

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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MICHAEL MANTELL, :
 :
 : Petitioner-Appellant, : Sup. Ct., N.Y. Co.
 : : Index No.: 108655/99
 :
 : -against- :
 :
 : NEW YORK STATE COMMISSION : AFFIRMATION IN
 : ON JUDICIAL CONDUCT, : OPPOSITION TO MOTION
 :
 : Respondent-Respondent. :
 :
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CONSTANTINE A. SPERES, an attorney duly licensed to practice law in the State of New York, affirms under penalty of perjury that:

1. I am an Assistant Attorney General in the office of Eliot Spitzer, Attorney General of the State of New York, attorney for the respondent-respondent herein. I submit this affirmation in opposition to a motion by Elena Ruth Sassower ("Sassower") that seeks to (1) intervene in the referenced appeal as of right, by leave of Court or as an *amicus curiae*; (2) adjourn the scheduled oral argument of the referenced appeal so that it can be heard together with the appeal in Sassower v. Commission on Judicial Conduct, Index No. 108551/99 (Sup. Ct. N.Y. Co. 1999); and (3) disqualify the office of the Attorney General as counsel for respondent-respondent in this appeal.

2. Sassower has failed to demonstrate any entitlement to intervention as of right under CPLR 1012(a)(1) because no statute confers an absolute right to intervene. Moreover, CPLR 1012(a)(2)

does not provide a basis for intervention as of right because, although the issues presented in both appeals are similar and a decision in the Mantell appeal may impact the arguments presented in and the outcome of Sassower's appeal, Sassower is not bound by the judgment and there is no evidence to support her belief that Mr. Mantell, a licensed and practicing attorney, is incapable of representing his interests adequately. Further, CPLR 1012(a)(3) does not apply since the two lawsuits do not involve disputes between Mantell and Sassower over property or conflicting claims for damages. Sassower's claim for intervention as of right should, therefore, be denied.

3. Leave to intervene should also be denied. CPLR 1013 provides that intervention by permission may be granted upon a "timely motion" when the proposed intervenor's claims have a common question of law or fact with the main action. Additionally, CPLR 1013 provides that, in exercising its discretion to grant intervention, the court should consider whether the intervention will unduly delay the determination of the action or prejudice the rights of any party to the main action. Moreover, CPLR 1014 requires that a motion to intervene "shall be accompanied by a proposed pleading setting forth the claim ... for which intervention is sought."

4. Here, Sassower's motion for intervention by permission should be denied because it was not made in a timely

manner and does not comply with the mandates of CPLR 1014.

5. By her own admission, Sassower has been aware of Mr. Mantell's Article 78 proceeding since early October, 1999 -- nearly one year ago. Sassower Aff., ¶ 36. It further appears that she has been in contact with Mr. Mantell from early October, 1999 to date (Mantell notarized the Sassower affidavit on September 21, 2000) and, presumably, knew about the briefing schedule for his appeal. Yet, Sassower waited until the eleventh hour -- after the submission of all briefs and the scheduling of the argument for October 24th -- to seek permission to intervene. Sassower's application for intervention is untimely and should be denied because Sassower should have made the application prior to the perfection of Mantell's appeal. The Commission is entitled to have the Mantell appeal heard without the approximately four month delay that Sassower's schedule will require.

6. Additionally, Sassower's motion does not attach her proposed brief on appeal. Instead, she merely states that she will file it on December 23, 2000 -- the last day that her appeal may be perfected. Sassower Aff., ¶ 2. Accordingly, intervention pursuant to CPLR 1013 should be denied due to Sassower's failure to comply with the requirements of CPLR 1014.

7. Sassower alternatively asks for permission to appear amicus curiae. Again, this application must fail because Sassower has failed to attach her proposed amicus brief for this Court's

review.

