CITY COURT OF THE CITY OF WHITE PLAINS
STATE OF NEW YORK: COUNTY OF WESTCHESTER

FILED CITY COURT OF WHITE PLAINS, N.Y.

2007 SEP 11 P 4:37

JOHN McFADDEN,

Petitioner (Overtenant),

Index #SP1502/07

Respondent's Affidavit in Reply to Petitioner's Opposition to her Cross-Motion

-against-

ELENA SASSOWER,

Respondent (Subtenant)
16 Lake Street – Apt. 2C
White Plains, New York

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the respondent *pro se*, whose home of nearly twenty years is the subject of this proceeding. I am fully familiar with all the facts, papers and proceedings heretofore had herein.

2. This affidavit is submitted in reply to the September 5, 2007 affirmation of Leonard A. Sclafani, Esq., attorney for petitioner John McFadden, opposing my September 5, 2007 cross-motion and replying to my opposition to his August 23, 2007 default/dismissal motion contained in my cross-motion.

3. As hereinafter shown, Mr. Sclafani's affirmation – and Mr. McFadden's skimpy affidavit which it appends – continue the pattern of litigation misconduct chronicled by my cross-motion, reinforcing my entitlement to all the relief therein sought. Indeed, to the extent that the Court might have been charitably inclined to limit discharge of its mandatory "Disciplinary

Responsibilities" against Mr. Sclafani and Mr. McFadden by imposition of sanctions and costs under 22 NYCRR §130-1.1 *et seq.*, there should now be no doubt that referral to the Westchester County District Attorney is in order for their perjuries, as likewise referral of Mr. Sclafani to the appropriate grievance committee.

4. In the interest of judicial economy – and because there is literally no opposition, *as a matter of law*, to that branch of my cross-motion as seeks summary judgment pursuant to CPLR §3211(c) or, for that matter, to the branch of my cross-motion as seeks dismissal based on my Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Affirmative Defenses pursuant to CPLR §3211(a)1 – each of these defenses being "founded upon documentary evidence" – I will first address my entitlement to the granting of summary judgment/dismissal – and the legal standards applicable thereto before replying to Mr. Sclafani's affirmation section by section

5. Such will demonstrate that the Petition must be thrown out "on the papers" because, *as a matter of law*, there are no fact issues upon which to waste the Court's time by a trial. This is consistent with what Judge Friia stated on the September 6, 2007 return date of my cross-motion, *to wit*, that the Court's consideration of the motions herein will be as to "questions of law", "Points of law will be addressed" with "Any issues of fact, referred to hearing or trial" (Exhibit BB, p. 9, lns. 5-15)[1].

6. For the convenience of the Court, a Table of Contents follows:

---

[1] This reply affidavit continues the previous sequence of my exhibits: my Exhibits A-G are annexed to my Answer, my Exhibits H-AA are annexed to my cross-motion.

TABLE OF CONTENTS

* * *

Mr. Sclafani's Affirmation in Opposition/Reply, as Likewise Mr. McFadden's Affidavit are Deficient on their Face & Do Not Remotely Meet Rudimentary Standards for Motions, Especially Motions for Summary Judgment & Dismissal

7. Mr. Sclafani, once again, affirms (at ¶1) his affirmation "under penalty of perjury", without affirming it "to be true". Such affirmation – like his August 23, 2007 affirmation in support of Mr. McFadden's default/dismissal motion – is false over and again, and knowingly so – as hereinafter shown.

8. Unlike Mr. McFadden's default/dismissal motion, which was unsupported by any affidavit of Mr. McFadden – and whose deficiency on that ground was highlighted by my cross-motion (at ¶7) – Mr. Sclafani now appends to his opposition/reply a five-sentence affidavit from Mr. McFadden. Such is deficient for any purpose other than to make Mr. McFadden liable for the multitudinous perjuries in Mr. Sclafani's two affirmations. This, because Mr. McFadden attests to having read Mr. Sclafani's two affirmations and to incorporating all of their statements and allegations, but does not attest to having read either my Answer – against which Mr. Sclafani made his affirmation in support of the dismissal motion – or my cross-motion – against which Mr. Sclafani made his opposition/reply affirmation.

9. The facial deficiences of Mr. Sclafani's two affirmations – and now Mr. McFadden's affidavit – are all the more stunning when seen against rudimentary legal and adjudicative principles, set forth in the treatises and caselaw[2], of which Mr. Sclafani, a seasoned practitioner, cannot be ignorant.

10. The affidavit is "the foremost source of proof on motions", Siegel, New York Practice , §205 (1999 ed., p. 324). In dismissal motions, it is "the primary source of proof", Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, C3211:43 (1992 ed.,

[2] As with my cross-motion, insufficient time has prevented me from preparing a memorandum of law. Once again, I ask leave of Court to include in my affidavit such law as I have.

p. 60), as it is on summary judgment motions, Siegel, New York Practice, §281 (1999 ed., p. 442). [3].

11. In *Zuckerman v. City of N.Y*, 49 NY2d 557 (1980), our highest state court articulated the strict requirements on summary judgment motions:

> "To obtain summary judgment it is necessary that the movant establish his cause of action... 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally, if the opponent is to succeed in defeating a summary judgment motion, he must make his showing by producing evidentiary proof in admissible form... We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form...or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions...or unsubstantiated allegations or assertions are insufficient" (*Alvord v. Swift & Muller Constr. Co.,* 46 NY2d 276, 281-282; *Fried v. Bower & Gardner*, 46 NY2d 765, 767; *Platzman v. American Totalisator Co.*, 45 NY2d 910, 912; *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290)." at 562

12. "[T]he basic rule followed by the courts is that general conclusory allegations, whether of fact or law, cannot defeat a motion for summary judgment where the movant's papers make out a prima facie basis for the grant of the motion", Vol. 6B, Carmody-Wait 2d, §39:66 (1996 ed., p. 219). "A party opposing a motion for summary judgment cannot rely on mere

---

[3] "An affidavit must state the truth, and those who make affidavits are held to a strict accountability for the truth and accuracy of their contents", Corpus Juris Secundum, Vol. 2A, § 47 (1972 ed., p. 487). "False swearing in either an affidavit or CPLR 2106 affirmation constitutes perjury under Chapter 210 of the Penal Law", Siegel, New York Practice, §205 (1999 ed., p. 325). "Affidavits on any motion should be made only by those with knowledge of the facts, and nowhere is this rule more faithfully applied than on the motion for summary judgment." *Id*, §281 (p. 442).

> "An affidavit opposing a motion for summary judgment must indicate that it is being made by one having personal knowledge of the facts. An affidavit not based on personal knowledge constitutes hearsay and may not be utilized to defeat a motion for summary judgment..." 6B Carmody-Wait 2d, §39:69: (1996 ed., pp. 225-6).

denials, either general or specific...it is not enough for the opponent to deny the movant's presentation. He must state his version and he must do so in evidentiary form." *Id.* §39:56 (pp. 163-4). The party seeking to defeat summary judgment "must avoid mere conclusory allegations and come forward to lay bare his proof...", Siegel, New York Practice §281 (1999 ed., p. 442). "[M]ere general allegations will not suffice", Vol. 6B Carmody-Wait 2d §39:52 (1996 ed., p. 157). "[T]he burden is on the opposing party to rebut the evidentiary facts and to present evidence showing that there exists a triable issue of fact. Such party must assemble, lay bare, and reveal his proofs...some evidentiary proofs are required to be put forward", *Id.,* §39:53 (pp.159-60); *Stainless , Inc. v. Employers Fire Ins. Co.*, 418 NYS2d 76, *affd.* 49 NY2d 924, as well as Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16).

