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BY FAX: 718-643-7889 (13 pages)

February 25, 2010

Paul Kenny, Chief Clerk
Appellate Term, Second Judicial Department
141 Livingston Street, 15th Floor
Brooklyn, New York 11201

RE: Demand for Recall & Correction of February 19, 2010 Orders
*John McFadden v. Doris L. Sassower & Elena Sassower*
Appellate Term #2008-1427-WC & #2009-148-WC
(White Plains City Court #SP-651/89; #SP-2008-1474)

Dear Mr. Kenny,

I have received the Appellate Term's two February 19, 2010 decisions in the above case, with two corresponding orders, purporting to deny my January 2, 1010 motion to disqualify Justice Molia and other relief. For your convenience, they are enclosed.

With respect to the first unsigned decision which purports that the justices "PRESENT" were "FRANCIS A. NICOLAI, P.J., DENISE F. MOLIA, ANGELA G. IANNACCI, JJ", with "Nicolai, P.J., taking no part", please advise why the corresponding order is not signed by either Justice Molia or Justice Iannacci, but by you, above your typewritten name and title. Please also advise whether, by your signature, it is you, rather than Justices Molia and Iannacci, who is responsible for the material misrepresentations therein that I am appealing "from the ORDERS entered on OCTOBER 14, 2008 and JULY 3, 2008 and a FINAL JUDGMENT and WARRANT entered on July 21, 2008".

If it is your contention that Judge Friia's October 14, 2008 and July 3, 2008 orders and July 21, 2008 warrant were ever entered, please supply me with copies from the White Plains City Court's Clerk's Returns on Appeals for #SP-2008-1474 and #SP-651/89. Further, if you dispute that entry of Judge Friia's July 21, 2008 final judgment was not on that date, but on October 23, 2008, when the White Plains City Court Clerk's Office faxed to the Appellate Term's Clerk's Office a handwritten entry, backdated to July 21, 2008, in response to communication from the Appellate Term's Clerk's Office that the unentered July 21, 2008 judgment was unacceptable, please supply me with the particulars.[1]

[1] The transmitting fax from the White Plains City Court Clerk's Office, as well as the appealed-

With respect to the second unsigned decision which purports that the justice "PRESENT" is "DENISE F. MOLIA" and whose corresponding order similarly misrepresents that I am appealing "from the ORDERS entered on October 14, 2008 and July 3, 2008 and a FINAL JUDGMENT and WARRANT entered on July 21, 2008", please advise why the order is unsigned above Justice Molia's typewritten name and title.

To prevent the foregoing material misrepresentations as to entry from being replicated in the decisions to be rendered on my pending appeals, I hereby demand that the two February 19, 2010 orders be recalled, corrected, and appropriately signed[2], absent which I will *immediately* file administrative, disciplinary, and criminal complaints against you and the justices for record tampering and corruption, obliterating ALL adjudicative standards and ethical rules to wilfully deprive me of my legal entitlement.

As the record establishes, I have repeatedly alerted you – and the justices – that the appealed-from orders and warrant are unentered and that the judgment was unentered, causing the Appellate Term's Clerk's Office to communicate with the White Plains City Court Clerk's Office, which thereupon faxed the handwritten entry for the judgment, backdated three months. In addition to my many conversations with you and your Clerk's Office staff on the subject, both in-person and by telephone, these alerts have included my notices of appeals, my pre-appeal motions[3], my appellant's briefs[4], and,

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from orders, warrant, and judgment are in my Compendium of Exhibits to my appellant's brief herein as Exhibits C-4, C-1, C-2, C-3 and D.

[2] My January 2, 2010 motion itself identified the signature requirement of CPLR §2219(b), as follows:

> "'an order of an appellate court must be signed by a judge thereof, except that upon written authorization by the presiding judge, it may be signed by the clerk or, in his or her absence or disability, by a deputy clerk.', See New York Jurisprudence 2d, §15 'Signing of order'" (¶15 and fn. 12).

