CITY COURT OF THE CITY OF WHITE PLAINS
STATE OF NEW YORK: COUNTY OF WESTCHESTER
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JOHN McFADDEN,

Petitioner (Overtenant),

Index # SP1502/07

-against-

ELENA SASSOWER,

Respondent (Subtenant)
16 Lake Street – Apt. 2C
White Plains, New York

RESPONDENT'S MEMORANDUM OF LAW

In Support of Order to Show Cause for Stay of Trial,
Disqualification/ Disclosure, Reargument/ Renewal, & Other Relief

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Tel: 914-949-2169

November 8, 2007

RESPONDENT'S MEMORANDUM OF LAW

This memorandum is submitted in support of the disqualification of Part-Time City Court Judge Brian Hansbury and for vacatur of his October 11, 2007 decision & order (Exhibit HH)[1], whether directly by reason of his disqualification or by way of the granting of reargument and renewal. It is also submitted in support of a stay of trial, pending determination of these issues.

As demonstrated by respondent's accompanying affidavit, no fair and impartial tribunal could render – or adhere to – the October 11, 2007 decision as it flagrantly violates controlling legal and adjudicative standards and falsifies the factual record to deprive respondent of relief to which she is entitled, *as a matter of law*. Such decision is a knowing and deliberate fraud by the Court. It denies her cross-motion to dismiss the Petition, for summary judgment on her Counterclaims, and for costs and sanctions against, and disciplinary and criminal referrals of, petitioner and his attorney, without identifying ANY of the facts, law, or legal argument presented by her cross-motion, and without citing ANY applicable law. Indeed, it is "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause" of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Should Judge Hansbury not disqualify himself and vacate the October 11, 2007 decision based on the factual and legal showing in respondent's accompanying affidavit, he must – consistent with his ethical duty – disclose the facts bearing upon the appearance and

[1] Annexed to respondent's accompanying affidavit

actuality of his bias and interest. Likewise, such duty of disclosure falls on any other judge who, based on respondent's motion herein, does not deem Judge Hansbury to be disqualified and allows his October 11, 2007 decision to stand.

THIS MOTION MEETS THE STANDARD FOR JUDICIAL DISQUALIFICATION & VACATUR OF THE OCTOBER 11, 2007 DECISION & ORDER – AND IF SUCH ARE DENIED, THE COURT MUST ADDRESS THE FACTS AND LAW PRESENTED AND MAKE DISCLOSURE

The bedrock principle for a judge is judicial impartiality. Over 150 years ago, the New York Court of Appeals recognized that "the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality", *Oakley v. Aspinwall*, 3 N.Y. 547 (1850), quoted in *Scott v. Brooklyn Hospital*, 93 A.D.2d 577, 579 (2nd Dept. 1983). This standard of impartiality, both in appearance and actuality, is the hallmark of the Chief Administrator's Rules Governing Judicial Conduct (Part 100) – which, pursuant to Article VI, §§20 and 28(c) of the New York State Constitution, has constitutional force.

§100.3E pertains to judicial disqualification and states, in pertinent part:

> "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a)(i) the judge has a personal bias or prejudice concerning a party… (d) the judge knows that the judge...(iii) has an interest that could be substantially affected by the proceeding."

Judiciary Law §14 governs statutory disqualification for interest. In pertinent part, it states:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding…in which he is interested…"

It is long-settled that a judge disqualified by statute is without jurisdiction to act and the proceedings before him are void, *Oakley v. Aspinwall, supra*, 549, *Wilcox v. Arcanum*, 210 NY 370, 377 (1914), *Casterella v. Casterella*, 65 A.D.2d 614 (2nd Dept. 1978), 1A Carmody-Wait 2nd §3:94.

It is to ensure the impartiality of judicial proceedings that cases are required to be randomly assigned to judges.[2]

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 defendant."

