Supreme Court of the State of New York
Appellate Division – Third Department

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,

-against- **No. 527081**

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 APPELLANT'S MOTION TO STRIKE BRIEF AND FOR OTHER RELIEF

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Dated: November 2, 2018

Supreme Court, Albany County – Index No. 5122-16

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

State Laws

State Rules and Regulations

Miscellaneous

PRELIMINARY STATEMENT

Respondents submit this memorandum and the accompanying affirmation of Frederick A. Brodie ("Brodie Aff.") in opposition to the motion of plaintiffs-appellants Elena Ruth Sassower and Center for Judicial Accountability, Inc. (together, "plaintiff") to strike the respondents' appellate brief and for other relief.

When plaintiff attempted to bring this motion by order to show cause, the Court (Hon. Sharon A.M. Aarons, J.) declined to sign the order. That result would give most litigants pause, prompting them to reevaluate the propriety of their motion and revise its content or abandon it entirely. Plaintiff, however, has simply refiled her motion via notice of motion with exactly the same supporting materials. For the reasons set forth below, her latest motion should be denied.

ARGUMENT

PLAINTIFF'S MOTION SHOULD BE DENIED

A. The Court Should Not Strike Respondents' Brief

This Court has recognized a "strong public policy favoring the resolution of cases upon their merits." *See, e.g., Matter of Walker v. Buttermann,* 164 A.D.3d 1081, 1083 (3d Dep't 2018). That policy applies

here. Striking a party's filing is a "drastic sanction." *Forman v. Jamesway Corp.*, 175 A.D.2d 514, 515 (3d Dep't 1991) (reversing order striking answer as discovery sanction). The record before this Court presents no support for striking the brief as plaintiff requests (Notice of Motion ¶ 1).

First, plaintiff provides no reason for departing from the ordinary course of briefing, argument, and decision. To the contrary, she argues that the supposed defects in respondents' submission are set forth in her reply brief. (10/18/18 Moving Affidavit of Elena Ruth Sassower [Sassower Aff.] ¶ 3.) To determine the motion, then, the Court would have to review respondents' brief and compare it to plaintiff's reply brief. That is exactly what the Court would do in deciding the appeal on the merits—along with reviewing the record, plaintiff's opening brief, the oral arguments, and the applicable law, none of which should be objectionable to plaintiff. Plaintiff provides no reason for cutting off the appellate process prematurely.

Second, the filing, form, and timing of respondents' brief complied with applicable procedural rules and Court orders. Plaintiff does not contend otherwise.

Third, respondents' brief was authored by experienced counsel. (11/2/18 Affirmation in Opposition [Brodie Aff.] ¶¶9, 12-14.) In drafting the brief, counsel followed an objectively reasonable process to avoid errors, which included review of the relevant record materials in both this case and the predecessor case, *Center for Judicial Accountability v. Cuomo,* Index No. 1788-14 (Sup. Ct. Albany Cty.); review of the relevant case law and statutes; review of the draft brief by experienced supervising counsel; a separate cite-check of the case, statutory, and record citations by a legal assistant; and review and approval of the draft brief by the respondents' representatives. (Brodie Aff. ¶¶ 6-11.)

Fourth, respondents' counsel acted in subjective good faith. Specifically, counsel has no intent to defraud the Court and believes that the arguments in respondents' brief have merit. (Brodie Aff. ¶¶ 16-17.) The absence of any fraudulent intent is underscored, among other things, by footnote 1 in respondents' brief, which "urge[d]" the Court to read plaintiff's brief and the record. (Brodie Aff. ¶ 19.)

Fifth, striking the brief would cause respondents unfair and material prejudice. (Brodie Aff. ¶¶ 20-21.) The return date on plaintiff's motion is November 13, 2018—the same day this appeal will be argued.

Thus, by the time the motion is decided, respondents' counsel will have argued the case based on the existing briefs. (Brodie Aff. ¶ 20.) If respondents' brief is stricken, respondents will be materially prejudiced because they have been relying on that brief to set out their arguments for affirmance. (Brodie Aff. ¶ 20.)