13. Failing to respond to a fact attested in the moving papers...will be deemed to admit it", Siegel, New York Practice, §281 (1999 ed., p. 442) -- citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975), itself citing *Laye v. Shepard*, 265 N.Y.S.2d 142 (1965), aff'd 267 N.Y.S.2d 477 (1st Dept. 1966) and Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it" *id.* (1992 ed., p. 324). "[I]f answering affidavits are not produced, the facts alleged in the movant's affidavits will usually be taken as true", 2 Carmody-Wait §8:52 (1994 ed., p. 353). Where answering affidavits are produced, they "should meet traversable allegations" of the moving affidavit. "Undenied allegations will be deemed to be admitted, *id*, citing *Whitmore v. J. Jungman, Inc.*, 129 NYS 776, 777 (S.Ct., NY Co. 1911).

14. Additionally, relevant is *Ellen v. Lauer*, 620 N.Y.S.2d 34 (1st Dept., 1994) – cited in 6B Carmody-Wait 2d (1996) §39:54 (at p. 161):

"A court reviewing a motion for summary judgment will tend to construe the facts 'in a light most favorable to the one moved against, but this normal rule of summary judgment will not be applied if the opposition is evasive, indirect, or coy.'", citing *Siegel*, New York Practice §281 and *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 170 A.D.2d 108, 573 N.Y.S.2d 981 (1st Dept. 1991), *aff'd* 80 N.Y.2d 377, 590 N.Y.S. 831.

15. Moreover, and as set forth by my cross-motion (at ¶4), "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secundum Vol. 31A, 166 (1996 ed., p. 339).

My Entitlement to Summary Judgment is *As A Matter of Law*

16. My cross-motion for summary judgment as to the Petition pursuant to CPLR §3211(c) is set forth at ¶¶149-184 of my affidavit therein. These 36 paragraphs, spanning 11 pages of my affidavit and encompassing the extensive exhibits annexed to my Answer and cross-motion, corroborate the truth of my denials of the Petition's ¶¶6, 7, 8, 9, 10, 11, 13, and 14, showing them to be false:

¶¶150-163 particularize facts demonstrating the falsity of the Petition's ¶8 as to a supposed "oral agreement" between Mr. McFadden and myself – with my ¶¶161-162 specifying the minimal information an affidavit from Mr. McFadden would have to contain in substantiation of an "oral agreement":

(a) its date;
(b) whether it was face-to-face or by phone;
(c) the terms allegedly agreed to, including duration of occupancy, occupancy charges, and persons covered;
(d) an explanation as to why such "agreement" was oral, rather than written;

¶¶164-174 particularize facts demonstrating the falsity of the Petition's ¶¶6 and 7 as to a supposed end and termination of the October 30, 1987 contract of sale and occupancy agreement – with my ¶174 identifying that Mr. McFadden had not come forward with any affidavit denying or disputing my ¶TWENTY-THIRD of my Seventh Affirmative Defense, *to wit*,

"Notwithstanding the federal suit ended in 1993, adverse to respondent, petitioner did not then or thereafter seek her eviction

by reason thereof or otherwise clarify the basis of her occupancy, as he readily could have";

¶¶175-179 particularize facts demonstrating the falsity of the Petition's ¶¶9, 10, and 11 as to a supposed "rental" whose "term expired on May 31, 2007";

¶¶180-182 particularize facts demonstrating that the Petition's ¶13 as to the supposed lack of rent regulation with respect to my occupancy of the apartment was disputed;

¶¶180-184 particularize facts demonstrating the falsity of the Petition's ¶14 as to petitioner's supposed non-receipt of any "part" of "use and occupancy" since the supposed termination of the term of my "tenancy".

17. Mr. Sclafani's opposition/reply affirmation contains a single pertinent paragraph – ¶68 – under a title heading "Respondent is Not Entitled to Summary Judgment" (at p. 20), whose single sentence states:

"Respondent's papers offer nothing upon which summary judgment could, or should, be granted to her dismissing the petition herein or otherwise."

18. This bald-faced deceit is immediately apparent from examination of what my "papers…offer" in support of summary judgment – *to wit*, my cross-motion's ¶¶149-184.

19. As for Mr. McFadden's affidavit, it endorses the truth of Mr. Sclafani's affirmation, incorporating all its statements and allegations, without making any statement as to having read my cross-motion or even my Answer.

20. As established by the above-quoted legal authorities, such affidavit and affirmation do not constitute opposition, *as a matter of law*, but, indeed, by their deceit buttress my entitlement to summary judgment, *as a matter of law*.

My Entitlement to Dismissal is *As A Matter of Law*

21. My cross-motion for dismissal of the Petition based on my Fifth Affirmative Defense (*Equitable Estoppel and Unjust Enrichment*), my Sixth Affirmative Defense (*Detrimental Reliance*), my Seventh Affirmative Defense (*Implied Contract, Detrimental*

Reliance & Fraud), my Eighth Affirmative Defense (*Extortion and Malice*), my Ninth Affirmative Defense (*Breach of Covenant of Good Faith & Fair Dealing*), and my Tenth Affirmative Defense (*Fraud; Retaliatory Eviction; & Intentional Infliction of Emotional Distress*)[4] – each pursuant to CPLR §3211(a)1 for defenses "founded upon documentary evidence" – is set forth at ¶¶79-121 of my moving affidavit therein. Such paragraphs are additionally buttressed by my showing with respect to my First Counterclaim (*Prior Proceedings*), my Second Counterclaim (*Fraud from April 2003 Onward & Extortion*), my Third Counterclaim (*Fraud & Intimidation in June 2006, Retaliatory Eviction*), and my Fourth Counterclaim (*Ensuring the Integrity of the Judicial Process*), set forth at ¶¶122-148 of my cross-motion affidavit. These 69 paragraphs of my affidavit, spanning 23 pages and encompassing the voluminous exhibits annexed to my Answer and cross-motion, not only documentarily establish the truth of my six substantive affirmative defenses and four counterclaims, but that Mr. Sclafani's motion to dismiss them violated fundamental rules pertaining to such motions and was, again and again, an outright fraud on the Court.

22. The totality of Mr. Sclafani's opposition to my requested relief of dismissal of the Petition based on these affirmative defenses and counterclaims consists of two paragraphs – his ¶¶65-65 – under his title heading "Respondent's 'Fifth', 'Sixth', 'Seventh', 'Eighth', Nine', and 'Tenth' 'Affirmative Defenses' and 'First', 'Second', 'Third', and 'Fourth' 'Counterclaims' Are Meritless".

¶65 purports that my cross-motion

> "add nothing of substance to the question as to the sufficiency of those defenses and counterclaims but simply rehash the same meritless assertions as respondent

[4] These are my six substantive affirmative defenses – and are preceded by four procedural affirmative defenses: (1) *Open Prior Proceedings*; (2) *Petitioner's Receipt of Use and Occupancy*; (3) *Lack of Subject Matter Jurisdiction*; (4) *Failure to Join Necessary Parties* – as to which my cross-motion seeks dismissal on other CPLR §3211 grounds.

raised in her Answer and as petitioner has addressed in his moving papers herein.",

With ¶66 thereupon asserting,

"For the reasons set forth in petitioner's motion, those 'Affirmative Defenses' and 'Counterclaims' must be dismissed." (¶66).

23. Once more, these bald-faced deceits are immediately apparent from examination of these 69 paragraphs of my cross-motion: ¶¶79-148, meticulously demonstrating not only the "merit" of my six substantive affirmative defenses, but the flagrant deceit of Mr. Sclafani's motion in seeking to dismiss them.

24. As for Mr. McFadden's affidavit, it endorses the truth of Mr. Sclafani's affirmation, without making any statement as to having read either my cross-motion or Answer.

25. As established by the above-quoted legal authorities, such affidavit and affirmation do not constitute opposition, *as a matter of law*, but, indeed, by their deceit buttress my entitlement to the Petition's dismissal pursuant to CPLR §3211(a)1, *as a matter of law*, based on my six affirmative defenses, each "founded upon documentary evidence".

