11/1/92

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

----------x

JOHN McFADDEN,

Petitioner,

Index #651/89

-against-

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents.

----------x

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

DORIS L. SASSOWER and ELENA RUTH SASSOWER, being duly sworn, depose and say:

1. This Affidavit is submitted by the above-named Respondents in support of an application for adjournment of the Petitioner-Landlord's motion dated October 20, 1992 purportedly made "pursuant to CPLR §2212", and without prejudice to Respondents' right to submit opposing papers in opposition thereto, in the event such application is denied.

2. At the outset, the CPLR provision relied on by Petitioner has no bearing on this motion, since it is specifically applicable only to actions in the Supreme Court. Inasmuch as this is a City Court proceeding, the instant motion is unauthorized by such section and should be dismissed for that reason alone.

3. Without waiving jurisdictional and other legal objections to Petitioner's motion, Respondents seek an adjournment thereof for the <u>same</u> reason that this Court granted adjournment previously, i.e. Respondents have not exhausted their

Ex 2-1

appellate remedies.

4. As Petitioner's counsel, Frederic Lehrman, Esq., should be presumed to know, it is the United States Supreme Court--not the Circuit Court of Appeals--whose ruling will constitute the "ultimate federal determination". Such "ultimate federal determination" is specifically referred to in the Court's Decision, dated December 19, 1991 (para. "C" of the Conclusion).

5. Respondents are presently in the process of preparing their application for a Writ of Certiorari to the U.S. Supreme Court, which will be filed sometime next month.

6. To enable this Court to appreciate the serious and substantial issues to be encompassed in Respondents' Certiori Petition, annexed hereto is a copy of their Petition for Rehearing (Exhibit "A").

7. Insofar as sanctions are sought by Petitioner for the making of this motion, the Court should be aware that Petitioner and his counsel, Frederic Lehrman, failed to make any inquiry as to: (a) the status of Respondents' federal case; or (b) Respondents' intentions with respect to the subject apartment; prior to the making of this unnecessary motion.

Thereafter, they refused to return our phone calls which we made to explore the possibilities of a mutually-agreeable stipulation which would obviate the burden of yet another decision for this Court to make.

8. On Monday, November 9th--after five days of waiting to hear from Petitioner--we sought to discuss our

conciliatory intentions with James Glaathaar, Esq. of the Bleakly, Platt & Schmidt law firm, Petitioner's counsel in the federal action. Mr. Glaathaar advised us on Tuesday that Petitioner was deferring to Mr. Lehrman and that Mr. Lehrman informed him that he would "think about it". As of 12:00 noon today, Wednesday, we have heard nothing from Mr. Lehrman[1].

9. We must, therefore, burden the Court with this reasonable adjournment request of Mr. Lehrman's motion which is not only premature, but needless.

10. Such adjournment is not prejudicial to Petitioner, who himself makes no claim to the contrary. It is Respondents who would be severely prejudiced since their Certiori application, which they are making pro se, commands their attention at this time--as Petitioner and his counsel were informed[2].

11. Respondents have been in occupancy now for five (5) years and there is no justification for summary action by this Court to supersede Respondents' right to an "ultimate federal determination" by the U.S. Supreme Court. Respondents'

---

[1] The unprofessional, dishonest, and prejudicial behavior of Petitioner and Mr. Lehrman were documented by Respondents in their December 17, 1991 Responding Affidavit. Inasmuch as Mr. Lehrman has now annexed his last year's motion as his Exhibit "A", Respondents incorporate by reference their aforesaid Responding Affidavit, which should be read in response to such deceitful document.

[2] As discussed in Respondent's December 16, 1991 Responding Affidavit, incorporated by reference, this is the second time that Petitioner and Mr. Lehrman have deliberately and knowingly sought to impede and impair Respondents' federal appellate rights (see, paras. 7-15).

federal case is good and meritorious--as Petitioner well knows since he himself was a co-Plaintiff in commencing the federal action[3].

12. Respondents respectfully request sanctions against Petitioner and Mr. Lehrman for their instant irresponsible and unnecessary motion which plainly meets Rule 130.1-2 standards--being "undertaken primarily...to harass or maliciously injure" Respondents herein. Inasmuch as this is the second time that such abusive process has been demonstrated by their actions, corrective action by this Court is clearly warranted.

