelow demonstrated, these ten paragraphs are materially false and misleading, where not outrightly fraudulent, and do NOT establish either that “Respondents are Properly Represented by the Attorney General”, or that “[The Attorney General] Cannot Represent Plaintiffs”. Rather, they establish the exact opposite, plus Attorney General Underwood's disqualification for conflict of interest.

“Legal Autopsy”/Analysis of the Ten Paragraphs of Mr. Brodie's Memorandum (at pp. 4-9) Relating to the Second Branch of Appellants' Motion

Mr. Brodie first paragraph (at pp. 4-5) reads:

“Plaintiff asks that the Attorney General's representation of respondents be declared ‘unlawful’ under Executive Law §63(1). (Notice of Motion ¶2; *accord* Sassower Aff. ¶15.) Disqualification is a ‘harsh sanction.’ *Parnes v. Parnes*, 80 A.D.3d 948, 953 (3d Dep't 2011) (reversing disqualification). It ‘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). Here, plaintiff has failed to establish that the Attorney General should be precluded from representing respondents.”

This is false, both as to fact and law. Appellants are not seeking to disqualify the attorney general as a “sanction”, but because his representation violates Executive Law §63.1. And neither *Parnes* nor *Solow* is relevant as neither involves Executive Law §63.1 or the attorney general. Instead, they involve private attorneys representing private clients, not, as here, an attorney general whose SOLE

legal authority to represent the defendant-respondent public officers and the state – at taxpayer expense – is “the interest of the state”.

As for Mr. Brodie’s assertion that appellants “failed to establish that the Attorney General should be precluded from representing respondents”, it is utterly fraudulent, resting on his concealment of the ENTIRETY of appellants’ showing in support of the preclusion they have allegedly “failed to establish”. Indeed, Mr. Brodie conceals appellants’ showing not just in this paragraph, but in his subsequent paragraphs, whose prefatory words “First,” “Second,” “Third,” “Fourth”, and “Fifth,” give a false impression of rebutting, when they do not.

Mr. Brodie’s second paragraph (at p. 5), then continues:

“First, Executive Law §63(1) empowers the Attorney General 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 Temporary President, the Assembly and its Speaker, the Chief Judge, the Attorney General, and the Comptroller – all fall within that grant of authority. None of those clients has objected to the Attorney General’s representation or sought to have different counsel appear on this appeal. (Brodie Aff. ¶4.)”

This is materially false and deceitful. Executive Law §63.1 does NOT empower the attorney general to defend respondents, except where doing so is to “protect the interest of the state” – and this is evident from the first sentence of Executive Law §63.1, which specifies the attorney general’s duties to:

“Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state” (underlining added).

Mr. Brodie’s concealment of the first sentence of Executive Law §63.1 replicates his prior concealment of it, pointed out by appellants’ reply brief (at pp. 10-11) and by ¶17 of appellant Sassower’s moving affidavit in support of this motion and its annexed Exhibits E, F, and G.

Nor is it of the slightest relevance that respondents have not objected to the attorney general’s representation of them and have not sought different counsel, as Mr. Brodie here asserts and to which his cited “Aff. ¶4” attests¹. It does not change the fact that where, as at bar, the attorney general has NO legitimate defense to constitutional, statutory, and rule violations by public officers – and can

¹ Mr. Brodie’s ¶4 of his affirmation reads, in full:

“None of the respondents has objected to the Attorney General’s representation or sought to have different counsel appear on this appeal.”

only defend them through litigation fraud – Executive Law §63.1 does not permit him to defend them.

Mr. Brodie’s third paragraph 3 (at pp. 5-6), then continues:

“Second, the Attorney General is specifically empowered to litigate ‘in support of the constitutionality’ of the State’s statutes. Exec. Law §71(1). Plaintiff’s appeal challenges 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.”

