UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DORIS L. SASSOWER,

Plaintiff,

-against-

94 Civ. 4514 (JES)

HON. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF RECUSAL

GENERAL PRINCIPLES APPLICABLE TO 28 U.S.C. §144 RECUSAL

On a motion for recusal to disqualify a federal judge under 28 U.S.C. §144, the Court's sole function is to determine the timeliness and sufficiency of the affidavit as threshold questions.

The standard of ethical conduct expected of such judge is so high that for the purposes of the motion, the facts and the reasons set forth in the affidavit as a basis for the movant's belief that the judge is biased or the existence of the appearance thereo must be accepted as true by the judge--even though he or she knows of his or her own personal knowledge the statements are false. Hodgson v. Liquor Salesmaen's Union, 444 F.2d 1344 (C.A.2 N.Y. 1971); Blank v. Sullivan & Cromwell, 418 F.Supp.1 (D.C.N.Y.1975).

In other words, once the dual tests of timeliness and sufficiency are found by the Court to have been met, its adjudicative function is at an end and recusal is automatic, the challenged judge being without power to pass upon the truth or falsity of the facts alleged in the affidavit. In re Martin Trigona, 573 F.Supp. 1237 (D.C. Conn.1983), app dismsd 770 F.2d 157, cet den'd. 475 U.S. 1058.

A. THE MOTION IS TIMELY

The only time limitation contained in 28 U.S.C. §144 is that the recusal application "shall be filed not les than ten days before the beginning of the term at which the proceeding is to be heard." Since "the term" referred to is understood to be a trial term and this action is a long way off from trial--being still in the pleading stage--the Court having before it motions by both sides addressed to the pleadings, there can be no doubt as to the timeliness of the instant recusal request.

Plaintiff's Affidavit focuses on what transpired on September 28, 1995--at which time the Court's bias was unmistakably and most egregiously displayed. Although the transcript of the court session of that date was immediately ordered from the court reporter, it was not received by Plaintiff until October 13, 1995.

The Order to Show Cause and Affidavit in support of recusal herein were filed with the Court on October 26, 1995--within two weeks of Plaintiff's receipt of the transcript.

Obviously, a serious recusal application, made in good

faith, is not one any lawyer or litigant would make lightly without minutes of court proceedings, where they are available, to buttress and substantiate it. Particularly such lawyer or litigant must be mindful that the explicit words of §144 limit a party to the filing of "only one such affidavit in any case" and controlling decisional law warrants denial of the recusal motion made after the filing of an earlier affidavit--the filing of a second such affidavit being improper. U.S. v. International Business Machines Corp. (539 F.Supp. 473 (D.C.N.Y. 1982).

B. THE AFFIDAVIT IS PLAINLY LEGALLY SUFFICIENT

An affidavit is legally sufficient where the facts and reasons supporting the belief that the judge is biased are set forth on personal knowledge, are particularized and specific as to the time, date, and circumstances concerning the bias alleged, and, accepted as true, give fair support to the belief that a fair judgment of the action will not be made.

Obviously, a Court need not accept as true allegations that are merely conclusory and speculative statements or opinions, or based on rumors or gossip. U.S. v. Pastor, 419 F. Supp. 1318 (D.C.N.Y. 1975). However, such situation is not the case at bar, since the subject recusal affidavit does not set forth its request in such palpable insufficient terms.

On the contrary. Any fair inquiry into the sufficiency of the affidavit in support of recusal, which the Court is required to make preliminarily, Wolfson v. Palmieri,, 396 F.2d 121 (C.A.2 N.Y. 1968), establishes the Court's bias by

allegations demonstrating same overwhelmingly and more than adequately satisfying the movant's burden on such a motion.

Indeed, there can be no honest doubt that Plaintiff's recusal Affidavit properly presents such legally sufficient verified facts as would fairly support the charges of bias and such bent of mind that may prevent impartiality of judgment. The cases are legion that under such circumstances the challenged judge has the unavoidable legal and moral duty to recuse him or herself, and that is clearly the case at bar. Indeed, it is well established that a judge's wrongful failure and refusal to do so subjects the judge to liability by way of mandamus, directing such recusal, In re International Business Machines Corp., 618 F.2d 923 (C.A.2 N.Y. 1980); Rosen v. Sugarman, 357 F.2d 794 (C.A.2 N.Y. 1966), not to mention possible disciplinary relief.

Respectfully Submitted,

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