WHEREFORE, it is respectfully prayed that the instant motion be adjourned sine die to await the outcome of Respondents' application for a Writ of Certiori to the U.S. Supreme Court; and, in the event such requested adjournment is denied, that an adjournment of 45 days be granted to permit Respondents to file a response to the substantive issues raised herein without interference with the preparation of their "Cert" application, in which they are pro se.

DORIS L. SASSOWER

ELENA RUTH SASSOWER

Sworn to before me this
11th day of November 1992

ELI VIGLIANO
Notary Public, State of New York
No. 4987383
Qualified in Westchester County
Commission Expires June 4, 1992

[3] The merit of Respondents' federal action was further highlighted by the participation of the NAACP Legal Defense and Educational Fund, referred to in para. 14 of their December 16, 1991 Responding Affidavit, incorporated herein by reference.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Plaintiffs-Appellants,

-against-

Index No. 91-7489

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 LAKE STREET OWNERS, INC., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., and ROGER ESPOSITO, individually, and as an officer of 16 LAKE STREET OWNERS, INC.,

Defendants-Appellees.

----------x

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

DORIS L. SASSOWER
Appellant Pro Se
283 Soundview Avenue
White Plains, New York 10606

ELENA RUTH SASSOWER
Appellant Pro Se
16 Lake Street, Apt. 2C
White Plains, New York 10603

Ex A

TABLE OF CONTENTS

Abbreviation Guide:

Br. .....Appellants' Brief

Reply .....Appellants' Reply Brief

A- .....Appellants' Appendix

AA- .....Defendants' Appendix

TABLE OF AUTHORITIES

McMahon v. Shearson/American Express, Inc., 896 F.2d 17 (2nd Cir. 1990)

New York Ass'n. for Retarded Children v. Carey, 711 F.2d 1136 (2nd Cir. 1983)

Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986)

Roadway Express Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)

Sanko S.S. Co., Ltd. v. Galin, 835 F.2d 51 (2nd Cir. 1987)

United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171 (1949)

United States v. International Brotherhood of Teamsters, 948 F.2d 1338 (2nd Cir. 1991)

Civ.R. 11; 60(b)(3)

28 U.S.C. § 1927

This Petition seeks rehearing of the August 13, 1992 Decision [hereafter "the Decision"] by a three-judge panel of this Court ["the Panel"], sustaining a counsel fee/sanctions award of nearly $100,000 against two civil rights plaintiffs.

The issues involved are of transcending national importance not only to civil rights litigants, but to all litigants, since the Panel relies on inherent power to sustain an "extraordinary" fee award (at 6389) against Appellants where standards of other sanctioning provisions were not met--yet simultaneously fails to invoke inherent power to prevent fraud on the Court where the standards of Rule 60(b)(3) were met by Appellants in their uncontroverted formal motion to vacate Defendants' fraudulently procured judgment. Such discriminatory use of inherent power disregards due process, equal protection, and bedrock law of the Supreme Court and this Circuit.

STATEMENT OF THE ISSUES

1. Whether the Decision conflicts with I. Meyer Pincus & Assoc. v. Oppenheimer & Co., 936 F.2d 759 (2nd Cir. 1991), in affirming the award on grounds other than those relied on by the District Judge, without support in the record. [Pt. I]

2. Whether the Decision conflicts with Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), reaffirmed in Chambers v. Nasco, 111 S.Ct. 2123 (1991), as well as Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895 (2nd Cir. 1985), in that, apart from Appellants' Rule 60(b)(3) motion, courts have inherent authority to vacate judgments obtained by fraud. [Pt. V]

3. Whether the Decision conflicts with established

equitable principles and equal protection rights in that it failed to rule on Appellants' objection that the District Judge did not adjudicate their "unclean hands defense", detailed and documented in their Rule 60(b)(3) motion.

