SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

ELENA RUTH SASSOWER, DORIS L. SASSOWER, and CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,	Suffolk Co. Index No.: 10-12596
Plaintiffs,	App. Div.: 2012-00126 2012-05360 2013-0533
- against -	
GANNETT COMPANY, INC., THE JOURNAL NEWS, LOHUD.COM, HENRY FREEMAN, CYNDEE ROYLE, BOB FREDERICKS, D. SCOTT FAUBEL, KEITH EDDINGS, and DOES 1-10,	
Defendants.	

BRIEF IN OPPOSITION

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Defendants-Respondents Gannett Company, Inc., Gannett Satellite Information Network, Inc., Henry Freeman, CynDee Royle, Bob Fredericks, and D. Scott Faubel (collectively, "Defendants")[1], by and through their counsel Satterlee Stephens Burke & Burke LLP ("Satterlee"), respectfully submit this Brief in Opposition to the September 23, 2013 Motion (the "Motion") brought by Plaintiff-Appellant Elena Ruth Sassower (hereinafter "Elena Sassower"), who along with plaintiffs Doris L. Sassower and Center for Judicial Accountability, Inc. ("CJA") (collectively "Plaintiffs"), brought this action against Defendants.

PRELIMINARY STATEMENT

The present motion filed by Elena Sassower seeks (i) disqualification of the entire four-judge appellate panel that heard the appeal of this action, (ii) reargument, (iii) vacating this Court's Order dated August 21, 2013, (iv) sanctions against defense counsel, and (v) leave to appeal to the Court of Appeals.

While the motion is devoid of merit, unfortunately the allegations come as no surprise. Both in the proceedings below, where Plaintiffs also sought to disqualify the presiding judge and alleged fraud and sought sanctions against defense counsel, and in numerous prior proceedings brought by these Plaintiffs, it has been Plaintiffs' pattern and practice to seek to disqualify Judges who have

[1] Named defendant *The Journal News* is a business unit of Gannett Satellite Information Network, Inc., and "LoHud.com" is the name of a website maintained by *The Journal News*. Both are improperly identified as parties to this lawsuit.

issued adverse rulings against them, and to allege "fraud" and seek sanctions against any attorney who has advocated against them.

As in the many prior proceedings, here the allegations of bias, fraud, and sanctionable conduct are unsupportable. There is simply no basis to seek disqualification of the appellate panel, no basis for vacating this Court's Order on the grounds of "lack of jurisdiction" due to the panel's bias, no basis for vacating the Court's Order based on any alleged "fraud" of defense counsel, and no basis for sanctions against defense counsel. Further, as Elena Sassower does not identify any law or facts actually misapprehended or overlooked by the appellate panel, there is no grounds for reargument, and no reason this Court should grant leave to appeal to the Court of Appeals. It is time for this litigation to end, once and for all.

RELEVANT BACKGROUND

A. Procedural History

This action began on October 4, 2010, when Plaintiffs filed a complaint asserting causes of action for libel, libel *per se*, and "journalistic fraud" (the "Complaint"). R-1, R-33-48. The claims arose out of a newspaper article published by *The Journal News* on May 6, 2009, titled, "Hecklers try to derail new city judge," and which described Elena and Doris Sassower's protests at the judicial confirmation proceedings of Judge Brian Hansbury. (the "Article"). R-108.

Defendants filed a motion to dismiss the Complaint in its entirety on the straightforward grounds that the Article simply did not support a libel claim, and that "journalistic fraud" is not a cognizable cause of action. In response, Plaintiffs not only opposed the motion but asserted a cross-motion for an order, *inter alia*, imposing sanctions against Satterlee pursuant to NYCRR § 130-1.1 and referring Satterlee to disciplinary authorities for its advocacy in support of Defendants' Motion. In an order dated September 22, 2011, Justice Cohalan granted Defendants' Motion in its entirety and denied Plaintiff's cross-motion in its entirety (the "September 22 Order"). R-3-8.

On December 21, 2011, Appellant filed a motion seeking an order, *inter alia*, (i) disqualifying Justice Cohalan; (ii) granting reargument and renewal of the September 22 Order; (iii) vacating the September 22 Order on the grounds of fraud and/or lack of jurisdiction; (iv) sanctioning Satterlee; and (v) granting Appellant's leave to amend her dismissed Complaint. R-586-587. In an order dated April 23, 2012 (the "April 23 Order"), Justice Cohalan denied Appellant's motion in its entirety. R-11.