Mr. Sclafani's Section Entitled "The Premises Are Not Regulated Under the EPTA: No Referral to the DHCR Should Be Made" is a Sanctionable Deceit

26. My request that the Court refer the Petition's disputed ¶13 to the Office of Rent Administration of the New York State Division of Housing and Community Renewal is set forth at ¶5 of my cross-motion, with further particulars set forth at ¶¶181-182 – appearing under my section heading "The Petition's ¶13 Allegation that the Apartment is not Subject to the Emergency Tenants Protection Act or Other Rent Regulation is Disputed…". Mr. Sclafani's opposition thereto (at ¶¶3-19) is a deceit, accomplished by concealing the entirety of what my cross-motion has to say on the subject.

27. Thus, he asserts that there is "no question" that the subject apartment is "not

subject to the Emergency Tenant Protection Action...or any other rent regulatory statute" (¶3) and "no question that the premises is not subject to the EPTA or other rent regulatory statute" (¶15), claiming further that I do not "identify any authority under which [I] could claim regulatory protection" (¶15), and that my referral request is "disingenuous at best" (¶16). This, in face of my ¶182, stating:

> "182. My denial 'upon information and belief' of the Petition's ¶13 was based on initial inquiries made to the Office of Rent Administration of the New York State Division of Housing and Community Renewal. As that agency has the expertise and capacity to determine the truth of the Petition's ¶13 claim, I filed with it a formal request for same (Exhibit H, p. 2), contained in a 'Complaint of Improper Eviction'. Such complaint recited what I had been told:
>
> > 'I understand from Roberto Rodriguez of your office[] with whom I spoke on August 21, 2007, that your file for 16 Lake Street shows that Apartment 2C was originally covered under the Emergency Tenancy Protection Act and that there is nothing on file showing that it is no longer covered. I also understand from Rosemary Cantaloupe of your office, with whom I spoke on July 24. 2007 that it is unclear that the September 9, 1992 Common Council Resolution would have removed coverage. According to Ms. Cantaloupe, White Plains got 'creative' in its Resolution, which she said was vague as compared to other municipal resolutions, including as to whether or not it was to be applied retroactively. She further stated that the Office of Rent Administration could never get a definitive answer at that time and that such Resolution might have been superseded by the Rent Regulations Reform Act of 1993, passed by the State Legislature, which was prospective in effecting deregulation of co-ops and condos after July 7, 1993." (underlining added)

28. Mr. Sclafani is well aware of the significance of the above-quoted text of my complaint, as he telephoned the Office of Rent Administration of the New York State Division of Housing and Community Renewal and spoke to Mr. Rodriguez, inquiring, specifically, about it. Mr. Sclafani's affirmation does not reveal this telephone call – which I learned of on August 31, 2007 when I phoned Mr. Rodriguez to inquire whether, as it seemed from the Commission's "Notice of Disposition" (Exhibit H), a copy had been sent to Mr. McFadden along with a copy of

my complaint. Mr. Rodriguez confirmed that it had – a confirmation reinforced by the fact, recounted by Mr. Rodriguez, that Mr. Sclafani had already telephoned him, directly inquiring as to what Mr. Rodriguez and Ms. Cantaloupe had told me.

29. In addition to not denying or disputing what Mr. Rodriguez and Ms. Cantaloupe told me, as recounted in my complaint, Mr. Sclafani also does not deny or dispute the very basis for my request for referral set forth by my ¶5, namely, it would be "In the interest of judicial economy" because the Office of Rent Administration of the New York State Division of Housing and Community Renewal is "the agency with the expertise and resources to make that determination". Indeed, Mr. Sclafani also does not deny or dispute my ¶5 assertion that such referral would be "particularly appropriate as the determination of coverage under the Emergency Tenants Protection Act or other rent regulations apparently requires a great deal more factual information, analysis, and interpretation than the Petition's ¶13 provides" – a fact evident from what Mr. Rodriguez and Mr. Cantaloupe told me and what Mr. Sclafani presumably learned upon calling Mr. Rodriguez.

30. Mr. Sclafani's knowledge that the foregoing is controlling is evidenced by his omission of <u>all</u> of it from his affirmation, as, likewise, his omission of what Mr. Rodriguez further told me, also recited by my ¶5, *to wit*, "that the Court can request the Office of Rent Administration to take jurisdiction of such narrow and potentially dispositive issue – and that it will do so."

31. Nothing in Mr. Sclafani ¶¶3-19 changes these undisputed facts. Rather, his paragraphs only further demonstrate his *modus operandi* of deceit. Thus, ¶4 of his affirmation essentially paraphrases his Petition's non-probative ¶13, though omitting its reliance on the Common Council's 1992 Resolution. His ¶¶5-9 then annex and quote from the Resolution, but

with no assertion by him, let alone discussion, that it was to be applied retroactively or as to the effect of the Legislature's Rent Regulations Reform Act, about which Mr. Sclafani says nothing.

32. As for Mr. Sclafani's ¶¶10-14, which seek to show that Mr. McFadden's purchase and occupancy of the apartment put it within the ambit of the Common Council's 1992 Resolution by removing it from coverage under the Emergency Tenants Protection Act, he does not address the fact that the files of the Office of Rent Administration contain no record of the apartment having, in fact, been removed from coverage.

33. It may be noted that Mr. Sclafani's ¶¶10-11 do not identify the actual dates of McFadden's occupancy of the apartment as his "primary" or "principal" residence – an omission all the more significant as he also incorrectly identifies the year Mr. McFadden "determined to sell the premises to [me]" as 1986. It was not. It was the very end of October 1987. Before then, Mr. McFadden may have sublet the apartment – as may be seen from the first page of a June 19, 1988 letter he wrote to my mother which refers to "[his] last sublet" (Exhibit DD). What effect, if any, that would have on rent regulation of the apartment, I do not know – and Mr. Sclafani does not say.

34. Although Mr. Sclafani's ¶12 purports to annex as Exhibit B "copies of petitioner's stock certificate, the petitioner's proprietary lease for the premises[5], and other related documents

---

[5] The proprietary lease contains a pertinent provision entitled "Subletting", from which it is clear that Mr. McFadden could not have lawfully entered into any "oral agreement" with me subletting the apartment. He was required to give me a lease, with a copy to the Co-Op for approval. In pertinent part, Such provision – ¶15 – states:

> "...the Lessee shall not sublet the Apartment for any term to any person or persons or renew or extend any previously authorized sublease unless consent thereto shall have been duly given by resolution of the Directors in writing or, if the Directors shall have failed or refused to give such consent, by the holders of two-thirds (2/3) of the then issued and outstanding shares of the Lessor, which consent shall be evidenced by an instrument, in writing, signed by an officer of the Lessor, the Lessor's attorneys or managing agent, pursuant to due authorization (a) of a resolution of the Directors, or (b)

which evidence the foregoing", such includes no evidence as to the period in which Mr. McFadden occupied the apartment as his "principal residence. Indeed the so-called "other related documents" are four pages of "HOUSE RULES", which, by their page numbering, appear to be part of the proprietary lease.

35. Needless to say, such factual information as to the date of Mr. McFadden's occupancy of the apartment – for which Mr. Sclafani annexes no documentary evidence – should have been, but is not, set forth by Mr. McFadden's own affidavit.

Mr. Sclafani's Section Entitled "Petitioner's Application for a Default Judgment" is a Sanctionable Deceit

36. At ¶¶20-20 of Mr. Sclafani's affirmation, he belatedly withdraws that part of his motion for default as had been grounded on my having "not timely answered the petition herein". He purports that he (and Mr. McFadden) did not know that the Court had granted my extension request, but that "a recent review of the Court's records reveals that it had". Conspicuously, he gives no date for this "recent review".