4. Whether the Decision misapplies Chambers v. Nasco, by expanding inherent authority to sustain sanctions in a case where, unlike Chambers: (a) Appellants were denied a hearing as to liability for sanctions and the amount thereof; (b) No detailed findings were made by the District Judge; (c) the District Judge relied on other sanction rules--not his inherent authority; (d) the Panel made no findings that the sanction rules relied on by the District Judge were inadequate; and (e) the Panel cited no record references to support invoking the inherent authority of the District Judge and itself made no findings based on independent review of the record. [Pt. III]

5. Whether the Panel's interpretation of Chambers v. Nasco is in conflict with Oliveri v. Thompson, 803 F.2d 1265 (1986) and Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), and represents a sub silentio repudiation of the "American Rule" against fee-shifting, as well as of the express limitations of 28 U.S.C. §1927. [Pts I, II]

6. Whether the Decision's expansion of Chambers v. Nasco, supra, invidiously discriminates against Appellants by imposing liability against them for litigation conduct of their attorneys--for which their attorneys were not assessed. [Pt. IV]

7. Whether the Decision conflicts with this Circuit's decisions in Browning Debenture Holders' Committee v. Dasa Corp.,

560 F.2d 1078 (1977), and Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329 (1986), in sustaining the imposition of joint liability upon both Appellants for the full amount of the sanctions awarded, without differentiation of the separate liability of each and with no apportionment based on respective individual culpability. [Pt. IV]

8. Whether the Decision conflicts with this Circuit's decision in Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (1979) and invidiously discriminated against Appellant Doris Sassower in denying her the opportunity to make a showing as to her ability to pay the potential full liability for the nearly $100,000 sanctions imposed.

9. Whether the Decision conflicts with the specific language of 28 U.S.C §1927, as well as the standards of Oliveri, supra, and invidiously discriminates against lawyer-Plaintiff Doris Sassower by imposing liability upon her for litigation conduct when she was represented by counsel, and with no correlation of the award to any alleged bad-faith conduct either when she was unrepresented or when she was acting pro se. [Pts. I, IV]

10. Whether the Decision conflicts with United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949) and this Circuit's decision in Brocklesby Transport v. Eastern States Escort, 904 F.2d 131 (1990), in that the Panel failed to rule on Appellants' Motion to Dismiss and threshold jurisdictional objection that the fully-insured Defendants are not "parties in interest" and that any fee award constitutes a "windfall" since

no defense costs were incurred by them. [Pt. VI]

11. Whether the Decision conflicts with this Circuit's decision in New York Ass'n. for Retarded Children v. Carey, 711 F.2d 1136 (1983), citing Hensley v. Eckerhart, 103 S.Ct. 1933, 1943 (1983), in that no contemporaneous time records were submitted by defense counsel and the District Judge failed to make specific findings identifying how he computed the amounts awarded, the particular services being compensated, the reasonableness and necessity thereof, the number of hours and rates being allowed, and that said rates accorded with prevailing market rates in the community. [Pt. VII]

ESSENTIAL FACTS FOR PURPOSES OF THIS REHEARING PETITION

What the District Judge Did:

1. The District Judge summarily denied Plaintiffs' Rule 60(b)(3) motion, mischaracterizing it as "reargument". Although the motion was also explicitly entitled "Factual Rebuttal", and submitted in opposition, to Defendants' counsel fee/sanctions applications--with a fully documented paragraph-by-paragraph refutation thereof--the District Judge treated such rebuttal as non-existent.

2. The District Judge assessed Plaintiffs $92,000 as counsel fee/sanctions under the Fair Housing Act, as amended after commencement of this action, purportedly to reimburse the "prevailing" fully-insured Defendants, who had not paid a dime out of pocket for defense of the action.

3. An alternative award was also made by the District Judge in an identical aggregate amount under Rule 11 ($50,000)

and 28 U.S.C. 1927 ($42,000) which would come into play solely against Plaintiffs--not their counsel or their former co-Plaintiff--in the event his award under the Fair Housing Act was not upheld. The District Judge did not explain the basis of these two allocations. As to his Rule 11 award, he stated:

> "These sanctions are not directly connected with the fees expended by the defense attorneys, nor can they be prorated in that fashion. We find that the appropriate sanction against the Plaintiffs for commencing and prosecuting this meritless litigation to be in the sum of $50,000." (A-37-8)

Likewise, the District Judge did not correlate the $42,000 award under §1927 to any "costs, expenses, attorneys' fees reasonably incurred" as a result of any specific conduct by either Plaintiff (A-37). Additionally, the Rule 11 or the 28 U.S.C. §1927 awards made no distinction between the two Plaintiffs as to their separate liabilities.

