

To be Argued by:  
LEONARD A. SCLAFANI  
(Time Requested: 15 Minutes)

Cal. No.: 2008-1428 WC

Westchester County Civil Court No. 1502/07

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# New York Supreme Court

Appellate Term—Second Department

9th & 10th Judicial Districts

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JOHN MCFADDEN,

*Petitioner-Respondent-Cross-Appellant,*

— against —

ELENA SASSOWER,

*Respondent-Appellant-Cross-Respondent.*

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## BRIEF FOR PETITIONER-RESPONDENT- CROSS-APPELLANT

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### PRELIMINARY STATEMENT

On October 11, 2007, the White Plains City Court made and entered its decision and order determining the motion of John McFadden , petitioner in a summary holdover proceeding against Elena Sassower, seeking an order pursuant to CPLR §3211(b) inter alia, striking the ten affirmative defenses and four counterclaims raised by Elena Sassower, respondent in those summary proceedings and appellant herein (hereinafter "Sassower"). By that decision and order, the White Plains City Court denied McFadden's motion on the sole basis that, according to the Court, it was not supported by an affidavit of a person with knowledge. The court made that decision notwithstanding that, for the most part, McFadden's motion challenged Sassower's affirmative defenses and counterclaims on the applicable law and not on the facts, with respect to some branches of McFadden's motion, the facts were not in dispute and/or the motion rested on Sassower's admissions and documentary evidence, including prior court decisions that were matters of public record. Despite the Court's rulings, McFadden's arguments were also supported by the affirmation of McFadden's counsel who did have personal knowledge of the facts needed to support various branches of McFadden's motion and did, in fact, include as part of McFadden's opposition to Sassower's cross-motion and reply papers on his motion, his own affidavit attesting to the accuracy and truth of the facts presented by his counsel on his motion.

By the October 11, 2007 order, the White Plains City Court also denied the cross-motion of Sassower for an order, allegedly pursuant to CPLR §3211 and 3212, striking McFadden's petition and for other relief, including an order referring McFadden's counsel to the Westchester County District Attorney's Office for criminal prosecution based upon Sassower's overly imaginative, vitriolic allegations of fraud, deceit and attorney misconduct. By the October 11, 2008 decision and order, the City Court also, sua sponte, directed that McFadden's holdover proceeding be consolidated with other proceedings pending in the Court between the parties, at least one of which had been pending since as early as 1989.

Sassower appealed the October 11, 2007 decision and order and McFadden filed a notice of cross-appeal therefrom. Sassower's appeal was perfected on the same date that she perfected her appeal herein and, simultaneous with the filing of this brief, McFadden submitting his brief in opposition and in support of his cross-appeal from the October 11, 2007 decision and order.

Following the entry of that decision and order, Sassower made application to the White Plains City Court by order to show cause for disqualification of Judge Hansbury and for renewal and

reargument of the October 11, 2007 decision and order or, in the alternative, for a stay pending determination of Sassower's appeal of the said decision and order. McFadden also sought reconsideration and/or reargument of the October 11, 2007 decision and order by way of cross-motion.

By its decision and order dated and entered on January 29, 2008, the White Plains City Court determined to grant renewal/reargument of both Sassower's and McFadden's applications but, ultimately, adhered to its original decisions. The court also denied Sassower's application for disqualification of Judge Hansbury but, at the same time, provided that Judge Hansbury would recuse himself from the case.

The court also denied Sassower's application for a stay pending her appeal of the October 11, 2007 order.

Thereafter, Sassower filed a notice of appeal of the January 29, 2008 decision and order and McFadden filed a notice of cross-appeal. It is Sassower's appeal and McFadden's cross-appeal that are the subjects of McFadden's' within brief.

As hereinafter more fully demonstrated, the court correctly refused to disqualify itself and, also, correctly refused to

alter its decision denying Sassower's cross-motion seeking dismissal of McFadden's petition and other relief.

Unfortunately, the court erred in refusing to amend its decision that denied McFadden's motion for an order striking Sassower's affirmative defenses and counterclaims pursuant to CPLR §3211(b).

For the reasons herein set forth, the January 29, 2008 order must be affirmed to the extent that it denied Sassower's application and reversed to the extent that it denied McFadden's cross-motion

The facts surrounding and leading up to the appeal and cross-appeal addressed herein are set forth in detail in McFadden's brief in opposition to sassower's appeal of the October 11, 2007 decision and order and in support of McFadden's cross-appeal from that decision and order under Index No. 2008-1433 WC. Reference is respectfully made thereto.

For the reasons set forth hereinafter, this Court should dismiss Sassower's appeal and grant McFadden's cross-appeal herein striking Sassower's ten affirmative defenses and three counterclaims.