37. Mr. Sclafani's "recent review of the Court's records" took place on August 24th, simultaneous with his filing of the default/dismissal motion. Yet he did not immediately notify me that he was withdrawing the branch of his motion based on the alleged untimeliness of my Answer. Indeed, on August 27th, the "return date" of his motion, he pretended during the court proceeding before Judge Hansbury that although he had seen "a handwritten indication" in the file that the extension had been granted, he was still not certain of that fact. (Exhibit CC-2, p. 4,

---

of a majority of the Directors evidenced by their written consent, or (c) of the holders of 66 2/3% of the then issued and outstanding shares of the Lessor, as the case may be, and the Directors or shareholders, as the case may be, may condition any consent given to a proposed subletting upon compliance by the Lessee with any requirements made with respect to such subletting...Whenever the Lessee applies for consent to any subletting, the Lessee shall deliver to the Lessor a copy of the proposed sublease to which consent is requested..." (underlining added).

ln. 23 – p. 5, ln. 17). This then necessitated my expending a huge amount of time in laying out his motion's many deceits in connection therewith, which I did at ¶¶30-43 of my cross-motion. I believe it is because my cross-motion exposed his utterly brazen, bald-faced lie that my Answer had not been served upon him until August 21, 2007 – for which I requested that the Court require his production of the U.S. postmarked envelope in which my Answer was delivered (¶¶32-37) – that Mr. Sclafani has now belatedly withdrawn his application for my default for untimeliness.

38. The facts pertaining to the multitudinous deceits utilized by Mr. Sclafani's motion for my default on this utterly spurious ground are fully particularized at ¶¶30-43 of my cross-motion – and their truth and accuracy is undenied and undisputed by him. Such paragraphs remain pertinent to adjudication of the branches of my cross-motion for sanctions and costs against him and Mr. McFadden, for their referral to criminal authorities, and for referral of Mr. Sclafani to disciplinary authorities.

Mr. Sclafani's Section Entitled "Petitioner Did Not Receive and has Not Received Payment of June's and July's Use and Occupancy" is a Sanctionable Deceit

39. Mr. Sclafani's unremitting deceits pertaining to Mr. McFadden's alleged non-receipt of my June and July use and occupancy payments continue at ¶¶23-34 of his affirmation. The true facts as to this wholly specious grounds for seeking a default judgment against me are recited by my cross-motion's ¶¶11-29 – whose accuracy Mr. Sclafani's affirmation does not deny or dispute in any respect and whose content he does not even identify. The true facts are additionally established by the transcript of the August 27th proceeding before Judge Hansbury (Exhibit CC-2) – a copy of which Mr. Sclafani does not annex and which he does not purport to

have ordered[6].

40. Indeed, Mr. Sclafani's flagrant deceit by his opposition/.reply affirmation is readily verifiable from his moving affirmation for my default, which at least had identified (at ¶¶14-15) that following the July 16, 2007 court proceeding before Judge Press, I had written a July 20, 2007 letter to Judge Press concerning his direction to me to go to my bank and void my checks for the June and July use and occupancy and forward new checks to Mr. McFadden.

41. Mr. Sclafani now omits any mention of that dispositive July 20, 2007 letter (Exhibit J) – as likewise the facts pertaining thereto, which ¶¶11-29 of my cross-motion had detailed with painstaking precision. These included:

> "(1) that the Court has yet to rule on my July 20, 2007 letter, which remains *sub judice*;
>
> (2) that, throughout these many weeks, Mr. Sclafani took no steps to request that the Court expedite its ruling thereon; and
>
> (3) that Mr. Sclafani at no time notified me that I was not legally entitled to await the Court's ruling on my July 20, 2007 letter or that my doing so would constitute a legal basis for his seeking a default judgment against me." (at ¶12)

¶13 of my cross-motion further pointed out that in moving for default on such ground, Mr. Sclafani's motion had not asserted that I was not legally entitled to await the Court's ruling on my July 20, 2007 letter, had not asserted that my doing so was legal grounds for the Court's granting a default judgment against me, and had not furnished any citation of law for such non-existent, noxious propositions.

42. These are the decisive factual and legal issues as to my supposed "default" for alleged non-payment – which, rather than confronting – Mr. Sclafani's opposition/reply affirmation completely conceals, while placing before the Court utterly false and misleading

---

[6] By contrast, I immediately ordered the transcript (Exhibit CC-1).

claims.

43. Thus, after purporting, without record reference, that I don't "appreciate the difference between one's receipt of a check and one's receipt of payment thereunder" (¶23), he asserts:

> "As reflected in the transcript of the proceedings on July 16, 2007 (Exhibit 'I' to respondent's cross-motion), petitioner never denied receipt of the checks sent by respondent for rent for the months of June and July, 2007. Rather, petitioner asserted that he did not receive 'payment' of rent or use and occupancy for those months because he, through your affirmant, promptly returned to respondent the checks that she had sent to petitioner as evidence by the documents annexed to petitioner's within motion as Exhibit 'C" thereof." (his ¶24).

Conspicuously, Mr. Sclafani does not identify where the July 16, 2007 transcript" shows what he claims. This is not surprising as the transcript shows that Mr. Sclafani did not represent to Judge Press that he himself had returned the checks to me, nor that he had "documents" purporting to evidence same. Indeed, ¶¶19-20 of my cross-motion expressly pointed out such omissions by Mr. Sclafani – and their significance. This, after my ¶18 quoted, in its text, the pertinent transcript excerpt.

44. The July 16th transcript (Exhibit I-1) further shows that Mr. Sclafani, in his request to Judge Press that I be "directed to pay use and occupancy during the interim", did not repeat the false claim made at ¶14 of the Petition, that "no part" of the "use and occupancy" for this period had been "received" by petitioner. Rather, it was I who brought up the "receipt" issue, addressing myself to the Petition's falsity. As for Mr. Sclafani's interchangeable use of the term "rent" and "use and occupancy" by his ¶24, this is yet a further deceit by him. I never used the word "rent" with respect to my monthly payments – not on July 16th before Jude Press or at any other time.

45. Mr. Sclafani's ¶¶25-30 then embarks on a series of flagrant falsehoods. He

purports that "as of the August 27 adjourn date of the proceedings", I had not only failed to void the checks I had sent to Mr. McFadden for June and July and send him new ones, as directed by the Court on July 16th, but "misrepresented to the Court that [I] had" (¶26). Indeed, he claims that on August 27th, I "insisted that in compliance with the July 16, 2007 Order, [I] had already sent new checks to petitioner for June's and July's rent", that I had done so "in order to secure" an "extension of time to respond" to his motion (¶27), and that

> "The Court granted the extension but expressly conditioned that grant on [my] providing proof on the adjourn date; September 6, that, as of the date of the August 27 proceeding, [I] had complied with the July 16, 2007 order and had, by then, tendered new checks to petitioner as use and occupancy for June and July, 2007." (¶28)

His ¶30 then repeats: "Her representation to the Court in order to induce it to grant her the extension of time that she sought was false."

46. In so doing, Mr. Sclafani does not annex a copy of the transcript of the August 27th proceeding, which was before Judge Hansbury – or purport that he has ordered the transcript so that whatever judge adjudicates these papers will be able to verify his claims. This, notwithstanding when he came before Judge Friia on September 6th, he stated that "the transcript from the last proceeding would be helpful." (Exhibit BB, p. 3, lns. 17-18) and then asserted:

> "When last we were in court the Judge made the extension that respondent got to submit the papers to me at four o'clock last night conditioned on her payment or her proof that she had paid certain monies that she represented to the court had already been paid.
>
> That statement was not true. The Judge was quite clear that I would not even accept the papers if she couldn't demonstrate that what she said was true which is that she had made the payment." (Exhibit BB, p. 4, lns. 9-18).

47. By contrast, I promptly sought to order the transcript upon the conclusion of the August 27th proceeding – a fact I not only stated to Judge Fria on September 6th in attempting to defend myself from Mr. Sclafani's misrepresentations on that date (Exhibit BB, p. 7, ln. 14- p.

10, ln. 3) and in his opposition/reply affirmation, but which I had previously identified to Mr. Sclafani by my August 31st faxed letter (Exhibit L-3, p. 2).