4. In passing, the District Judge indicated that he had inherent authority under Chambers v. Nasco, supra (A-17; A-24). He did not state, however, that he was then exercising such inherent authority or the amount that would be encompassed thereunder were he to do so. Nor did the District Judge specify any conduct by either Plaintiff outside Rule 11 and §1927 which would require his inherent authority to address.

5. Expressly rejected by the District Judge were Plaintiffs' due process objections based on their asserted right to an evidentiary hearing before determination of liability for sanctions and the amount of the award (A-11).

What the Three-Judge Panel Did:

1. The Panel affirmed the District Judge's denial of

Appellants' Rule 60(b)(3) motion by adopting virtually verbatim his characterization of the motion as one for "reargument" (at 6399)--although such mischaracterization was exposed as fallacious in Appellants' Brief (Br. 27-33). The Panel did not address Appellants' "unclean hands" defense, which that motion documented. Nor did the Panel rule on the significance of the information and documents crucial to Appellants' discrimination case, which the District Judge had allowed Defendants to withhold without sanction, including: (a) statistical data as to the number of Board-approved purchasers who were Jews and/or unmarried women; (b) completed purchase applications of all purchasers, with supporting processing information; and (c) information concerning the adoption and distribution of the Co-Op's "Guidelines for Admission"--explicitly applicable to purchases by "minorities or single women" (See Br. 16-7, 52-3; Reply 21-2, 26).

2. The Panel vacated the District Judge's award under the Fair Housing Act, stating:

> "...the plaintiffs' suit adequately alleged the elements of a prima facie case of discrimination and presented a factual dispute for the jury as to whether the plaintiffs had proven that the defendants' articulation of non-discriminatory reasons were pretextual...There is no finding that the plaintiffs did not believe that they had been the victims of discrimination. Moreover,...there is no finding that the plaintiffs' had given a false account of the basic facts alleged to support an inference of discriminatory motive. Nor is this a case where the trial judge expressed the view that no reasonable jury could have found in plaintiff's favor but reserved ruling on a motion for a directed verdict and submitted the case to the jury simply to have a verdict in the event that a court of appeals might have disagreed with his subsequent ruling to set aside a plaintiffs' verdict, had one been returned..." (at 6394)

3. Having concluded that Plaintiffs' case was not "meritless" or brought in bad faith, the Panel then ruled on the District Judge's fall-back sanction alternatives:

(a) It vacated the proposed alternative Rule 11 award because the District Judge failed to meet the basic requirement for its invocation: i.e., he did not identify any specific offending document (at 6395). However, the Panel did not remand[1], saying:

> "Since...the $50,000 portion of the award grounded on Rule 11 is equally supportable by the exercise of the District Court's inherent authority, we need not return the matter to Judge Goettel for a precise identification of which documents warranted Rule 11 sanctions." (at 6395)

The Panel thus maintained intact the uncorrelated Rule 11 award, which the District Judge expressly predicated on his view that the litigation was "meritless" (A-38)--a view rejected by the Panel when it disallowed counsel fees under the District Judge's original basis, the Fair Housing Act (at 6394).

(b) Observing that §1927 was "designed to curb abusive tactics by lawyers", the Panel also rejected out of hand the District Judge's attempt to impose such sanctions against Elena Sassower, a non-lawyer (at 6397). Nonetheless, applying §1927 to plaintiff Doris Sassower because she happened to be a lawyer, it sustained an undefined portion of the undifferentiated $42,000

---

[1] Cf. U.S.A. v. International Brotherhood of Teamsters, where this Court remanded after vacating a Rule 11 award, stating: "An adjustment to one of the sanctions awards...would probably affect the underpinnings of the other, and might lead the district court, in the exercise of its discretion to reduce or adjust the other award." at 1347. See, also, Sanko, and Business Guides.

sanction against her. This disregarded the following facts: (i) Doris Sassower had been represented by counsel for approximately half the period of the litigation[2]; (ii) The District Judge had never correlated any of the monetary sanction under §1927 to specific conduct by Doris Sassower (A-37) at any time; (iii) The only three instances cited by the District Judge to support his "finding" of bad faith by Plaintiffs sanctionable under §1927 (A-20-4) were unsubstantiated by the record--a fact fully detailed in Appellants' Brief (Br. 25-6; 33-39; 39-40). [see discussion at pp. ~~14-15~~ 10-11 herein]