If Justice Nicolai, who took "no part" in the first February 19, 2010 decision and order, nonetheless, gave "written authorization" as "presiding judge" of the Appellate Term for the 9th and 10th Judicial Districts, authorizing you to sign the order, I request a copy.

[3] As illustrative, (1) my October 15, 2008 reargument/renewal order to show cause whose third, fourth, and fifth branches pertained to the non-conforming and deficient Clerk's Returns on Appeals of White Plains City Court Clerk Patricia Lupi in #SP-651/89, #SP-1502/07, and the lack of any Clerk's Return on Appeal for #SP-2008-1474 – a copy of which is Exhibit G to my January 2, 2010 motion (*see* ¶¶31-38, 43, & footnote 13 of moving affidavit); (2) my May 11, 2009 motion whose exclusive relief pertained to Clerk Lupi's non-conforming and deficient Clerk's Return on Appeal for #SP-2008-1474 – the relevant allegations of which are recited by my January 2, 2010 motion (*see* pp. 12-13).

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[4] See, *inter alia*, my April 17, 2009 appellant's brief herein: pp. ii, ¶6 of my "Statement Pursuant to Rule 5531 of the CPLR"; pp. 57, 58 of my brief and, especially, the description at pp. 65-67, whose referred-to March 13, 2009 and April 14, 2009 letters to you, annexed as Exhibits B-1 and B-2 to my brief's Compendium of Exhibits, are dispositive of your knowledge of the true facts. The description is as follows:

> "By letter to this Court's Clerk, Paul Kenny, dated March 13, 2009 []...Sassower asked Clerk Kenny to confirm – based on his own inspection of the Clerk's Returns on Appeals [] in #SP-651/89 (#SP-1474/08) – that Judge Friia's July 3, 2008 decision & order is not entered [], her July 21, 2008 warrant of removal is not entered [], and her October 14, 2008 decision & order is not entered [] and that, likewise, in #SP-1502/07, neither Judge Hansbury's October 11, 2007 decision & order, nor his January 29, 2008 decision & order are entered. Indeed, Sassower stated that only Judge Friia's July 21, 2008 judgment of eviction is entered – and that was not done until October 23, 2008 when this Court's Clerk's Office received from the White Plains City Court Clerk's Office a fax of the judgment of eviction with a handwritten entry, backdated to July 21, 2008 [][fn.54] This, after this Court's Clerk's Office had informed it that the unentered judgment was unacceptable.[fn.55]
>
> Clerk Kenny responded by an April 2, 2009 phone conversation in which he assigned Senior Court Clerk Julio Mejia to assist in addressing Sassower's March 13, 2009 letter. The outcome of which Sassower memorialized by an April 14, 2009 letter to Clerk Kenny []."

The pertinent recitation in my April 14, 2009 letter to you (at pp. 1-2) – *whose accuracy you have never denied or disputed* – is as follows:

> "Mr. Mejia has also confirmed – on your behalf – that my observations at pages 4-5 of my March 13th letter as to the various decisions & orders, etc. in the Clerk's Returns on Appeals are correct:
>
> (1) Judge Friia's July 3, 2008 decision & order is not 'entered';
> (2) Judge Friia's July 21, 2008 warrant of removal is not 'entered' – and there is no original in the Clerk's Return;
> (3) Judge Friia's October 14, 2008 decision & order is not 'entered' – and there is no original in the Clerk's Return;
> (4) Judge Hansbury's October 11, 2007 decision & order is not 'entered'';
> (5) Judge Hansbury's January 29, 2008 decision & order is not 'entered'.
>
> Only Judge Friia's July 21, 2008 judgment is 'entered' – and that was not done until October 23, 2008 when, in response to the Appellate Term's notification to the White Plains City Court Clerk's Office that the unentered judgment was unacceptable, the White Plains City Court Clerk's Office faxed the judgment with a handwritten 'entry' to the Appellate Term, backdated to July 21, 2008. The Appellate Term has only the fax of this handwritten, backdated July 21, 2008 'entry' of the judgment of eviction. There is no original. Nor is there an original of the unentered July 21, 2008 judgment of eviction."