Elena Sassower appealed both orders of the trial court. Oral arguments were held on May 6, 2013 and this Court issued a Decision and Order dated August 21, 2013 (the "Appellate Order"). The Appellate Order dismissed the appeal of both the September 22 Order and the April 23 Order, and unanimously affirmed the

judgment below. *See* Motion, Ex. A. This Court specifically held that the libel and "journalistic fraud" claims were properly dismissed, that the record did not support any of the allegations asserted against defense counsel, and that there was no proof of any bias or prejudice on the part of Justice Cohalan that would warrant recusal.

The present motion was filed on September 23, 2013 in response to the Appellate Order.

B. The Plaintiffs' Pattern and Practice of Seeking Judicial Recusal and Sanctions Against Adversaries

The present motion seeking recusal of the four-judge appellate panel that heard Elena Sassower's appeal asserts bias and/or interest on the same generalized grounds (applicable to essentially every Judge in New York) as formed the basis for Plaintiffs recusal motion at the trial court level; namely, that the Justices on the panel are biased and interested in this action due to (a) Plaintiffs' prior efforts at recusal and sanctions against other judges with whom the Justices may have professional relationships, and (b) the fact that Plaintiffs have publicly opposed judicial pay raises. *Cf.* Motion at 11 *and* R-592-595.

Significantly, the assertions of bias and interest against the judges they have encountered in this action are the same as Plaintiffs have levied against many other judges in prior actions. *See, e.g.,* R-203-206 (*Sassower v. The New York Times Co.*, No. 05-19841 (Sup. Ct. West. Co. Sept. 27, 2006) ("*Sassower v. NYT II*") at 2

(denying Appellant's motion for recusal in which she accused Judge Nicolai of "engag[ing] in an on-going retaliatory vendetta against [them] due to their crusade against judicial corruption" and noting that "at least nine of the Supreme Court or Acting Supreme Court Judges in this courthouse had issued standing recusal orders recusing themselves from any action involving the plaintiffs"), *aff'd*, 852 N.Y.S.2d 180 (2d Dep't 2008); *Sassower v. Field***,** 973 F.2d 75,78 (2d Cir. 1992) (the Second Circuit quoting the district court's summary of plaintiffs' abusive litigation tactics in a case in which George, Doris, and Elena Sassower were all plaintiffs, noting "[t]hey made several unsupported bias recusal motions based upon this court's unwilling involvement in some of the earlier proceedings initiated by George Sassower"). Notably, in *Sassower v. Comm'n on Judicial Conduct of the State*, slip op. 108551/99 (Sup. Ct. N.Y. Co. Jan. 31, 2000), the Honorable William A. Wetzel sums up the Plaintiffs' standard procedure of seeking recusal and why it cannot be permitted:

> The proceeding has been marked by petitioner's deluge of applications seeking recusal of each of the various assigned judges. For the most part, these applications have been based upon the petitioner's categorical allegation that this action somehow implicates the Governor, and therefore all judges who are subject to reappointment by the Governor are ipso facto disqualified. Petitioner further asserts a potpourri of grounds for recusal, and then particularizes its application as to this court in a letter and attachments dated December 2, 1999, which contain specific allegations of impropriety.

> It is noteworthy that this court finds itself in wide company as a target of allegations by this petitioner. These papers are replete with accusations against virtually the entire judiciary, the Attorney General, the Governor, and the respondent. Petitioner cannot however bootstrap a conflict where none exists merely by making accusations against a court.

R-768-773 (*Sassower v. Comm'n on Judicial Conduct of the State,* slip op. 108551/99 (Sup. Ct. N.Y. Co. Jan. 31, 2000) at 2-4), *aff'd,* 289 A.D.2d 119, 734 N.Y.S.2d 68 (1st Dep't 2001).

Similarly, it is not only judges who are targeted by the Sassowers. Too often they have disparaged the professional conduct of their adversaries. *See Sassower v. Field***,** 973 F.2d 75, 78 (2d Cir. 1992) ("There were continual personal attacks on the opposing parties and counsel."); *Sassower v. New York Times Co.*, 48 A.D.3d 440, 441 (2d Dep't 2008) (affirming dismissal of Appellant's motion for the disqualification of the trial court judge and for sanctions against the *Times's* counsel); *McFadden v. Sassower,* 900 N.Y.S.2d 585, 589 (App. Term 2010) (affirming dismissal of Appellant's motion for imposition of costs and sanctions against opposing party and his attorney, as well as the disciplinary referral of the attorney); *Sassower v.Comm'n on Judicial Conduct of the State,* 289 A.D.2d at 119 (imposing a filing injunction against Appellant due to her "vitriolic ad hominem attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions"); *Sassower v. City of White Plains,* 992 F. Supp. 652, 656 (S.D.N.Y.