4. The Panel then sustained the balance of the $92,000 counsel fee/sanctions award, stating:

> "Judge Goettel explicitly relied, alternatively, on his inherent authority in the portion of his Opinion awarding Rule 11 sanctions, see Opinion at 11, and in the portion awarding section 1927 sanctions, Opinion at 18. We may reasonably infer that he intended to base the $50,000 portion of the award, alternatively, on his inherent authority, to whatever extent it was not supportable by Rule 11, and to base the $42,000 portion of the award, alternatively on his inherent authority, in the event section 1927 was deemed inapplicable to Elena Sassower." (at 6397-8) (emphasis added)

5. No findings were made by the Panel as to what was being sanctioned under the $50,000 figure, the former Rule 11 sanction award (at 6395-8). Nor did the Panel cite any instance of conduct by Elena Sassower entitling an undefined portion of the $42,000 sanctions under §1927 to be applied against her via the District Court's inherent power (at 6397-8).

---

[2] The Panel's statement that Appellants "filed their suit pro se in 1988" (at 6389) is one of numerous serious factual errors. Both Appellants were then represented by counsel--as they were for substantial periods thereafter.

6. The Panel did not address Appellants' due process objections based on their asserted right to an evidentiary hearing as to liability for sanctions and the amount thereof, as well as to an impartial judge.

7. The Panel failed to rule on Appellants' November 29, 1991 Motion to Dismiss, which was "referred to the panel that will hear the appeal" (Order dated December 4, 1991, Ex. "A").

POINT I: The District Judge did not invoke his inherent authority to fee-shift litigation costs--which he was in a position to do, had he deemed it appropriate. That the District Judge deemed it inappropriate can be inferred from the fact that although he was uncertain that his fee-shifting award under the Fair Housing Act would be upheld, he nonetheless explicitly relied on that Act--not his inherent authority to shift litigation costs (A-34-7).

Even in devising a fall-back to the Fair Housing Act, the District Judge did not reach out to his inherent authority to shift fees under the "bad faith exception to the American Rule". Rather, he proceeded under a combination of Rule 11 and §1927 (A-37-8), neither of which are fee-shifting provisions.

These two distinct decisions by the District Judge: (1) to use the Fair Housing Act, and (2) to devise a Rule 11/§1927 alternative must be seen as an informed assessment by him that the record would not permit him to meet the stringent standards for fee-shifting via his inherent authority, notwithstanding the recent Supreme Court decision in Chambers, which he cited.

The District Judge cited Oliveri v. Thompson for the

proposition that bad-faith is a prerequisite to §1927 sanctions (A-20) and had before him the standard for fee-shifting enunciated therein:

> "To ensure...that fear of an award of attorneys' fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both ''clear evidence' that the challenged actions 'are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes,'' and 'a high degree of specificity in the factual findings of [the] lower courts.'" Oliveri, at 1272 (citing 2nd Circuit cases) (emphasis added)

See also McMahon v. Shearson/American Express, at 23-4. The extent to which the District Judge did not meet the standards required for an award under inherent authority is highlighted by the only instances in his Opinion as showing Plaintiffs' alleged bad-faith, cited in the context of §1927 sanctions (at A-14-7).

Because the Decision repeats these instances (at 6391-2) to support fee-shifting for the totality of the litigation, rather than specific conduct to be sanctioned under §1927, they are herein set forth to demonstrate their inaptness for sanctions under any theory:

(a) "plaintiffs 'attempted to communicate directly with the defendants'" (at 6391): The record shows (AA-47) that the letter to Defendants was not sent by either Elena Sassower or Doris Sassower, but by John McFadden, the former co-Plaintiff and seller of the subject apartment[3] for the stated purpose of effectuating a settlement.