most recently, my December 16, 2009 oral argument of my appeals and January 2, 2010 motion.[5]

Nonetheless, you and the justices have willfully persisted in issuing decisions and orders falsifying the proven record facts as to entry. The February 19, 2010 orders that you signed and that Justice Molia did not sign are the latest examples.[6]

Recalling these orders to correct their false recitations of entry is important for another reason. It will afford Justices Molia and Iannacci the opportunity to justify their jointly-rendered February 19, 2010 decision by giving reasons for severing, *without reasons*, the first branch of my motion, for Justice Molia's exclusive "determination", and for denying, *without reasons*, the second, third, fourth, and fifth branches of my motion[7].

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[5] See, *inter alia*, pp. 12-13 of my January 2, 2010 motion (pertaining to Justice Molia's June 22, 2009 decision and order denying my May 11, 2009 motion), as well as its Exhibit G (October 15, 2008 reargument/renewal order to show cause: ¶¶31-38, 43, & footnote 13 of my moving affidavit).

[6] As for your other orders falsifying the entry status of the appealed-from White Plains City Court orders subsequent to my April 14, 2009 letter to you (fn. 4, *supra*): your June 5, 2009 and July 17, 2009 "orders on applications" granting Mr. Sclafani's second and third letter-requests to extend his time to file his respondent's brief and your June 5, 2009 and June 29, 2009 "orders on applications" granting my letter-requests for extensions to file my reply brief to the Attorney General's non-party opposing brief. These should be contrasted with your May 19, 2009 "order on application" granting Mr. Sclafani's first letter-request to extend his time to file a respondent's brief.

[7] The denied third branch of my January 2, 2010 motion would have established the state of the record with respect to entry, as it sought a subpoena to Clerk Lupi, *inter alia*, for:

> "an explanation for her failure to respond to [my] August 22, 2008 letter to her, including its itemization of the deficiencies of her Clerk's Returns on Appeals for #SP-651/89 and #SP-1502/07."

You were an indicated recipient of my August 22, 2008 letter to Clerk Lupi – and I referred to it, repeatedly, in my conversations with you. It quotes (at fn. 5) from the Appellate Term's Guide to Preparing a Civil Return on Appeal to the Appellate Term Ninth and Tenth Judicial Districts that "If the appeal is from a judgment even if an order granted the judgment, it must be properly entered, see CPLR 5106" – and reproduces that provision in full, beginning with its subdivision (a) "What constitutes entry. A judgment is entered when, after it has been signed by the clerk, it is filed by him."

This August 22, 2008 letter – which was based on my review, at the Appellate Term, of Clerk Lupi's Returns on Appeals for #SP-651/89 and #1502/07 – stated (at pp. 2-3) that none of the transmitted documents for #SP-651/89 had been "entered" – identifying these as "Judge Friia's July 3, 2008 decision & order, her July 21, 2008 judgment of eviction, and her July 21, 2008 warrant of removal".

Three copies of my August 22, 2008 letter are in the record before Justice Molia by: (1) my September 2, 2008 affidavit in further support of my August 13, 2008 dismissal/vacatur motion, where it is Exhibit G-2; (2) my November 3, 2008 affidavit in further support of my October 15,

Similarly, it will afford Justice Molia the opportunity to justify her individually-rendered February 19, 2010 decision by giving reasons for denying, *without reasons*, the first branch of my motion – and then tacking on a "note[]" whose applicability to my motion is implied, but not stated:

> "It is noted that a party is not entitled to disqualification of a judge based on the fact that the judge has ruled against her in prior stages of the litigation (see Petkovsek v. Snyder, 251 AD2d 1086 [1998]; 1A Carmody-Wait 2d §3:9)."

I am not such "party", as my motion does not seek the disqualification of Justice Molia because of prior rulings which, though adverse, are factually and legally defensible. To the contrary, my motion showed that Justice Molia's adverse prior rulings – virtually all *without reasons*[8] – were factually and legally indefensible.