This is meaningless – and materially misleading. As appellants’ reply brief points out (at p. 11), Executive Law §71.1 merely ‘authorizes’ the attorney general ‘to litigate in support of the constitutionality of the State’s statutes’. It does not require him to do so. Nor could it, as the attorney general could not be required to “litigate in support of the constitutionality” where a statute is, in fact, unconstitutional. This is the situation at bar – and not only with respect to Chapter 60, Part E of the Laws of 2015, creating the Commission on Legislative, Judicial and Executive Compensation, but with respect to the budget, enacted by budget bills codified as if they were statutes.

Mr. Brodie’s fourth and fifth paragraphs (at p. 6), then continue:

“Third, plaintiff seeks to disqualify the Attorney General ‘for lack of any evidence – or even a claim’ that the Attorney General has found that representing respondents serves the State’s interest. (Notice of Motion ¶2). Although §63(1) allows the Attorney General to ‘participate or join’ in certain actions ‘if in [her] opinion the interests of the state so warrant,’ it does not confer on plaintiff, or other private parties, the right to compel or block the attorney general’s participation.

In any event, although it is not required, the Brodie Affirmation provides the evidence plaintiff requests. It states: ‘The Office of the Attorney General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.’ (Brodie Aff. ¶3.)”

Again, utter deceit – beginning with Mr. Brodie’s quoting of Executive Law §63.1, which is NOT from its first sentence, on which appellants rely, but its second, which reads:

“No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.”

Thus, although this second sentence may confer upon appellants no “right to compel or block the attorney general’s participation”, that is NOT the case with respect to the first sentence of Executive Law §63.1, about which Mr. Brodie makes no comparable claim based on its language.

And notwithstanding his disclaimer, Mr. Brodie effectively concedes appellants’ rights with respect to the first sentence by furnishing what it describes as “the evidence plaintiff requests” – thereupon quoting, *verbatim*, his affirmation’s ¶3 single-sentence.

Such ¶3, however, is NOT evidence, as it is completely conclusory, failing even to provide the names of such persons in the attorney general’s office as supposedly “determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.” – or any evidence in corroboration. Indeed, it is an obvious perjury, rebutted by ALL the EVIDENCE constituting the record of this citizen-taxpayer action below, as well as ALL the EVIDENCE constituting the record of the proceedings before this Court with respect to appellants’ three motions, each intended to ensure the integrity of the appellate proceedings – each of which Mr. Brodie corrupted with litigation fraud, because he had NO legitimate defense.

Mr. Brodie’s sixth paragraph (at pp. 6-7) then continues:

“Fourth, plaintiff is not entitled to a declaration that the Attorney General’s representation ‘belongs to’ her (Notice of Motion ¶2; Sassower Aff. ¶15). The Attorney General is not authorized to engage in ‘the representation of private individuals such as [plaintiff] in matters involving the enforcement of private rights.’ *Matter of Cliff v. Vacco*, 267 A.D.2d 731, 732 (3d Dep’t 1999) (Graffeo, J.), *lv. denied*, 94 N.Y.2d 762 (2000); *accord Waldman v. State of New York*, 140 A.D.3d 1448, 1449 (3d Dep’t 2016). Plaintiff’s 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). Thus, plaintiff’s demands for the Attorney General’s representation cannot be granted.”

This is utterly fraudulent. Appellants are not seeking to have the attorney general “engage in the representation of private individuals...in matters involving the enforcement of private rights” – and *Cliff v. Vacco* and *Waldman v. State of New York* are inapposite for that reason. To contrive the fiction that appellants are enforcing private rights, Mr. Brodie’s falsely purports that their “causes of action under the citizen statute are personal in nature” because the citizen-taxpayer action statute provides that “‘each individual citizen and taxpayer of the state’ has an interest in proper disposition of state funds”. He furnishes no caselaw for his novel proposition – presumably because there is NONE, as State Finance Law §123-b itself rebuts same, reading, in pertinent part,

“any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of

the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property...” (underlining added).

Nor does Mr. Brodie disclose that appellants have brought this citizen-taxpayer action expressly and by its caption “on behalf of the People of the State of New York & the Public Interest” – or specify a single allegation of appellants’ ten causes of action, or of the declaratory relief sought with respect to each, let alone anything about either that might be deemed “personal in nature” and aimed toward “enforcement of private rights” – because, as is obvious, they resoundingly are not.