(b) "the Magistrate...had recommended dismissal of the complaint because of Doris Sassower..." (at 6391-2): The record shows (see discussion and record references cited in Br. 33-39) that the Magistrate's recommendation and the District Judge's Opinion based thereon were factually unjustified, rendered

---

[3] In fact, the District Judge's Opinion acknowledges Mr. McFadden's authorship of the letter to Defendants--the "impropriety" of which it acknowledged "can be overlooked" (A-32).

without due process, and even without a formal motion for Rule 37 sanctions ever made by defense counsel. The lack of due process precludes its use as a basis for a "bad faith" finding against her, a fact recognized by Chambers v. Nasco:

> "A court must...comply with the mandates of due process...in determining that the requisite bad faith exists..., see Roadway Express, supra, at 767, 100 S.Ct. at 2464." Chambers at 2136

(c) Doris Sassower's "role in assisting another attorney " 'in conducting incredibly harassing depositions'", and "'particularly shocking and abusive questioning'" (at 6392): Examination of the transcript shows this statement to be factually false (Br. 39-40), the questions were not improper, and Doris Sassower's entire participation consisted of two wholly innocuous one-line comments: (1) "She doesn't know when she was born." (AA-48); and (2) "Are you serious?" (AA-59).

As a matter of law, the foregoing three instances do not show bad faith to constitute a basis for §1927 sanctions, which is the context in which they were cited by the District Judge, nor do they constitute a basis upon which the Panel could activate the District Judge's inherent power against either Plaintiff, Roadway Express, Inc., at 2465. Indeed, as this Court recognized in Dow Chemical Pacific, at 345, such isolated instances, even were they legitimate, are too inconsequential to sustain an award representing the totality of three year's litigation costs.

Since the District Judge cited no other specific instances of alleged "bad faith", the exception to the "American Rule" cannot be sustained on the basis of his Opinion--and the Panel cited no basis in the record. Indeed, the Decision does not cite the record once.

POINT II: An award to Defendants under the Housing Act involves a lesser standard than under inherent power, as Christianburg itself makes clear. Christianburg requires only

that an action be "meritless" or without foundation. It does not require a showing that the action was brought in bad faith, which awards under a court's inherent power require:

> [I]n enacting [the fees provision] Congress did not intend to permit the award of attorney's fees to a prevailing defendant only...where the plaintiff was motivated by bad faith...[I]f that had been the intent...no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith." 434 U.S. at 419.

Here, the Panel held that there was no basis to find that the action was meritless or that the Plaintiffs "did not believe that they had been the victims of discrimination", i.e. that they had brought the action in bad faith. Thus, it was inconsistent with Christianburg and Chambers, as well as Oliveri and other precedents of this Court, to uphold fee-shifting based on inherent power that must rest on a bad-faith finding.

POINT III: The Panel turned to inherent authority as an alternative sanctioning source, with no finding that the sanctioning rules were inadequate. As the five-four majority in Chambers stated:

> "...when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than the inherent power." at 2136.

This view was expressed even more strongly by three of the four dissenting justices (including the Chief Justice):

> "Inherent powers are the exception, not the rule, and their assertion requires special justification in each case...Inherent powers can be exercised only when necessary, and there is no necessity if a rule or statute provides a basis for sanctions. It follows that a district court should rely on text-based authority derived from Congress rather than inherent

power in every case where the text-based authority applies." at 2143.

The fact that the Panel did not find that the sanctioning rules were not "up to the task" Chambers, 2126, 2136. is further reflected by its express statement in not remanding the $50,000 Rule 11 sanction award to the District Judge so that he might specify what "offending documents" he had in mind[4] (at 6395).

Moreover, the Panel's ruling that §1927 could not be used against Elena Sassower was irrelevant for purposes of invoking inherent authority--since no sanctionable conduct by her was cited by either the District Court or the Panel. Under such circumstance, Elena Sassower's non-lawyer status was irrelevant, there being nothing to sanction in any case.

Additionally, unlike Chambers, Appellants were denied their right to a hearing before sanctions liability and the $92,000 sum were awarded. Thus absent was the most fundamental prerequisite for invocation of inherent authority, reiterated by Chambers, 2135, in no uncertain terms: "due process".

Also distinguishable from Chambers, the District Judge did not invoke his recognized inherent authority, but chose instead to proceed under non-fee-shifting sanctioning provisions and further, unlike Chambers, made no detailed findings to fee-shift a totality of litigation costs.