1998) (declining to grant plaintiff Doris Sassower's request for Rule 11 sanctions against the defendants); *Ward-Carpenter Engineers, Inc. v. Sassower*, 163 A.D.2d 304, 305 (2d Dep't 1990) (declining to grant defendant Doris Sassower's request for sanctions against the plaintiff).

As in prior proceedings, it appears that ultimately the only way to curtail these attacks is through the imposition of sanctions, either monetary or by means of a filing injunction. *See Sassower v. Comm'n on Judicial Conduct of the State*, 289 A.D.2d 119, 734 N.Y.S.2d 68, 69 (1st Dep't 2001) ("The imposition of a filing injunction against both petitioner [Elena Sassower] and the Center for Judicial Accountability was justified given petitioner's vitriolic *ad hominem* attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions."); *Wolstencroft v. Sassower*, 234 A.D.2d 540, 540, 651 N.Y.S.2d 609, 609-10 (2d Dep't 1996) (affirming an order sanctioning Doris Sassower in the amount of $10,250 and directing that $100,000 of settlement monies be returned to plaintiff); *Sassower v. Field*, 973 F.2d 75, 77-78 (2d Cir. 1992) (affirming imposition of sanctions against both Elena and Doris Sassower for engaging in an "extraordinary pattern of vexatious litigating tactics" and pursuing the litigation "as if it was a holy war and not a court proceeding"); *see also Sassower v. Signorelli*, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702, 704 (2d Dep't 1984).

ARGUMENT

POINT I

THERE IS NO BASIS FOR DISQUALIFICATION

Elensa Sassower seeks disqualification of the four-judge appellate panel that heard her appeal on the basis of "bias" or "interest." Disqualification pursuant to Judiciary Law § 14 requires that the court be "interested" in the matter at hand or "related by consanguinity or affinity to any party to the controversy…." 22 NYCRR § 100.3(E) calls for disqualification, where, *inter alia*, the "judge has a personal bias or prejudice concerning a party." Elena Sassower has offered no facts warranting disqualification under either statute.

First, Elena Sassower suggests the panel's alleged "bias" is evidenced by their application of the law to the facts alleged, resulting in an Order with which she disagrees. *See* Motion at 3. Of course, disagreement with a court's legal reasoning is not grounds for disqualification. The law is clear that bias allegedly evidenced by a legal opinion is simply not proper grounds for disqualification. *Petkovsek v. Snyder*, 251 A.D.2d 1086, 674 N.Y.S.2d 208, 209 (4th Dep't 1998) (affirming denial of motion for recusal because "the motion was based solely on the fact that the Trial Judge had not previously ruled in petitioner's favor"); *Hurrell-Harring v. State*, 20 Misc. 3d 1108(A), 866 N.Y.S.2d 92 (Sup. Ct. Albany Co. 2008) ("In order to be disqualifying, alleged bias and prejudice must stem from

an extrajudicial source and result in an opinion on the merits on some basis other than what is learned from participation in the case. Neither the formation of an opinion on a question of law nor judicial rulings in a litigation constitute grounds for a claim of bias or prejudice on the part of a judge."). Nor can bias be based on the Panel's failure to ask questions at argument or to permit rebuttal, s*ee* Motion at 8, as these actions (or inactions) are plainly and necessarily within the sound discretion of the panel.