Mr. Brodie’s seventh through tenth paragraphs (at pp. 7-9) then shift to the issue of attorney general’s conflict of interest, introduced by a first sentence reading: “Fifth, Attorney General Underwood has no conflict of interest in representing respondents”. Annotating this is a footnote stating:

“The fact that Attorney General Underwood did not reply to plaintiff’s correspondence on this point (Sassower Aff. ¶11) is of no moment. Plaintiff does not show that the Attorney General was required to answer her letters.”

This is another fraud. No reading of appellants’ correspondence to Attorney General Underwood – beginning with the May 16, 2018 NOTICE/complaint and the May 30, 2018 letter, annexed to the motion as Exhibits C and D and recited at ¶¶11-14 – would support a view that Attorney General Underwood was not duty-bound to respond or that, in the context of appellants’ July 24, 2018 order to show cause and this motion, challenging the lawfulness of the attorney general’s representation of defendants and Attorney General Underwood’s conflicts of interest, as specified by the May 30, 2018 letter (Exhibit D), she was not required to respond, personally, by affidavit.

As Mr. Brodie and his direct superior, Assistant Solicitor General Paladin, each seasoned litigators, know, it is of great “moment” that Attorney General Underwood has not responded by sworn statement – because it means, *as a matter of law*, that appellant Sassower’s May 30, 2018 letter, annexed to her affidavits in support of two separate motions, are uncontested. Indeed, Mr. Brodie’s own affirmation, which purports to provide “factual support for certain arguments made” in his memorandum (at ¶2, p. 1) provides NO “factual support” for the assertions in the seventh through tenth paragraphs of his memorandum that Attorney General Underwood suffers from no conflicts of interest. Thus, not only does it not recite any conversations with Attorney General Underwood pertaining to the May 30, 2018 letter, it is altogether silent about her conflicts of interest.

Mr. Brodie’s non-probative and conclusory seventh through ninth paragraphs are non-responsive to most of the specifics furnished by appellants’ six-page May 30, 2018 letter about Attorney General Underwood’s conflicts of interest (Exhibit D). This includes her role, as solicitor general, in the decision not rearguing or appealing to the U.S. Supreme Court the New York Court of Appeals’ decision in *Maron v. Silver* – which gave rise to Chapter 567 of the Laws of 2010 and the Commission on Judicial Compensation – and her knowledge that the Commission’s August 29, 2011 report was, as demonstrated by appellants’ October 27, 2011 opposition report, statutorily-violative,

fraudulent, and unconstitutional. And, suffice to add, the scant, conclusory argument in each of these three paragraphs of Mr. Brodie’s memorandum rests on the flagrantly false factual assertions that:

“In any event, plaintiff has tendered no evidence that the existence of such complaints affected the Attorney General’s judgment” (¶7, at p. 7, underlining added);

“There is no showing that Justice Hartman’s former employment as an Assistant Solicitor General has affected the Attorney General’s judgment” (¶8, at p. 8, underlining added);

“And plaintiff does not show that any alleged relationships affects the Attorney General’s judgment” (¶9, at p. 9, underlining added).

Such assertions, made serially, are on par with Mr. Brodie’s assertions at page 2 of his memorandum that “The record before this Court presents no support for striking the brief as plaintiff requests” and that appellants’ reply brief presented nothing more than “supposed defects” in the respondents’ brief.

Mr. Brodie’s ¶10, begins with the word “Finally”, stating:

“Finally, plaintiff should not be heard to argue that the Attorney General has a conflict of interest because she should really be representing plaintiff rather than respondents.”

He then reprises *Cliff v. Vacco* – having no relevance because at issue there was “representation of private individuals...in matters involving the enforcement of private rights”. Likewise, his citation to *Grant v. Harvey*, No. 09 Civ. 1918, 2012 WL 1958878 *3 (S.D.N.Y. May 24,2012), quoting *Cliff v. Vacco*. At issue here is, emphatically, the enforcement of public rights – the rights of the People of the State of New York.