As for Justice Molia's cited case of *Petkovsek v. Snyder*, introduced with an inferential "see"[9], such Appellate Division, Fourth Department decision establishes the "error" of her joint decision with Justice Iannacci severing my disqualification branch for her exclusive "determination". This, because my motion *expressly* invoked "interest under Judiciary Law §14" – determination of which – unlike bias – is not within "'the discretion and personal conscience of the Justice whose recusal is sought'", *Petkovsek v. Snyder*, quoting *Matter of Card v. Siragusa*, 214 A.D.2d 1011, 1023 (1995), also an Appellate Division, Fourth Department decision.

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2008 reargument/renewal order to show cause, whose third branch relief included a request that Clerk Lupi be directed to explain her non-response to my August 22, 2008 letter and requiring her response thereto; and (3) Clerk Lupi's Return on Appeal for #SP-2008-1474, transmitting (an incomplete) record of my September 18, 2008 motion in White Plains City Court to compel her to file proper Clerk's Returns on Appeals for #SP-651/89, #1502/07, and a Clerk's Return for #2008-1474 and directing that she explain her failure to respond to my August 22, 2008 letter and requiring her response thereto, where it is Exhibit K to the motion.

Discussion of my August 22, 2008 letter – the seminal document underlying my September 18, 2008 motion, the subject of my appeal #2009-148-WC – appears at pp. 56-60 of my appellant's brief herein.

[8] Only Justice Molia's November 26, 2008 decision contained scant reasons – and this for denying a fraction of the relief sought by my October 15, 2008 reargument/renewal order to show cause. My January 2, 2010 motion highlighted the material incompleteness and falsity of those reasons (at pp. 10-12).

[9] According to The Blue Book: A Uniform System of Citation (Harvard Law Review Association, 17th edition, 200), "*see*" before a legal citation means that there is "an inferential step between the authority cited and the proposition it supports". In other words, "the proposition is not directly stated by the cited authority" (at pp. 22-23).

Even more inapt is Justice Molia's treatise citation to "1A Carmody-Wait 2d §3:9". That section, entitled "Bar association's evaluation and endorsement of candidates", has nothing to do with disqualification – as may be seen from the annexed copy of the 2008 edition of Carmody-Wait 2d, Volume 1A, §3:9.

Suffice to say, that Justice Molia's paltry two-sentence decision conceals the very grounds upon which my motion sought her disqualification: "demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14"— and that this was not confined to her rulings "in prior stages of the litigation", but extended to her conduct at the December 16, 2009 oral argument of my four appeals.

None of the facts establishing Justice Molia's "actual bias and interest", particularized by my 26-page moving affidavit and, especially, ¶¶5-20, 21, 25, 35-36, 37-43, 44-46 thereof, are contested by her. Nor does she contest the law pertaining to those facts, identified by my ¶19 as "set forth by my appellant's brief in #2008-1428-WC, at pages 16-20...". These pages discussed Judiciary Law §14 and cited *People v. Moreno*, 70 N.Y.2d 403 (1987), the same New York Court of Appeals decision as *Petkovsek v. Snyder* cited – but for the legal principle germane to this case: "bias or prejudice or unworthy motive" disqualify where they are "shown to affect the result" – which I then buttressed with Appellate Division, Second Department decisions and treatise authority, as follows:

> "Although recusal on non-statutory grounds is 'within the personal conscience of the court', a judge's denial of a motion to recuse will be reversed where the alleged 'bias or prejudice or unworthy motive' is 'shown to affect the result', *People v. Arthur Brown*, 141 A.D.2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 N.Y.2d 403, 405 (1987), *Matter of Rotwein*, 291 N.Y. 116, 123 (1943); 32 New York Jurisprudence §44; *Janousek v. Janousek*, 108 A.D.2d 782, 785 (2nd Dept. 1985): 'The only explanation for the imposition of such a drastic remedy...is that...the court became influenced by a personal bias against the defendant.'" (my November 13, 2008 appellant's brief in #2008-1428-WC, at p. 18).