8. In any event, although the decision of whether to accept the *amicus* briefs is a matter vested to the discretion of the Court, the Commission submits that "[a]s all possible points of view are represented by counsel in this proceeding, nothing will be served by allowing additional appearances." Matter of Mayer, 110 Misc.2d 346, 351 (Surr. Ct., N.Y. Co. 1981), aff'd 92 A.D.2d 756 (1983). Accord Rourke v. N.Y.S. Dep't of Corr. Services, 159 Misc.2d 324 (Sup. Ct., Albany Co. 1993) (rejecting New York Civil Liberties Union's *amicus* application "inasmuch as petitioner's contentions have been fully and ably presented"), aff'd other grounds, 201 A.D.2d 179 (3d Dep't 1994). Sassower's unilateral claim that Mantell is not "adequately protect[ing] his own interest, let alone the larger public interest at stake in this appeal," Sassower Aff., ¶ 6, does not require a different result since Sassower is not an attorney and, therefore, lacks the capacity to appear in this appeal *pro bono publico* or on behalf of anyone other than herself. See Jud. L. § 478. Accordingly, this Court should, in its discretion, deny Sassower's application for leave to appear *amicus curiae*.

9. Sassower also alternatively asks the Court to adjourn the date for oral argument on the Mantell appeal so that it can be heard together with her appeal, if and when she finally perfects it on December 23, 2000. Sassower Aff., ¶2. The Commission opposes

the requested adjournment of the oral argument date. Although Mantell notarized Sassower's affidavit, he does not expressly join this application for an adjournment. Since the parties to this appeal are ready to go forward, the requested adjournment should be denied.

10. Finally, Sassower has asked this Court to disqualify the Attorney General from representing the Commission on this appeal and to impose sanctions against the Attorney General and the Commission for its actions in the Mantell appeal. Sassower's application is based upon her unsubstantiated allegations of fraud by the Assistant Attorneys General handling both her case and the instant appeal, which seem to stem from Sassower's belief that decisions that go against her are "fraudulent" rather than precedent -- a concept which, according to Sassower, even Mr. Mantell is too "overburdened" to appreciate -- and that the Attorney General's reliance upon such cases is a "fraud upon the court." Notice of Motion, ¶3; Sassower Aff., ¶ 5.

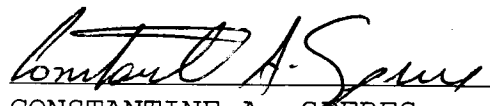
11. Sassower's earlier challenge the authority of the Attorney General to represent the Commission in her Article 78 proceeding was flatly rejected by the Supreme Court and, *a fortiori*, it should be rejected here, where she is not even a party to the appeal. The Commission is entitled to such representation and the Attorney General is statutorily authorized to defend this proceeding. Executive Law §63(1); Sassower v. Signorelli, 99

A.D.2d 358 (2d Dep't 1984); Kilcoin v. Wolansky, 75 A.D.2d 1, 12 n. 1 (2d Dep't 1980), aff'd 52 N.Y.2d 995 (1981) (a plaintiff's motion to disqualify the Attorney General from representing the defendant State official suggests "something more than a concern over the Attorney General's ethical position. Rather, it bespeaks her continuing effort to harass and punish" the official).

12. Likewise, Sassower's motion for sanctions under 22 NYCRR Part 130 is, itself, frivolous and should be denied, with costs. Indeed, Sassower's effort to inject herself into this appeal at this late stage and to clutter it with the unrelated issues that she wishes to address in her appeal -- like the manner in which the Attorney General assigns cases and responds to Sassower's FOIL requests, Sassower Aff., ¶¶ 36-45 -- reflects the need for Justice Wetzel's order enjoining Sassower "from instituting any further actions or proceedings relating to the issues decided herein." Sassower v. Commission on Judicial Conduct, Index No. 108551/99 (Sup. Ct. N.Y. Co. 1999) (attached hereto as Exhibit A at 5).

WHEREFORE, Sassower's motion should be denied in all respects, with costs and disbursements.

Dated: New York, New York
September 27, 2000


CONSTANTINE A. SPERES
Assistant Attorney General