Further, in arguing for recusal, the purported "relationships and interest" identified are primarily based on Plaintiffs' prior efforts at recusal and sanctions against other judges, and Plaintiffs' public opposition to judicial pay raises. *See* Motion at p. 11. Needless to say, such allegations arguably apply with equal force to any state court judge daring to dismiss claims brought by Elena Sassower, and she cannot be permitted to use recusal as a sword against any adverse outcome in litigation. Indeed, the protection of the judicial process requires denial of unwarranted motions for disqualification or recusal. R-768-773 (*Sassower v. Comm'n on Judicial Conduct of the State, supra,* at 2-4 ("Equally important as the obligation to recuse when appropriate is the obligation to decide the case when there is no legal basis for recusal. . . . When a court recuses itself without a proper basis, it undermines respect for the judiciary, encourages forum-shopping, unnecessarily prolongs litigation, and unfairly "passes the buck" to other judges.");

Galasso v. Calder, 31 Misc. 3d 1220(A), 929 N.Y.S.2d 199 (Sup. Ct. N.Y. Co. 2011) ("A judge is as much obligated not to recuse himself when it is not called for as he is obligated to when it is.").

Notably, in her effort to identify some basis to suggest grounds for disqualification, Elena Sassower points to Justice Skelos's involvement in a prior action brought by Plaintiffs. *See* Motion at 11-12. But prior adverse decisions by a Judge cannot create a basis for disqualification. *See Greenman v. Greenman*, 175 A.D.2d 360 (3rd Dep't 1991) ("Defendant initially contends that the Trial Judge erred in refusing to recuse himself from the case on the basis that the Judge had presided over another unrelated matter involving defendant. This is not a ground warranting a legal disqualification.") (internal citations omitted); *see also People v. Collins*, 136 A.D.2d 722 (3d Dep't 1998). Nor can Elena Sassower be permitted to demand disqualification of Justice Skelos based on the fact that she has separately targeted his brother, Dean Skelos (along with the Governor, Chief Judge, Attorney General and others), in unrelated proceedings. *See* Motion at 12.

As the allegations of bias and/or interest as without basis, there is equally no merit to Elensa Sassower's novel request that the Appellate Order be vacated pursuant to CLPR 5015(a)(4), based the panel's alleged "lack of jurisdiction" due to their "disqualification for interest."

POINT II

NEITHER REARGUMENT OR LEAVE TO APPEAL IS WARRANTED

Pursuant to Second Department Rule 670.6(a), a motion for reargument is required to "concisely state the points claimed to have been overlooked or misapprehended by the court, with appropriate references to the particular portions of the record or briefs and with citation of the authorities relied upon."

In that portion of the motion addressing reargument, Elena Sassower states that "the panel 'overlooked and misapprehended' *the entirety of what was before it* in the record, in the briefs, and at oral arguments." Motion at 13 (emphasis added). Essentially, Elena Sassower seeks to again re-litigate in full the issues already twice decided, which is not the purpose of a motion for re-argument. *See Foley v. Roche*, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588, 593 (1st Dept. 1979) ("Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided."). In short, you cannot move for rearguemnt on the grounds that the panel "misapprehended and overlooked" everything. As the Motion fails to identify any specific point or issues, nor cite any specific portion of the record or briefs, in support of her request, she has plainly failed to set forth a valid basis for reargument.

With respect to Elena Sassower's request for leave to appeal to the Court of Appeals, the questions of law to be reviewed by the Court of Appeals that she sets

forth in her Motion (p. 14-15), as required by Second Department Rule 670.6(c), plainly do not merit review by the Court of Appeals. As the proposed questions concerns Elena Sassower's baseless arguments regarding disqualification and bias, there is simply no justifiable reason to grant leave to appeal, which would only lead to further frivolous litigation, unnecessarily taxing both the judiciary and defendants.

POINT III

ELENA SASSOWER'S ALLEGATIONS OF FRAUD AND REQUEST FOR SANCTIONS AGAINST DEFENSE COUNSEL ARE FRIVOLOUS

Elena Sassower devotes a single paragraph of her reargument motion to her repeated claims that Satterlee has engaged in fraud and should be sanctioned.

In order to vacate an order or judgment of the court pursuant to CPLR § 5015(a)(3), the moving party must establish misconduct or fraud on the part of its adversary or its adversary's attorney sufficient to warrant the vacatur of the ruling. *See Blumes v. Madar*, 21 A.D.3d 518, 519, 800 N.Y.S.2d 580, 581 (2d Dep't 2005); *Arroyo v. Hilton*, 281 A.D.2d 440, 441, 721 N.Y.S.2d 553 (2d Dep't 2001). To warrant vacatur, the fraud must have prevented a party "from fully and fairly litigating the matter." *Shaw v Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231 (2d Dep't 1983). Furthmore, the moving party must "affirmatively establish fraud by clear and convincing evidence." *Cofresi v. Cofresi*, 198 A.D.2d 321, 603 N.Y.S.2d 184, 185 (2d Dep't 1993). *See also Aames Capital Corp. v. Davidsohn*, 24 A.D.3d 474,