POINT IV: In approving fee-shifting under inherent

---

[4] The Panel's speculation that the District Judge "probably had in mind principally the complaint" (at 6395) is erroneous since the complaint was signed by neither Plaintiff.

power, the Decision conflicts with Hall v. Cole, cited by Browning, at 1089, for the proposition that "bad faith is personal". The failure to differentiate the respective liabilities of the Appellants and to hold them liable for conduct of lawyers who were representing them conflicts also with Greenberg v. Hilton, at 939, and Calloway v. Marvel, at 1474. Moreover, Browning specifically held that:

> "in an action not itself brought in bad faith, an award of attorneys' fees should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves.", at 1089.

POINT V: As Chambers points out, at 2132--citing Hazel-Atlas--"fraudulently begotten judgments" are such a defilement of the judicial process that a court can vacate it sua sponte, and can even "conduct an independent investigation in order to determine whether it has been the victim of fraud". These powers exist apart from its duty to adjudicate motions properly before it under Rule 60(b)(3).

Neither the Panel nor the District Judge dealt with the fraud issues of Appellants' 60(b)(3) motion because they erroneously viewed the motion as "reargument"[5]. Such view--totally unsupported by the record (Br. 27-33)--would not relieve either tribunal from its duty to independently ascertain the validity of the fraud allegations, documented by Appellants'

---

[5] This Court considered "the opportunity to litigate" the issue of fraud and misrepresentation to be critical and in Leber-Krebs, supra, reversed Judge Goettel for summarily denying such opportunity. Judge Goettel--the District Judge herein--similarly denied Appellants their right to an adjudication of Defendants' fraudulent conduct--a fact detailed and documented in the opening pages of their Rule 60(b)(3) motion (Aff. A: Pt 2: pp. 7-11).

uncontroverted motion. Indeed, such invocation of inherent power was mandated because the parties Appellants charged with fraud were seeking to profit from it by a fee award.

POINT VI: The Panel's failure to decide the threshold jurisdictional question raised in Appellants' separate Motion to Dismiss, as well as in their Reply Brief (pp. 2-8), conflicts with Brocklesby Transport, citing United States v. Aetna:

> "...Under federal law, if an insurer has compensated an insured for an entire loss, the insurer is the only party-in-interest, and must sue in its own name..." Brocklesby, at 133 (emphasis added).

POINT VII: The Decision conflicts with New York Ass'n. for Retarded Children v. Carey, at 1147:

> "...contemporaneous time records are a prerequisite for attorney's fees in this Circuit. See Hensley v. Eckerhard,...we...convert our previously expressed preference for contemporaneous time records...into a mandatory requirement, as other Circuits have done..."

There were no contemporaneous time records submitted by defense counsel (Br. at 43)--as further conceded by their evasiveness and silence at oral argument when the question was specifically asked by Judge Newman, the author of Carey. Moreover, the $92,000 award confirmed by the Panel was devoid of all specificity--failing even to set forth the number of hours compensated and the rates allowed (A-34-8; Br. 43-5, 48).

CONCLUSION

For the reasons stated above, it is respectfully prayed that a rehearing, en banc, be granted so that the Decision may be corrected to conform with the factual record and controlling law.

Respectfully submitted,

DORIS L. SASSOWER, Pro Se

ELENA RUTH SASSOWER, Pro Se

Index No. 651 Year 19 89

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

JOHN McFADDEN,

Petitioner,

-against-

DORIS L. SASSOWER and ELENA RUTH SASSOWER,

Respondents.

AFFIDAVIT and EXHIBIT

DORIS L. SASSOWER, P.C.
Attorney for
Pro Se
Office and Post Office Address, Telephone
50 MAIN STREET, TENTH FLOOR
WHITE PLAINS, NEW YORK 10606
(914) 682-6004

New Address:
283 Soundview Avenue
White Plains, N.Y. 10606
(914) 997-1677

Elena Ruth Sassower
Pro Se
16 Lake Street, Apt. 2C
White Plains, NY 10603

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

.....

Attorney(s) for

Sir:—Please take notice

☐ NOTICE OF ENTRY

that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges
of the within named court, at
on 19 at M.

Dated,

Yours, etc.

DORIS L. SASSOWER, P.C.
Attorney for
Pro Se
Office and Post Office Address

To

New Address:
283 Soundview Avenue
White Plains, N.Y. 10606

Elena Ruth
Sassower
16 Lake St.
White Plains