Finally, respondents' brief was filed on behalf of the Governor, the Senate and its Temporary President, the Assembly and its Speaker, the Chief Judge, the Attorney General, and the Comptroller. Respondents' counsel thus represent every branch of the State government. As a matter of courtesy and comity toward coordinate branches of government, this Court should read respondents' brief and not strike it. *See generally Campaign for Fiscal Equity v. State of New York,* 8 N.Y.3d 14, 28 (2006) (discussing deference to legislative branch); *New York State Inspection, Sec. & Law Enf. Employees v. Cuomo*, 64 N.Y.2d 233, 239 (1984) (discussing deference to executive branch).

B. Respondents are Properly Represented by the Attorney General, Who Cannot Represent Plaintiff

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.

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.)

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.

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.)

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 demand for the Attorney General's representation cannot be granted.

Fifth, Attorney General Underwood has no conflict of interest in representing respondents.[1] The "personal and professional relationships" among attorneys who work in the Office of the Attorney General (Sassower Aff. Ex. D at 1) do not pose a cognizable conflict of interest. Were the law otherwise, a litigant could disqualify any law firm or government office from representing clients simply by filing a grievance, because lawyers who work together will have at least a professional

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[1] 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.

relationship. Further, the Attorney Grievance Committee has declined to take up any of the disciplinary complaints that plaintiff filed against personnel in the Office of the Attorney General. (*See* 8/1/18 Sassower Reply Aff. Ex. AA.) In any event, plaintiff has tendered no evidence that the existence of such complaints affected the Attorney General's judgment.

Nor do the Attorney General's alleged "personal and professional relationships" with Justice Hartman (Sassower Aff. ¶ 11 & Ex. D at 1) pose a conflict of interest. The Attorney General must defend Justice Hartman's decisions—or appeal from them—in numerous cases decided by Justice Hartman involving the State, its agencies, or its officers and employees. There is no showing that Justice Hartman's former employment as an Assistant Solicitor General has affected the Attorney General's judgment. By analogy, a judge who was formerly a district attorney may preside over the criminal trial of a defendant whom the judge previously prosecuted. (*See* Defendants-Respondents' Brief at 59 and cases cited.) If that is permitted, then the Attorney General can surely be trusted to assess impartially the decisions of a judge who formerly worked as one of her subordinates.

As to the Attorney General's alleged "personal and professional relationships" with Governor Cuomo (Sassower Aff. Ex. D at 2), the Governor is a client. Lawyers are permitted to be friends with their clients, and to work in the same organization as their clients. It does not cause a conflict of interest. And plaintiff does not show that any alleged relationship affects the Attorney General's judgment.

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. As Justice Graffeo (later a Judge of the Court of Appeals) wrote for this Court in rejecting similar allegations:

> In light of respondents' clear statutory obligation to represent the State employees named as respondents in the two prior proceedings, and in the absence of any basis to conclude that respondents possessed a corresponding duty to represent petitioner in those proceedings, we discern no circumstances giving rise to an inherent conflict of interest.

Cliff, 267 A.D.2d at 732; *accord Grant v. Harvey,* No. 09 Civ. 1918, 2012 WL 1958878, *3 (S.D.N.Y. May 24, 2012) ("no legal basis exists for Grant's argument that the attorney general should represent him, and that the attorney general should be disqualified from representing the defendants because a conflict of interest exists on that basis").

C. Respondents' Brief Is Not Sanctionable

Respondents' brief is not sanctionable under 22 N.Y.C.R.R. § 130-1.1. Conduct is "frivolous," and therefore sanctionable under the rule, 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). Plaintiff cannot meet it here.

First, the legal arguments in respondents' brief are based on the statutes, case law, and other legal authorities cited therein. (Brodie Aff. ¶¶ 6-7, 17.) Because respondents' brief relies upon appropriate legal authorities to support its arguments, it has "merit in law" or at least a "reasonable argument" for the extension or modification of existing law.

Second, the factual statements in respondents' brief are supported by citations to the record in plaintiff's instant lawsuit and the record in her predecessor lawsuit. (Brodie Aff. ¶¶ 6-7, 17.)

Respondents prevailed (a) in Supreme Court before Justice Hartman; (b) in Supreme Court in the predecessor lawsuit before Justice

McDonough; (c) on the preliminary injunction motion in this Court; and (d) on plaintiff's motion for reargument and renewal of the preliminary injunction motion in this Court. Plaintiff, in contrast, lost every one of her causes of action in both lawsuits. Against that background, plaintiff's position that there is "NO legitimate defense to this appeal" (Sassower Aff. ¶11) may charitably be described as hyperbole.