Over and again, my January 2, 2010 motion showed that "bias or prejudice or unworthy motive" totally "affected the result". Yet, Justice Molia's decision conceals the entirety of my showing: ALL the facts, law, and legal argument presented by my motion. As such, it could not be further from the standard identified by ¶¶19-20 of my motion as one which any fair and impartial tribunal would adopt:

> "'Adjudication of a motion for a court's disqualification must be guided by the same legal and evidentiary standards as govern adjudication of

> other motions. Where, as here, the motion details specific supporting facts, the court, as any adversary, must respond to those facts, as likewise the law presented relative thereto. To fail to do so would subvert the motion's very purpose of resolving the 'reasonable questions' warranting disqualification.'"

Indeed, Justice Molia's decision also conceals the alternative relief sought by my motion's first branch, if disqualification were denied, *to wit*, "disclosure ...pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon her fairness and impartiality". Justice Molia makes no disclosure, reflective of her knowledge that doing so would require her to concede the grounds for disqualification my motion particularizes.

The sufficiency, *as a matter of law*, of my January 2, 2010 motion for Justice Molia's disqualification divests her of jurisdiction to proceed further. It also magnifies her direct interest in my four appeals, requiring adjudication of <u>identical</u> issues: the sufficiency, *as a matter of law*, of my July 18, 2008 order to show cause for Judge Friia's disqualification and the sufficiency, *as a matter of law*, of my November 9, 2007 order to show cause for Judge Hansbury's disqualification – both for "demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14", divesting them of jurisdiction and entitling me to vacatur of their decisions/orders, judgment, and warrant that are the subject of my appeals. These judges, likewise, concealed my alternative requests for "disclosure... pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon [their] fairness and impartiality", which neither of them made.[10]

Based on the foregoing, I could rightfully move for reargument and renewal of the two February 19, 2010 decisions and orders, simultaneously expanding the grounds of Justice Molia's disqualification from "demonstrated actual bias and interest" to "pervasive actual bias and interest" meeting the "impossibility of fair judgment" standard of *Liteky v. United States*, 510 U.S. 540, 551, 556, 565 (1994). I could also rightfully now seek Justice Iannacci's disqualification for actual bias and interest, as well.

Of course, the key question is whether, in fact, either of these justices ever saw my January 2, 2010 motion, let alone adjudicated it. It may well be that my January 2, 2010 motion – like my predecessor motions – has been entirely handled by Appellate Term court attorneys, without the knowledge of the justices. <u>Such would certainly explain why the February 19, 2010 orders do not bear the signatures of either Justice Molia or Justice Iannacci.</u>

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10 *See* ¶12 of my January 2, 2010 motion.

In that connection, please furnish me with the names of all Appellate Term court attorneys who handled my January 2, 2010 motion, my prior motions, as well as who have been handling my pending four appeals: #2008-1427-WC; #2009-148-WC; #2008-1433-WC; and #2008-1428-WC – relief explicitly sought by the fifth branch of my motion and denied, *without reasons and without identifying same*, by Justices Molia's and Iannacci's joint February 19, 2010 decision.

I await your expeditious response so that I may be guided accordingly in safeguarding my consistently trampled rights – and, in conjunction therewith, those of my mother, Doris L. Sassower, a respondent on appeals #2008-1427-WC and #2009-148-WC.

Thank you.

Very truly yours,

ELENA RUTH SASSOWER
Appellant *Pro Se*

Enclosures: February 19, 2010 decisions and orders
1A Carmody-Wait 2d §3:9 (2008)

cc: Leonard A. Sclafani, Esq.
Doris L. Sassower
New York State Attorney General Andrew Cuomo
ATT: Deputy Solicitor General Benjamin N. Gutman
Assistant Solicitor General Diana R.H. Winters

Am. Jur. 2d, Judges §§ 5, 6, 10
C.J.S., Judges §§ 28 to 39

*Forms*

Am. Jur. Legal Forms 2d § 156:10
Am. Jur. Pleading and Practice Forms, Judges § 73

### 1. In General

## § 3:8 Generally

**Research References**

West's Key Number Digest, Judges ⊂=4, 5
N.Y. Jur. 2d, Qualifications and eligibility, generally; judge appointed to fill a vacancy; ineligibility of political party officials. Courts and Judges §§ 280 to 282