48. Yesterday, September 10th, I received a call from the court reporter who had taken down the August 27th proceeding, who, thereafter, furnished me with the transcript (Exhibit CC-2), enabling me to documentably rebut Mr. Sclafani's false and misleading claims.

(a) Contrary to Mr. Sclafani's claim, I did not seek any "extension" of time to respond to his August 23rd default/dismissal motion. Rather, my position was that I was "short-served" in that the motion failed to comply with notice requirements in setting an August 27th return date, as to which I asked Judge Hansbury's guidance. Judge Hansbury declined to provide same, but recognized that I was entitled to put in opposition by unconditionally offering me until September 5th to file it (Exhibit CC-1, p. 2, ln. 10 – p. 3, ln. 19);

(b) Contrary to Mr. Sclafani's claim, I never stated to Judge Hansbury that I sent "new checks". What I stated was that I sent two checks – and that, notwithstanding, I was thereafter served with a Petition falsely claiming that "no part" of the use and occupancy had been received – the falsity of which had been established in court on July 16th, the Petition's return date (Exhibit CC-1, p. 7, ln. 4- p. 8, ln. 8);

(c) Contrary to Mr. Sclafani's claim, Judge Hansbury's requirement of proof that I paid for use and occupancy, was not specified as to "new checks", rather than my aforesaid two checks (Exhibit CC-1, p. 8, lns. 14 - 23) – the proof of which I could readily provide as it was annexed as Exhibit C to Mr. Sclafani's default/dismissal motion.

49. Mr. Sclafani then continues his deceit by his ¶¶31-33. Omitted from his description of my August 31st faxed letter are the facts therein recited that would support a view that he was setting me up for purposes of his trumped-up claims with respect to my June and July

occupancy payments. Mr. Sclafani describes only the end of the letter, which he expurgates to remove the pertinent explanation, which was as follows:

> "As I do not yet have the transcript of the short August 27th proceeding before Judge Hansbury – although I promptly ordered same – I am uncertain whether Judge Hansbury made any direction with respect to the two checks I mailed Mr. McFadden for June and July and whose alleged return by you I never received: not the check for June, which your motion alleges you returned to me under a June 7, 2007 letter (¶13: Exhibit C) and not the check for July, which your motion alleges you returned to me under your July 10, 2007 letter (¶13 Exhibit: C). Apparently, you sent neither of these two letters to me by certified mail/return receipt, as one would expect a lawyer to have done, given the fact that Mr. McFadden's Petition would be compromised if you retained my checks, rather than promptly returning them to me.
>
> To avoid any inadvertent failure on my part to comply with Judge Hansbury's direction, I am sending Mr. McFadden two checks replacing my earlier two. I am also putting a 'stop' on those two earlier checks – deducting from each replacement check to Mr. Mcfadden the $30 the bank charges for 'stopping' each check. This, so as not to moot the issue presented by my *sub judice* July 20, 2007 letter to Judge Press – an issues reinforced by my affidavit in opposition to your motion."

50. Further deceitful is Mr. Sclafani's ¶32, in which he claims that Mr. McFadden has advised him that as of the September 5th date of his affirmation he had "not received...[my] alleged two new checks". This, in face of the concluding paragraph of my August 31st faxed letter that identified that I was sending those checks to Mr. McFadden certified mail/return receipt. Indeed, it is perhaps because my cross-motion annexed a copy of the replacement checks with my transmitting August 31st letter to Mr. McFadden, wherein the certified mail number was set forth at the very outset of the letter: 7002-2030-0007-8572-9143 (Exhibit L-4), that he superfluously annexes my August 31st faxed letter to his affirmation, rather than referring the Court to my cross-motion, where the Court would see my August 31st faxed letter as Exhibit L-3 along side my August 31st transmittal letter to Mr. McFadden, as Exhibit L-4 .

51. Annexed is the U.S. Post Service's tracking information for 7002-2030-0007-8572-9143 (Exhibit EE), showing that it had been mailed from White Plains on August 31st at

5:44 p.m., that delivery was attempted on September 4th at 4:21 p.m. in East Meadow, New York 11554, and that a notice was left at that time. In other words, Mr. McFadden's claim to Mr. Sclafani that he did not "receive" the two new checks was with knowledge that a certified mail/return receipt delivery was attempted, which was awaiting either his pick-up at the post-office or request for re-delivery.

Mr. Sclafani's Section Entitled "Petitioner's Motion Is Not Defective" is a Sanctionable Deceit

52. Mr. Sclafani's ¶¶35-37 is false and deceitful in purporting that his dismissal motion did not require a supporting affidavit of Mr. McFadden. He accomplishes this by completely concealing the basis upon which my cross-motion asserted that an affidavit from Mr. McFadden was necessary, *to wit*, that his motion to dismiss my affirmative defenses and counterclaims rested on factual allegations which Mr. McFadden – and not Mr. Sclafani – had personal knowledge. This was set forth at ¶7 of my cross-motion, with ¶¶57, 67, 69, 77, 87*, 165 demonstrating that Mr. Sclafani's affirmation predicates dismissal of my affirmative defenses and counterclaims on factual assertions he purports or implies to be "undisputed facts", but which, to the limited extent they are from the Petition, my Answer had denied, and where not from the Petition, could only be made by Mr. McFadden as it was he – not Mr. Sclafani – who had personal knowledge of them. These included:

> (a) Mr. Sclafani's claims at ¶¶36, 53, 68 of his moving affirmation that this proceeding – unlike Mr. McFadden's prior proceedings against me – rests on an "agreement" between myself and Mr. McFadden – alleged in the Petition to be "oral" – whereby I became his tenant on a month-to-month basis;
>
> (b) Mr. Sclafani's claims at ¶¶87-88, 109 of his moving affirmation that the reason Mr. McFadden entered into the ("oral") "agreement" of month-to-month occupancy was because he was "Exhausted both mentally and financially from the litigation" by the time the federal lawsuit was concluded – as to which the Petition makes no allegation;

(c) Mr. Sclafani's claim at ¶88 of his moving affirmation that the ("oral) "agreement" of month-to-month occupancy included that I would pay "varying amounts of rents as, from time to time, the parties agreed" – as to which the Petition makes no allegation;

(d) Mr. Sclafani's claims at ¶¶84, 109 of his moving affirmation as to the federal litigation – as to which the Petition makes no allegation – and his concealment that the suit was brought with Mr. McFadden as a co-plaintiff to enforce the contract of sale and occupancy agreement (Exhibit FF) – likewise omitted from the Petition;

(e) Mr. Sclafani's claim at ¶88 of his moving affirmation that upon the federal lawsuit's conclusion, I "continued to refuse to remove [myself] from the subject premises" – as to which the Petition makes no allegation.

53. Had Mr. Sclafani actually believed that no affidavit from Mr. McFadden were necessary, his opposing/reply affirmation would not have included its ¶37, belatedly annexing an affidavit from Mr. McFadden attesting to the truth of, and incorporating by reference, "all of the statements" in Mr. Sclafani's affirmation in opposition/reply, as well as in his affirmation in support of the dismissal motion – thereby making Mr. McFadden directly liable for the multitudinous deceits and perjuries which my cross-motion had already painstakingly demonstrated and which Mr. Sclafani could reasonably believe I would further demonstrate by this reply.

Mr. Sclafani's Section Entitled "The Pendency of Any Open Proceedings Between the Parties Herein Does Not Bar These Proceedings" is a Sanctionable Deceit

54. Mr. Sclafani does not identify that his ¶¶38-54 are responding to my cross-motion's ¶¶48-58 section entitled "Mr. Sclafani's Deceit as to my First Affirmative Defense (Open Prior Proceedings)". Mr. Sclafani conceals virtually the entirety of its content in ambiguously purporting that "any prior proceedings between the parties that remain open as of today's date" do not bar the instant proceeding (¶¶38, 40), which, by his final ¶54 he makes into a single "'open' prior case between the parties, if it is in fact, still 'open'".