A judge who fails to disqualify himself upon a showing that his "unworthy motive" has "affect[ed] the result" and, based thereon, does not vacate such "result" is subject not only to reversal on appeal, but to removal proceedings:

> "*A single decision or judicial action, correct or not, which is established to have been based on improper motives and not upon a desire to do justice or to properly perform the duties of his office, will justify a removal...*", italics added by Appellate Division, First Department in *Matter of Capshaw*, 258 A.D. 470, 485 (1st Dept 1940), quoting from *Matter of Droege*, 129 A.D. 866 (1st Dept. 1909).

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2 *Cf.*, §202.3(b) of the Uniform Rules of the Supreme Court and the County Court. "[A]ssignment by random selection is mandatory", *Morfesis v. Wilk*, 138 A.D.2d 244, 248 (dissent) (1st Dept 1988). Its purpose is "to prevent judge-shopping by lawyers and judge-steering by administrators", LEXSTAT 1-15 WEINSTEIN, KORN & MILLER CPLR MANUAL §15.02

In *Matter of Bolte*, 97 A.D. 551 (1st Dept. 1904), cited in the August 20, 1998 New York Law Journal column "*Judicial Independence is Alive and Well*", authored by the then administrator and counsel of the New York State Commission on Judicial Conduct, Gerald Stern, the Appellate Division, First Department held:

> "A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling, or for a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another..." (at 568, emphasis in original).
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> "...Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe." (at 574).

§100.3F of the Chief Administrator's Rules Governing Judicial Conduct provides that where a judge's "impartiality might reasonably be questioned" or he has an interest, he may:

> "disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

The Commission on Judicial Conduct's annual reports explicitly instruct:

> "All judges are required by the Rules of Judicial Conduct to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned."

According to the Commission in its brief before the New York Court of Appeals in *Matter of Edward J. Kiley*, (July 10, 1989, at p. 20),

> "It is cause for discipline for a judge to fail to disclose on the record or

> offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned".

Treatise authority holds,

> "The judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a disqualification motion", Flamm, Richard E., Judicial Disqualification: Recusal and Disqualification of Judges, p. 578, Little, Brown & Co., 1996.
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> Where a motion for judicial disqualification is made,
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> "The factual basis for the motion ordinarily must be stated with specificity – that is, for the moving party's allegations to warrant the requested relief, such allegations, when taken as true, must contain information that is definite as to time, place, persons, and circumstances. Before acting on a judicial disqualification motion, the challenged judge should carefully examine the allegations to determine whether the motion alleges specific, objective facts that, considered as a whole, would lead a reasonable person to believe that the court is biased, that the appearance of the court's impartiality is in doubt, or that a fair and impartial disposition did not occur." Flamm, Judicial Disqualification, pp. 572-3.

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.

The law is clear – and so-recited by ¶16 of respondent's accompanying motion, quoting her ¶13 of her reply affidavit in support of her cross-motion – that "failing to respond to a fact attested to in the moving papers...will be deemed to admit it", Siegel, New York Practice, §281 (4th ed. – 2005, p. 464) – citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975),

itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it".

Moreover, "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secundum, Vol. 31A, 166 (1996 ed., p. 339).

Respondent's disqualification/disclosure motion resoundingly meets the standard for Judge Hansbury's disqualification. It documents, "specific, objective facts that, considered as a whole, would lead a reasonable person to believe that the court is biased, that the appearance of the court's impartiality is in doubt, [and] that a fair and impartial disposition did not occur." It demonstrates that his October 11, 2007 decision (Exhibit HH) is not just factually and legally insupportable, but a fraud by the Court, requiring vacatur by reason thereof.

Such decision is *prima facie* evidence of actual bias – and so brazen as to suggest that the Court was propelled by interest.

Should Judge Hansbury not disqualify himself based on this motion, he must justify his October 11, 2007 decision by confronting and addressing, with specificity, the facts and law which the motion presents. Only by so doing can he demonstrate that there are no grounds on which his impartiality might "reasonably be questioned". In such circumstance, he must make disclosure as to the facts bearing upon his impartiality. Likewise, any other judge of this Court who adjudicates this motion.