## POINT I

### **THE COURT PROPERLY REFUSED TO DIRECT THE DISQUALIFICATION OF JUDGE HANSBURY**

As is obvious from the fact that both parties have appealed the October 11, 2007 decision and order of Judge Hansbury and as is also obvious from the briefs filed by the parties on their appeal and cross-appealed from that decision and order, neither of the parties was satisfied with the October 11, 2007 decision and order; both were aggrieved by some part of it.

Ms. Sassower now seeks to have this Court determine that Judge Hansbury should be disqualified and, as well, referred to the Court's Judiciary Committee for discipline based upon what she asserts in a wild and conclusory manner, is Judge Hansbury's bias, fraud and deceit in connection with his adjudication of the parties' previous motion and cross-motion.

The sole evidence that Sassower advances in support of her assertion is that the judge was obviously biased simply because he did grant her cross-motion. When all of the froth is blown from the surface of that portion of Sassower's application as sought disqualification of Judge Hansbury on the grounds of actual bias, what is left is nothing more than Sassower's pique,

expressed in vitriolic hyperbole, over Judge Hansbury's denial of Sassower's cross-motion for dismissal of the petition and for other relief in this matter.

Assuming solely of the purpose of argument herein that the court had erred in its denial of Sassower's cross-motion, this circumstances would not, itself, have supported a motion for disqualification of the Judge that decided the cross-motion.

The law in this State is clear that neither the formation of an opinion on a question of law nor a judicial ruling in a litigation, however erroneous they may be, constitutes grounds for a charge of bias or prejudice on the part of a judge. *Weiner v. Savarese*, 109 N.Y.S. 2d 14, app. dism'd 112 N.Y.S. 2d 772; *People v. Byrne*, 163 N.Y.S. 680. See also *Ortiz v. New York*, 136 Misc. 500, 518 N.Y.S. 2d 913.

It is significant to note that Judge Hansbury, through his January 28, 2008 decision and order, sua sponte, involuntarily, recused himself from handling the matter notwithstanding his determination that he should not be disqualified from adjudicating the parties' claims and cross-claims. This circumstance renders that branch of Sassower's application below as sought disqualification of Justice Hansbury, and,

consequently, Sassower's appeal herein moot. Yet, Sassower continues to devote virtually the entirety of her Appellant's Brief herein to her hyperbolic, over the top, accusations against Judge Hansbury.

Accordingly, this Court must deny Sassower's appeal insofar as it seeks any order with respect to Judge Hansbury.

## **POINT II**

### **THIS COURT MUST DENY SASSOWER'S APPLICATION FOR RENEWAL AND REARGUMENT**

To the extent that one can find among the rubble of Sassower's arguments in her brief relating to the disqualification of Judge Hansbury, any argument that the January 29, 2008 decision and order should be overturned because it refused to grant the relief she requested pursuant to her application for renewal/reargument, such an argument must be rejected both on the applicable facts and pursuant to applicable law, procedural and substantive.

CPLR §2221, the section upon which Sassower relied for that branch of her application in the court below, requires that "a motion seeking re-argument shall be specifically identified as such" (CPLR §2221(b)(2)), and that "a motion seeking renewal must [also] be specifically identified as such". (CPLR §2221(d)(2)).

When a movant seeks both reargument and renewal in the same application as Sassower has, the movant must separately identify and support each branch of the motion (CPLR §2221(f)). Sassower failed sufficiently to do that on her application in the court below.

Sassower also failed to include a copy of her original cross-motion and supporting papers as the law required. *Lower Main Street v. Thomas Re Partners*, N.Y. Journal, April 5, 2005, pg. 19, col. 3 (Sup. Ct. Nass. Co.). Accordingly, Sassower's application for renewal/reargument was procedurally defective and should not have been considered by the lower court.

The same is true with respect to the fact that respondent failed to include a copy of her answer and counterclaims among the exhibits annexed to her cross-motion. Ironically, Sassower argued below that the October 11, 2007 decision and order was invalid because it did not list her answer and counterclaims among those documents that it had considered in determining McFadden's motion and Sassower's cross-motion. However, in its January 29, 2008 decision and order, the court expressly stated that it had, in fact, considered Sassower's answer and counterclaims.

Sassower's application for renewal/reargument was also procedurally and substantively defective because it consisted of nothing more than a rehash of the issues raised on her earlier cross-motion. Although Sassower styled her application as one seeking both re-argument and renewal, she offered no additional facts that were not available for her to present at the time that she made her cross-motion, or change of law since that time, that would have effected the outcome of the decision on that cross-motion as she was required to present on a motion for renewal.