D. Respondents' Brief Did Not Violate Judiciary Law § 487

Plaintiff also seeks 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).

Here, respondents' counsel proceeded in subjective good faith and prepared the brief using a process that objectively ensured accuracy. (*See*

supra Point C; Brodie Aff. ¶¶ 5-11, 16-19.) 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). Where, as here, advocates' statements "were made in the course of judicial proceedings, and were material and pertinent to the issue to be resolved in those proceedings," they are "absolutely privileged," even against an attack under § 487. *Lipin v. Hunt,* 137 A.D.3d 518, 519 (1st Dep't) (affirming dismissal of claim under Judiciary Law § 487), *app. dismissed,* 27 N.Y.3d 1053 (2016), *rearg. denied,* 28 N.Y.3d 943 (2016).

Further, a claim under Judiciary Law § 487 is "nonexistent in the absence of sustainable compensatory damages." *Kaiser v. Van Houten,* 12 A.D.3d 1012, 1015 (3d Dep't 2004). Plaintiff has incurred no damage because her claims are presently before this Court. If plaintiff loses her appeal, she will not have been damaged because Supreme Court's decisions denying her claims would be sustained and her claims consequently would be found to have lacked merit. If plaintiff wins her

appeal, there will be no damage because this Court would presumably grant her the relief, if any, to which she is legally entitled.[2]

Finally, respondents' counsel have faith in the adversary system's ability to yield the proper result. (Brodie Aff. ¶ 18.) The operation of that system requires the Court to consider each side's submissions before making a decision. (Brodie Aff. ¶ 18.) Consistent with the above, in footnote 1 on page 1 of respondents' brief, counsel stated: "For a full account of plaintiff's claims, we urge the Court to read her brief and the record, available on plaintiff's website, www.judgewatch.org." (Brodie Aff. ¶ 19.) Counsel's willingness to "urge" the Court to read plaintiff's papers negates any inference of fraudulent intent.

E. Plaintiff is Not Entitled to Supplement Her Reply Brief

Plaintiff candidly admits that some of her arguments were included in this motion because points in respondents' brief were "not fully addressed" by her 55-page reply brief. (*See* Sassower Aff. ¶¶ 6-7.) Plaintiff had every opportunity to file a comprehensive reply brief.

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[2] Being "put to the burden of drafting [a] 55-page reply brief" (Sassower Aff. ¶4) is not cognizable injury. A party who proceeds *pro se* cannot recover attorney's fees. *Matter of Leeds v. Burns,* 205 A.D.2d 540, 540 (2d Dep't), *lv. denied,* 84 N.Y.2d 811 (1994).

The Court expanded the allowable word-count so that the filed reply brief was 12,555 words—almost 80% longer than otherwise permitted. Respondents did not object to plaintiff's filing an overlength brief, or move to strike it. (Brodie Aff. ¶ 19.)

Now that the appeal has been fully briefed, however, it is too late for plaintiff to introduce additional theories by motion—particularly where plaintiff has not moved for leave to supplement her reply brief. *Cf. People v. Evans,* 212 A.D.2d 628, 628 (2d Dep't 1995) (denying motion for, among other things, leave to file supplemental reply brief). Consequently, paragraphs 7 through 17 of plaintiff's moving affidavit should be disregarded because they constitute an unauthorized supplement to her already-overlength reply.

Plaintiff also complains about the Court's August 7 order denying her summary judgment motion. (*See* Sassower Aff. ¶14.) Her objections to that order have already been rejected when the Court denied her motion for reargument and renewal on October 23, 2018.

F. There is No Basis for a Referral to Disciplinary or Criminal Authorities

For reasons set forth above, the relief sought in paragraph 5 of the Notice of Motion should be denied in its entirety.

CONCLUSION

Appellant's "Motion to Strike Respondents' Brief, to Declare the Attorney General's Appellate Representation of Respondents Unlawful, & for Other Relief" should be denied in all respects.

Dated: Albany, New York
November 2, 2018

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Uniform Appellate Division Rules (22 N.Y.C.R.R.) § 1250.8(j), the foregoing memorandum was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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