55. Thus, he continues to conceal – as his dismissal motion had – the two prior proceedings which the Co-Op brought against both Mr. McFadden and myself under index numbers #434/88 and 500/88, the former open as to Mr. McFadden, the latter open as to both of us, wherein the Co-Op seeks to terminate Mr. McFadden's proprietary lease and evict me.

56. As stated at ¶50 of my cross-motion, Mr. Sclafani's failure to deny or dispute that such open prior proceedings bar Mr. McFadden's instant action make it

> "irrelevant whether Mr. McFadden's prior proceeding against me under index number 651/89 bars his instant proceeding, because the open proceedings under index number 434/88 and 500/88, in which we are both respondents, do."

This is undenied by Mr. Sclafani's opposition/reply affirmation.

57. As in his dismissal motion, Mr. Sclafani again purports that the reason there is no bar is because, unlike "any prior proceedings", the instant proceeding rests on

> "an oral agreement that was modified over the course of the last fourteen or so years, on several occasions, pursuant to which petitioner agreed to respondent's possession and occupancy of the premises at issue in exchange for monthly payments of rent." (at ¶39).

58. Yet, as highlighted by ¶¶57-58 of my cross-motion, such "oral agreement" is not an "undisputed fact", on which Mr. Sclafani could rely to dismiss my defense as a matter of law or based on documentary evidence. Mr. Sclafani does not deny or dispute this. Nor does he deny or dispute that upon the Court's finding that the "oral agreement" is a fiction – as particularized by ¶¶150-163 of my cross-motion for summary judgment – the instant proceeding should be dismissed pursuant to CPLR §3211(a)4, as likewise because of the Co-Op's open prior proceedings against Mr. McFadden and myself under index number 434/88 and 500/88. Rather, Mr. Sclafani materially omits this from his affirmation.

59. The particulars of my cross-motion's ¶¶150-163, establishing that the "oral agreement" is a fiction, concocted for purposes of this litigation, required a responding affidavit

from Mr. McFadden if his Petition were to survive my cross-motion for summary judgment. Yet, Mr. McFadden's affidavit does not confront any of the particulars therein set forth – nor any aspect of my cross-motion – relying instead on Mr. Sclafani's affirmation, whose sole response is its last paragraph, ¶68, that "[my] papers offer nothing upon which summary judgment could, or should, be granted to [me] dismissing the petition herein or otherwise." Such is insufficient, *as a matter of law* – and its deceitfulness reinforces my entitlement to dismissal pursuant to CPLR §3211(a)4. .

60. Finally, with respect to Mr. Sclafani's ¶¶41-54 argument that my own "admissions" entitle Mr. McFadden to my eviction in the open prior proceeding under 651/89 (¶41) and that the Court should forthwith grant Mr. McFadden summary judgment therein, such is fashioned on no law and innumerable deceits.

61. Firstly, Mr. Sclafani's ¶43 is materially false in purporting that "as is obvious from the express terms of the occupancy agreement itself, the term of that agreement expired upon the denial of the Coop Board of Director's refusal of its approval of respondent's purchase of petitioner's apartment." and, further, that this was what "the Court in the proceedings to which respondent refers in support of her defense held". Conspicuously, he does not quote the "express terms of the occupancy agreement" – because, as he knows from my cross-motion's ¶¶167-169 in support of summary judgment, quoting the occupancy agreement's language, it does not say what he purports. Nor does he identify what Court "held" that it did or cite to any decision. Such is not in the December 19, 1991 decision of former White Plains City Court Judge Reap in 651/89, which he annexes as his Exhibit E.

62. Secondly, contrary to Mr. Sclafani's ¶51 that

> "To the extent that respondent claims that this Court should decide the open prior case against her, petitioner joins in that application and requests that, in

> accordance with its December 17 (sic), 1991 decision...the Court grant summary judgment to petitioner seeking a warrant of eviction against respondent from the subject premises",

neither my Answer nor my cross-motion claim that the Court should decide such open prior case – let alone that it should do so "against me". Rather, my Answer and cross-motion assert that Mr. McFadden's open prior proceeding against me under 651/89, as likewise, the Co-Op's open prior proceedings against both him and me under 434/88 and 500/88, bar the instant action – for which reason the instant proceeding should be dismissed pursuant to CPLR 3211(a)4.

63. Mr. Sclafani provides no legal authority for how such long-dormant proceedings, involving additional parties, may be activated, but surely it cannot be done summarily – let alone by the summary granting of a 14-year old summary judgment motion therein – without a formal motion made under the index number of such proceedings, giving notice to the affected parties. Such affected parties would be my mother, a respondent in open proceeding 651/89, and the Co-Op, the petitioner in open proceedings 434/88 and 500/88.

64. However, were Mr. Sclafani to make a properly-noticed motion therein, Mr. McFadden would still not be entitled to summary judgment on his 14-year old undecided motion for summary judgment. Indeed, Mr. Sclafani's glib representation at ¶46 that "All the papers necessary for the disposition of the motion had been submitted" – for which he relies on Judge Reap's December 19, 1991 decision (at ¶49), as he likewise relies on it for his false claims that the outcome of the federal action against me entitles Mr. McFadden to summary judgment based on *res judicata*, collateral estoppel and issue preclusion (his ¶¶47-48) – violates both fundamental due process and black-letter law. Mr. Sclafani can be presumed to know this from my cross-motion's Exhibit Y, as well as from elementary rules governing application of *res judicata*, collateral estoppel, and issue preclusion, set forth in caselaw and treatise authority.

65. Exhibit Y of my cross-motion consists of my mother's December 16, 1991 "Responding Affidavit" and my own December 16, 1991 "Responding Affidavit", subscribing to, and incorporating, my mother's affidavit. Such were our submissions before Judge Reap when he rendered his December 19, 1991 decision with respect to Mr. McFadden's first summary judgment motion, dated November 25, 1991. Evident from ¶¶2 and 3 of my mother's affidavit, is that Judge Reap could not lawfully deny our "request to supply additional papers in opposition" to Mr. McFadden's summary judgment motion. The reason is the nature of the "additional papers", which those paragraphs identify. As stated:

> "2. This Affidavit is without prejudice to a motion for recusal, change of venue and other relief, which Respondents will make at such time as these proceedings are no longer stayed pursuant to the prior decision of this Court.
>
> 3. Petitioner's instant motion for summary judgment is premature and violative of the stay heretofore granted by this Court, and hence will not at this time be addressed as to its substance. In the interest of expediency, this Affidavit is strictly limited to the factual question as to whether Petitioner correctly contends that these proceedings are no longer subject to the stay because allegedly the related federal action has been concluded. Respondents reserve their right to address Petitioner's other material factual allegations – all of which are vigorously denied and disputed – by appropriate response at a later date, should the instant motion not be dismissed in accordance with Respondents' position."

66. Aside from our absolute right to interpose a motion for recusal/change of venue so that the proceeding could be heard by a fair and unbiased tribunal – which Judge Reap and the City Court were not – no summary judgment could be rendered where we denied and disputed the material factual allegations of Mr. McFadden's motion, expressing reserving our right to address same, if our showing as to its prematurity was not adopted by Judge Reap, which, by his December 19, 1991 decision, it was.

67. Conspicuously, Mr. Sclafani has not placed before the Court a copy of Mr. McFadden's November 25, 1991 summary judgment motion, upon which Judge Reap rendered his December 19, 1991 decision. Nor has he put forward Mr. McFadden's subsequent October

20, 1992 summary judgment motion, as to which there is no decision by Judge Reap or any other judge. Both these motions were made by the law firm, Lehrman, Kronick & Lehrman, which were Mr. McFadden's attorneys in all the prior City Court proceedings.