475, 808 N.Y.S.2d 229, 230 (2d Dep't 2005) (denying motion for vacatur under CPLR § 5015(a)(3) because movant "offered nothing more than broad, unsubstantiated allegations of fraud"); *Miller v. Lanzisera*, 273 A.D.2d 866, 868, 709 N.Y.S.2d 286, 288 (4th Dep't 2000) (same); *H & Y Realty Co. v. Baron*, 193 A.D.2d 429, 430, 597 N.Y.S.2d 343, 345 (1st Dep't 1993) (alleged fraud or misconduct must be "clearly demonstrated").

Elena Sassower's Motion accuses Satterlee of "pervasive litigation fraud," but offers no specifics other than references to her equally vague allegations asserted in the briefs on appeal. *See* Motion at 14. Thus, it still remains unclear what precisely is the nature of the fraud or misconduct perpetrated by Satterlee. In any event, there is no suggestion, nor could there be, that Satterlee in fact prevented Elena Sassower from fully and fairly litigating this matter, nor is there any evidence to suggest fraud, much less "clear and convincing evidence" of fraud.

Similarly, the argument for sanctions is sweeping, but says nothing specific. Elena Sassower contends: "it was frivolous and sanctionable *per se*, for defense counsel to have even appeared at the May 6, 2013 oral argument in opposition to appellants' appeals. His regurgitated deceits at the oral argument only reinforce appellants' entitlement to relief." Motion at 14. Evidently, Elena Sassower believes it is sanctionable for attorneys adverse to her to even show in court.

In order for conduct to be "frivolous" and sanctionable under Rule 130, it must be (1) "completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or (2) "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 NYCRR 130-1(c). Significantly, case law wholly supports Satterlee's arguments and briefing in this action, and both the trial court (twice) and appellate panel agreed with Satterlee's arguments on behalf of defendants. Further, there is no allegation, nor can there be, that Satterlee's advocacy at any point was made with any intent to delay or prolong litigation, or harass Plaintiff. Finally, even assuming, *arguendo,* that Satterlee (and therefore both the trial court and appellate panel) was wrong on the law, even such legal error would not be sanctionable conduct. *Golden v. Barker*, 223 A.D.2d 769, 770, 636 N.Y.S.2d 444 (3d Dep't 1996) ("[C]onduct attributable to legal error, standing alone, is not frivolous within the meaning of 22 NYCRR 130-1.1 (c).").

In contrast, Elena Sassower's baseless and frivolous sanctions motion is itself sanctionable. *See* 22 NYCRR 130-1.1 (c)(3)("Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section."); 24 N.Y. Jur. 2d *Costs in Civil Actions* § 84. Further, as it is clear that there is no basis for Elena Sassowers' repeated, harmful, and baseless accusations against Satterlee, in light of Appellant's history of vexatious litigation, it is respectfully submitted

that this Court should follow the lead of prior courts and enjoin Elena Sassower "from instituting any further actions or proceedings relating to the issues decided herein." R-768-773 (*Sassower v. Comm'n on Judicial Conduct of the State*, *supra*, at 5); *see also Sassower v. Signorelli*, 99 A.D.2d 358, 472 N.Y.S.2d 702 (2d Dep't 1984) (permitting Court to enjoin further litigation by George or Doris L. Sassower, holding that "when, as here, a litigant is abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation."); *see also In the Matter of Pignataro v Davis*, 8 A.D.3d 487, 778 N.Y.S.2d 528 (2d Dep't 2004) (affirming trial court's precluding individual from making further applications to court, noting that while "[p]ublic policy generally mandates free access to the courts . . . a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will."). Provided Elena Sassower is given an opportunity to be heard, this Court is free to impose such sanctions *sua sponte*. 22 NYCRR 130-1.1 (d) ("an aware of costs or the imposition of sanctions may be made … upon the court's own initiative, after a reasonable opportunity to be heard"); *Kamen v. Diaz-Kamen*, 40 A.D.3d 937, 837 N.Y.S.2d 666 (2d Dep't 2007).

CONCLUSION

Defendants respectfully submit that, for the reasons set forth herein, the present Motion be denied in its entirety.

Date: October 11, 2013

Respectfully submitted,

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