Rather, Sassower devoted almost the entirety of that branch of her cross-motion as sought "renewal and re-argument" to a rehash of the arguments that she had previously presented on her cross-motion and that the court denied. Indeed, the largest section of Sassower's application consisted of her quotation from the papers that she had submitted in support of her cross-motion.

A motion for reargument (or for renewal) of a prior motion may not be utilized to authorize the unsuccessful party to argue again the precise issues previously determined. *American Trading Co., Inc. v. Fish*, 87 Misc. 2d 193, 383 N.Y.S. 2d 943; *Shell Oil Co. v. New York Tax Commission*, 11 Misc. 460, 444 N.Y.S. 2d 392, Modified on other grounds, 91 A.D. 2d 91, 458 N.Y.S. 2d 938, motion denied 60 N.Y. 2d 632, 467 N.Y.S. 2d 355.

The arguments raised by Sassower through the branch of her application as purportedly sought "re-argument and renewal" address claims and issues precisely the same as those that were litigated, and that the court decided in the prior motion practice that the court determined by its October 11, 2007 order. Each of Sassower's arguments were addressed in McFadden's moving papers on his prior motion for dismissal of Sassower's various "affirmative defenses and "counterclaims" and in McFadden's opposition to Sassower's prior cross-motion for dismissal of the petition. McFadden respectfully requests that the court consider those papers as part of its opposition to Sassower's appeal and in support of McFadden's within appeal.

### POINT III

**THE COURT DID NOT ERR IN DIRECTING THE CONSOLIDATION OF THE PROCEEDINGS BELOW WITH THOSE CASES PENDING IN THE CITY COURT BETWEEN THE SAME PARTIES THAT SASSOWER ALLEGED REMAIN "OPENED"**

Sassower argues that the White Plains City Court erred in its October 11, 2007 decision and order when it, sua sponte, directed that the case below be consolidated with that case between the parties; to wit, 651/89 together with any other open cases "between the parties involving the same subject matter", of which there were, and are, none. If was not.

CPLR §3211(a)(4) provides that where there is another action pending between the same parties for the same cause of action in a court of any state or the United States, the court need not dismiss upon this ground but may make such order as justice requires. In interpreting the statute, the courts of the state have held that consolidation of open cases involving the same subject matter and parties is such an order as justice may require. See *Thompson v. Thompson*, 103 A.D. 2d 752, 477 N.Y.S. 2d 405 (2<sup>nd</sup> Dept., 1984). At this point, it should be noted that, by decision and order dated July 3, 2008, the White Plains City Court granted summary judgment to McFadden on his holdover petition in the proceedings under Index No. 651/89, the only case that the White Plains City Court determined was still open and involved the same parties and subject matter as the case herein. The question of consolidation of the two cases was, thereby, rendered moot.

Accordingly, this court must reject Sassower's appeal to the extent that she seeks to overturn the order of the White Plains City Court directing consolidation of the case below with the case under Index No. 651/89 or any other case pending in that court between the parties.

#### POINT IV

#### THE COURT BELOW ERRED IN REFUSING TO REVERSE ITSELF ON ITS DECISION TO DENY MCFADDEN'S MOTION TO STRIKE SASSOWER'S DEFENSES AND COUNTERCLAIMS

As above noted, the only basis cited by the court in its October 11, 2007 decision for its denial of McFadden's motion seeking to strike Sassower's ten affirmative defenses and counterclaims was that the motion was not supported by the affidavit of a person with knowledge of the facts. It appears that the court confused McFadden's motion essentially to dismiss with a motion for summary judgment. The court cited three cases in support of its determination: *Nehrebreski v. Molnar*, 286 A.D. 2d 891; *Arriaga v. Laub Co.*, 233 A.D. 2d 244 and *Subgar Realty Corp. v. Gothic Lumber and Millwork, Inc.*, 80 A.D. 2d 774. However in each of those cases, the Appellate Division denied a motion styled as one "to dismiss" that, in reality, was a motion for summary judgment; and it did so on the grounds that factual allegations were not supported by either the affidavit of a person with personal knowledge of the facts "or other evidentiary proof".

In the case here, McFadden submitted the affirmation of his attorney who, unlike the movants in the cases cited by the court, did have personal knowledge of the facts necessary for the court

to have dismissed at least some of Sassower's affirmative defenses and counterclaims.