68. Mr. McFadden's November 25, 1991 summary judgment motion was supported only by Mr. McFadden's own affidavit, with no accompanying attorney's affirmation or memorandum of law. Such motion did not assert, nor make any argument with respect to, *res judicata*, collateral estoppel, and issue preclusion. Indeed it failed to identify, including by any of its annexed exhibits, that Mr. McFadden had been a co-plaintiff in the federal action, had withdrawn himself as co-plaintiff nearly a year prior to the adverse jury verdict, nor any of the consequences of his withdrawal.

69. The standards for invocation of *res judicata*/collateral estoppel are reflected in *Gramatan Home v. Lopez*, 46 N.Y.2d 481 (1979), wherein the Court of Appeals enunciated:

> "Collateral estoppel...is but a component of the broader doctrine of *res judicata*...As the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, *strict requirements for application of the doctrine must be satisfied* to insure that a party not be precluded from obtaining at least one full hearing on his or her claim. ... First, *it must be shown* that the party against whom collateral estoppel is sought to be invoked had a full and fair opportunity to contest the decision said to be dispositive of the present controversy. Additionally, *there must be proof* that the issue in the prior action is identical, and thus decisive, of that in issue in the current action [*Schwartz v. Public Administrator of County of Bronx*], (24 N.Y.2d, at p. 71)." (*Gramatan*, at 485, emphasis added).

70. The first inquiry on collateral estoppel is "whether it is being used only against one who has already had his day in court" – for which, together with a careful analysis to establish "identity of issues", "all the circumstances of the prior action must be examined to determine whether the estoppel is to be allowed." Siegel, New York Practice, §462 (1999 ed., pp. 742-3). As stated:

> "Caselaw suggests with good reason that in the final analysis collateral estoppel is sui generis, that its 'crowning consideration' is fairness, that rigidity has no place in its application, and that 'all the circumstances of the prior action must be examined to determine whether the estoppel is to be allowed.'" *Id*, p. 743.

71. Mr. Sclafani does not claim that Judge Reap's December 19, 1991 decision complies with the "strict requirements" for application of *res judicata*, collateral estoppel, and issue preclusion. His ¶¶47-48 conspicuously do not quote, or even identify, Judge Reap's stated factual basis for application of these doctrines, *to wit*, that "all respondents' claims in the federal action were dismissed and it is those exact claims that form their defense in the City Court summary proceeding." Nor does Mr. Sclafani himself independently assert such factual basis – let alone meet any standard of specificity in particularizing my federal claims, the grounds of their dismissal, and compare them to my claims in defending against the referred-to City Court proceeding. Such is all the more telling as my cross-motion expressly noted (at p. 33, fn. 18) that his dismissal motion had not repeated the false statement in his July 17, 2007 letter to Judge Press (Exhibit N) that the federal court decisions and orders had "dismissed on their merits" "the claims of Elena Sassower and her mother Doris Sassower, involving the events, facts, and circumstances underlying and precipitating the instant action."

72. As Judge Reap should have realized based on the March 20, 1991 "jury verdict and judgment of the U.S. District Court" (Exhibit X) – to which his December 19, 1991 decision refers – Mr. McFadden had ceased to be a co-plaintiff with myself and my mother in the federal action and (by reason thereof) virtually the entirety of our federal complaint "causes of action 2 through 8 and 10" – the causes of action involving corporate non-compliance – were withdrawn.

73. Mr. Sclafani – whose ¶45 states that the status of 651/89 "as of 1992" was that McFadden had a "pending...motion for summary judgment" – does not identify the date of that motion – presumably October 20, 1992. Nor does he distinguish that such motion is not the

same as Mr. McFadden's previous summary judgment motion, to which Mr. Scalfani makes reference at ¶¶46-49, also with no date. This enables Mr. Sclafani's false representation (at ¶46) that "All of the papers necessary for disposition of the motion had been submitted", substantiating it (at ¶49) by the December 19, 1991 decision on the earlier summary judgment motion.

74. It further enables Mr. Sclafani to misleadingly represent, also at ¶46, that "the Court elected to hold its determination of the motion in abeyance pending a final decision in federal court". He has no basis to speculate as to what Judge Reap "elected" – and certainly the December 19, 1991 decision shows that Judge Reap was perfectly capable of explaining the situation, which for reasons unknown he did not do.

75. Upon information and belief, Judge Reap – and the other judges of White Plains City Court – subsequently recused themselves from cases involving my mother.[7] This would have included Mr. McFadden's open proceeding against me and my mother under 651/89 as to which no decision had been rendered on Mr. McFadden's October 20, 1992 summary judgment motion.

76. In any event, by June 1993, there was "a final decision in federal court" – thereby clearing the way for the Court to determine Mr. McFadden's pending October 20, 1992 summary judgment motion. All that was needed from Mr. McFadden's lawyers was a letter to the Court that the federal case was finally over and asking for a decision on the unadjudicated summary judgment motion. This would have entailed virtually no expense and no emotional energy. As such, it puts the lie to Mr. Sclafani's representation to Judge Press in open court on July 16th that

---

[7] I herein request that the Court make disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of any facts bearing upon its ability to be fair and impartial – or otherwise disqualify itself pursuant to §100.3E thereof and Judiciary Law §14 – so that this important and substantial case is decided on the facts and law.

by the time the federal case was over, Mr. McFadden "lack[ed]...the funds to proceed to complete the [e]viction" -- which was Mr. Sclafani's pretext as to why Mr. McFadden thereafter made "an agreement,...oral, [of] a month-to-month tenancy with me (Exhibit I-1, p. 5, lns. 12-24), as likewise ¶¶86-88 of Mr. Sclafani's affirmation on his dismissal motion purporting that because Mr. McFadden was "Exhausted both mentally and financially", he "took no action" to remove me upon the conclusion of the federal action, but, instead allowed me to remain, "on a month to month basis in exchange for the payment of varying amounts of rents, as from time to time, the parties agreed".

77. Needless to say, if Mr. Sclafani believes the December 19, 1991 decision entitled Mr. McFadden to summary judgment at the conclusion of the federal action, such powerfully reinforces my Seventh Affirmative Defense based on Implied Contract[8], Detrimental Reliance & Fraud, whose ¶TWENTY-THIRD states:

> "Notwithstanding the federal suit ended in 1993, adverse to respondent, petitioner did not then or thereafter seek her eviction by reason thereof or otherwise clarify the basis of her occupancy, as he readily could have done. To the contrary, he fostered in respondent the belief that he was honoring the terms of the October 30, 1987 occupancy agreement and contract of sale." (underlining added).

78. Neither Mr. Sclafani nor Mr. McFadden has answered the obvious question as to why Mr. McFadden did not seek my eviction upon the federal litigation's conclusion in June 1993, when, based on Judge Reap's December 19, 1991 decision, he readily could have. That Mr. McFadden did not do so from mid-June 1993 or in the 14 years since, however, was a conscious choice by him and his attorneys, who were fully knowledgeable of the December 19,

---

[8] *Cf.* Mr. Sclafani's ¶52 that falsely purports that I cannot and do not rest on "any subsequent agreement, express or implied, written or oral, between the parties herein". This, because I "affirmatively assert[] that [I] remain[] in occupancy of the premises at issue under the temporary occupancy agreement". Examination of my affirmative defenses and counterclaims shows this to be yet another one of Mr. Sclafani's lies.

1991 decision.[9] Indeed, this may explain why Mr. Sclafani has not put before the Court Mr. McFadden's October 20, 1992 pending summary judgment motion, which annexed the December 19, 1991 decision as an exhibit and made it the focus of the five-paragraph supporting affirmation of his attorney, who cited to, quoted from, and annexed it, albeit without any independent assertion as to the truth of Judge Reap's factual basis for holding *res judicata*, collateral estoppel, and issue preclusion applicable.

79. Finally, with respect to Mr. Sclafani's ¶53 assertion that my cross-motion and Answer seek "to preclude this Court from ruling on matters the subject of the subsequent events". This is flagrantly false. As my Answer's affirmative defenses and counterclaims make evident – as likewise my cross-motion, seeking dismissal and summary judgment based thereon – I have placed before the Court nearly 20 years of "subsequent events" to the October 30, 1987 occupancy agreement and contract of sale on which to rule.