A judge must be a person of good character and reputation.[1] Thus, one who has once been removed for cause from judicial office is ineligible, as a matter of law, for appointment to the unexpired term of the office from which he or she was removed.[2] Indeed, it is implicit that removal of a judge from office renders the judge ineligible to hold any other judicial office.[3]

The state constitution and statutes prescribe certain qualifications for judges, including residency requirements,[4] the amount of legal experience required for the various judgeships,[5] and the oath required of judges.[6] A sitting judge may not run for a full term on the bench after having served less than half of the original term.[7]

If the judicial office is not one created by the constitution, the legislature may properly prescribe the necessary qualifications of the candidates therefor, and if the constitution creates an office and prescribes qualifications therefor, the legislature may then prescribe additional qualifications not prohibited by the constitution, so long as they do not interfere with nor nullify those

**[Section 3:8]**

[1]Knickerbocker Textile Corp. v. Leifer Mfg. Corp., 103 N.Y.S.2d 782 (Sup 1951), order rev'd on other grounds, 278 A.D. 351, 105 N.Y.S.2d 200 (1st Dep't 1951).

[2]Matter of Schamel, 49 A.D.2d 786, 372 N.Y.S.2d 742 (3d Dep't 1975).

[3]Scacchetti v. State Com'n on Judicial Conduct, 56 N.Y.2d 980, 453 N.Y.S.2d 629, 439 N.E.2d 345 (1982).

As to removal of judges, see §§ 3:114 to 3:155.

[4]§ 3:10.

[5]§ 3:13.

[6]§ 3:12.

[7]Hurowitz v. Board of Elections of City of New York, 53 N.Y.2d 531, 443 N.Y.S.2d 54, 426 N.E.2d 746 (1981) (New York City Civil Court).

Carmody-Wait 2d Vol 1A 2008



constitutionally prescribed.[8] While the state legislature has the power to prescribe qualifications for judges, it cannot enact arbitrary exclusions from office. Any classification establishing qualifications must be nondiscriminatory and bear a reasonable relation to the object sought to be accomplished by the legislation.[9] The legislature is under a mandate to prescribe qualifications for judges of district, town, village, or city courts outside the City of New York, other than the qualifications as to admission to practice law within the state.[10]

◆ **Observation:** A member of a national committee, an officer or member of a state committee, or a county chairperson of any political party, while serving as such, is ineligible to serve as a judge of any court of record.[11]

Judges appointed to fill vacancies must have the same qualifications as the judges originally appointed or elected to such positions.[12]

## § 3:9 Bar association's evaluation and endorsement of candidates

**Research References**

West's Key Number Digest, Judges ⊂=5

The constitution and statutes prescribe the qualifications of judges.[1] However, a bar association does not violate any statutes or engage in ultra vires conduct when it adopts a plan setting forth minimum qualifications for all judges, methods for evaluating candidates, and providing for endorsement of candidates.[2]

## § 3:10 Residency requirements

**Research References**

West's Key Number Digest, Judges ⊂=4
N.Y. Jur. 2d, Residency. Courts and Judges § 284

The New York Constitution contains requirements as to the

[8]Matter of O'Connor, 180 Misc. 630, 43 N.Y.S.2d 412 (Sup 1943).

[9]Phelan v. City of Buffalo, 54 A.D.2d 262, 388 N.Y.S.2d 469 (4th Dep't 1976).

[10]N.Y. Const. Art. VI, § 20(c).

[11]N.Y. Pub. Off. Law § 73(9).

[12]Matter of Schamel, 49 A.D.2d 786, 372 N.Y.S.2d 742 (3d Dep't 1975).

As to filling vacancies, see §§ 3:26 to 3:28.

**[Section 3:9]**

[1]§§ 3:10 to 3:13.

[2]Pecora v. Queens County Bar Ass'n, 46 Misc. 2d 530, 260 N.Y.S.2d 116 (Sup 1965).