Thus, for example, with respect to that part of McFadden's motion that sought dismissal of Sassower's "second affirmative defense"; i.e., that McFadden had not plead in his petition that he had returned to respondent the checks that she had tendered for the two month period following the expiration of her month to month occupancy and before McFadden commenced the instant proceedings, McFadden's counsel did have personal knowledge of the facts relevant to Sassower's claim because, inter alia, it was McFadden's counsel who actually returned to Sassower the relevant checks. McFadden's counsel's correspondence with Sassower annexed as Exhibits to his affirmation had established that fact.

Moreover, to the extent that there were any allegations of fact in McFadden's counsel's affirmation about which counsel had no personal knowledge, McFadden also submitted his own affidavit, he being a person with personal knowledge of those facts.

McFadden, in his own affidavit, affirmatively attested that he had read the affirmation of his counsel, that he knew the facts and allegations set forth therein to be true of his own personal

knowledge and that McFadden was incorporating those facts and allegations set forth in his counsel's affirmation by reference into his own affidavit as fully and completely as if they were each and all set forth fully in McFadden's affidavit.

McFadden also supported his motion by and through the submission of other "evidentiary proof" in the form of such documentary evidence as: (a) affidavits and other proofs of service of the notice of petition and petition on Sassower in this matter; (b) correspondence from McFadden's counsel evidencing the return to Sassower of her rents checks for the period following the expiration date of the notice of termination served upon her until McFadden commenced the instant proceedings and obtained an order of the court permitting him to accept Sassower's use and occupancy without prejudice to his claims; and (c) the opinions and decision and orders of the United State District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States in the case of *Sassower v. Field et. al.*, which cases established that the Board of Directors of McFadden's Coop Corporation had not discriminated against Sassower in determining to refuse their consent to the sale of McFadden's coop apartment to Sassower.

McFadden also submitted true copies of his stock and lease for his apartment and decisions of the court in the case of *McFadden v. Sassower*, Index No. 651/89 pursuant to which this court held in abeyance a determination of a motion for summary judgment that *McFadden* had made in that case pending the outcome of the above cited federal litigation.

Similarly, *McFadden* cited legal authorities that supported his motion for dismissal of *Sassower's* various "affirmative defenses" and "counterclaims".

With respect to some of the "affirmative defenses" and "counterclaims" that *McFadden* challenged on his motion, the facts necessary for the court to have adjudicated *McFadden's* motion on its merits were admitted by *Sassower* and/or were not in dispute; adjudication of them, therefore, turned not on issues of facts but on application of the law as cited in *McFadden's* moving papers. See, for example, that branch of *McFadden's* motion that sought dismissal of *Sassower's* defense of "equitable estoppel" on the ground that the facts as *Sassower* alleged them to be failed to support the defense as a matter of law.

Because, it appears, the court overlooked the fact that *McFadden's* counsel's affirmation set forth facts about which

McFadden's counsel did, himself, have personal knowledge, and which facts were, themselves, supported by documentary evidence and because, it appears, the court also overlooked the fact that McFadden's motion was also supported by the affidavit of McFadden himself who had personal knowledge of those facts set forth in his motion about which McFadden's counsel may not have had personal knowledge as well as other evidentiary proofs and legal authorities submitted by McFadden and, lastly, because the court apparently misunderstood or misapprehended the applicable law in denying McFadden's motion in that the court, apparently, did not understand that, where a motion to dismiss is supported by evidentiary proof or raises issues of a pure legal nature or where the facts as the opposition pleads them are either not in dispute or are assumed to be true for the purpose of the motion, or are in direct conflict with binding legal precedent against the opposition, the motion may not be dismissed solely because it is supported by the affirmation of movant's counsel, reargument of that branch of McFadden's motion as sought dismissal of Sassower's various "affirmative defenses" and "counterclaims" is both warranted and appropriate.

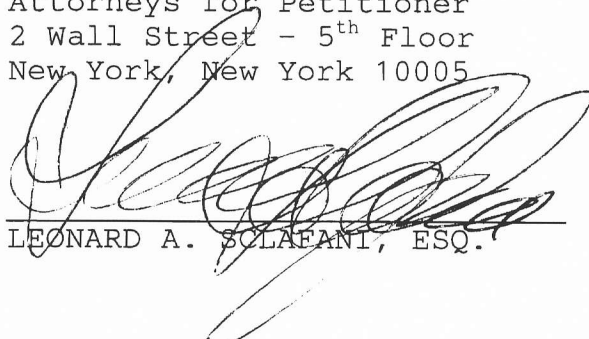
### CONCLUSION

On the basis of the foregoing, it submitted, this Court must

reject Sassower's appeal herein in its entirety and grant McFadden's cross-appeal. In doing so, this should issue an order striking each and all of the defenses and counterclaims raised by Sassower in her answer in this matter and grant to McFadden such other relief as is just and proper

Respectfully submitted,

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