Mr. Sclafani's Section Entitled "This Court has Subject Matter Jurisdiction Over These Proceedings"is a Sanctionable Deceit

80. Mr. Sclafani does not identify that his ¶¶55-61 are responding to my cross-motion's ¶¶65-72 section entitled "Mr. Sclafani's Deceit as to my Third Affirmative Defense (Lack of Subject Matter Jurisdiction)". He does not deny or dispute the accuracy of my showing therein, largely focused on his misrepresentation that he was seeking dismissal of such affirmative defense "as a matter of undisputed fact and as a matter of law", which was false. My Answer had both denied that there was any "oral agreement" wherein I became his month-to-month tenant and that the occupancy agreement and contract of sale had ended and terminated – denials Mr. Sclafani had concealed.

---

[9] In pleading ignorance, a showing is required "that the ignorance is unavoidable and that with diligent effort the fact could not be ascertained." Siegel, §281 New York Practice (1999 ed., p. 442). *See* also, C3212:16, Civil Practice Law and Rules (1999 ed., p. 324).

81. Instead, Mr. Sclafani now shifts. Although reiterating (at ¶56), albeit by pluralizing the previously singular "oral agreement", that:

> "petitioner herein seeks eviction of respondent as a holdover on oral agreements pursuant to which respondent occupied the subject premises as petitioner's tenant subsequent to the cancellation of the contract of sale and the expiration of the term of temporary occupancy agreement contained therein",

he purports (at ¶58) that my denials are "bald[]" – belied by "the documentary evidence that [I] submit[ted] as part of [my] own answer", which he identifies as "the contract of sale and various correspondence between [me] and petitioner" . According to him (¶58), these:

> "plainly establish[] both that the term of the temporary occupancy agreement had expired upon the denial of the coop Board of Directors's refusal to approve the sale of the premises to respondent and her mother, and that, subsequently respondent agreed to pay, and did pay, monthly rent to petitioner in various amounts as the parties from time to time agreed in consideration for respondent's exclusive possession and occupancy of the subject premises."

He further purports (¶59) that:

> "In face of this evidence, there can be no issue that there was, in fact, a landlord-tenant relationship between petitioner and respondent subsequent to the expiration of the term of the temporary occupancy agreement"

and that, because I have submitted it, I am "estopped from disputing [its] validity and substance" (¶60).

82. All of this is utter fraud. Aside from Mr. Sclafani's conspicuous failure to identify any substantiating language of the contract of sale, including the occupancy agreement which is part of it, and to specify which of the "various correspondence" shows what he claims, my cross-motion had substantiated the "denials" of my Answer with a particularized showing in support of summary judgment.

83. Thus, my ¶72 stated:

> "once this Court finds that the Petition's alleged "oral agreement" of a month-to-month tenancy is a fabrication and that the October 30, 1987 occupancy

> agreement has been the basis of my continued occupancy (as set forth at ¶¶150-175 herein in support of my cross-motion for summary judgment), this proceeding must be dismissed pursuant to CPLR §3211(a)2 based on the language of the October 30, 1987 occupancy agreement that "in no way do the parties intend to establish a landlord/tenant relationship".

84. Mr. Sclafani neither identifies nor denies or disputes the 25 paragraphs of my cross-motion's ¶¶150-174, wherein I discuss the language of the occupancy agreement, pertinent correspondence with Mr. McFadden, and recite facts pertaining thereto of which I have personal knowledge.

85. As hereinabove stated, the legal standards pertaining to dismissal/summary judgment motions required Mr. McFadden's to confront the particulars of my ¶¶150-174 by a responsive affidavit, if his proceeding was to survive. He has not done so, nor has Mr. Sclafani done so by an affirmation and any memorandum of law or pertinent citation to legal authorities. As such, I am not only entitled to dismissal pursuant to CPLR §3211(a)2 for lack of subject matter jurisdiction, but summary judgment pursuant to CPLR §3211(c).

Mr. Sclafani's Section Entitled "Petitioner Has Joined All Necessary Parties"is a Sanctionable Deceit

86. Mr. Sclafani does not identify that his ¶¶62-63 are responding to my cross-motion's ¶¶73-78 section entitled "Mr. Sclafani's Deceit as to my Fourth Affirmative Defense (Failure to Join Necessary Parties)". He identifies none of my arguments therein – and his sole citation to my ¶76 as to my "admis[sion]" that my mother "does not now and did not in the past live in the apartment" is itself a deceit in omitting the argument presented by that paragraph's single sentence, *to wit*,

> "The fact that my mother does not now and did not in the past live in the apartment does not change the fact that she expressly has the right to live there pursuant to the October 30, 1987 occupancy agreement and the Co-Op's approval letter (Exhibits A-2 and B-2)."

87. As to his claim that my mother was "not a party to the agreement between petitioner and respondent upon which the petition is based" (¶63) – by which he means the "oral agreement" creating a month-to-month tenancy – I was also "not a party" to it, as it is a fiction, established as such by my uncontested ¶¶150-163, entitling me to summary judgment, *as a matter of law*.

Mr. Sclafani's Concealment of My Entitlement to Costs, Sanctions, & "Appropriate Action" by this Court by his Misnomered Section "Respondent is Not Entitled to Summary Judgment"

88. Mr. Sclafani's hides his response to ¶¶185-189 of my cross-motion, entitled "My Entitlement to Costs & Sanctions under 22 NYCRR §130-1.1 *et seq.* & to 'Appropriate Action' by this Court Pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct", in his final section, misnomered "Respondent is Not Entitled to Summary Judgment".

89. His two-paragraph response – by his ¶¶66-67 – consists of two sentences. The first purports that my request for costs, sanctions, and referral of him to the disciplinary committee is "frivolous *per se* and not worthy of any response", omitting therefrom that I have also requested that he be referred to the Westchester County District Attorney for perjury and that the costs and sanctions I seek, in the maximum amount allowed by law, I have also requested from Mr. McFadden. The second purports that if sanctions, costs, or attorney fees are imposed herein, they should be against me "for obvious reasons".

90. Such final deceits, resoundingly exposed by my fact-specific, meticulously record-referenced cross-motion and this reply, only further reinforce the appropriateness of maximum impositions against Mr. Sclafani and Mr. McFadden under 22 NYCRR §130-1.1 *et seq.*, with referrals to disciplinary and criminal authorities pursuant to this Court's mandatory "Disciplinary Responsibilities" under §100.3D(2) of the Chief Administrator's Rules Governing Judicial

Conduct for their brazen and repeated violations of their professional and ethical obligations to this tribunal and its proper adjudications.

* * *

WHEREFORE, this proceeding should be held in abeyance pending referral of the Petition's disputed ¶13 to the Office of Rent Administration of the New York State Department of Housing and Community Renewal or, if such be denied, the Petition must be denied for dismissed upon the granting of respondent's summary judgment/dismissal cross-motion – entitlement to which is *as a matter of law* – with the amount of compensatory and punitive damages to be awarded on respondent's counterclaims to abide the outcome of a trial of such issue. Additionally, costs and sanctions in the maximum amount allowed by law must be imposed on both petitioner and his counsel, personally, pursuant to 22 NYCRR §130-1.1 *et seq.* – consistent with the notice posted on the window of this Court's Clerk's Office and §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct – together with such further "appropriate action" as would include, but not be limited to, referral of their demonstrated, pervasive perjuries and deceits to criminal and disciplinary authorities.

Elena Ruth Sassower

ELENA RUTH SASSOWER

Sworn to before me this
11th day of September 2007

Notary Public

JOHN POMEROY
NOTARY PUBLIC - STATE OF NEW YORK
NO. 01PO6164355
MY COMMISSION EXPIRES
APRIL 16, 2011

TABLE OF EXHIBITS