

\*Case No. 2008-1427 WC

\*Case No. 2009-148 WC

To be Argued by:  
Elena Sassower  
(15 minutes requested)

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APPELLATE TERM OF THE SUPREME COURT  
NINTH & TENTH JUICIAL DISTRICTS

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JOHN McFADDEN,

Respondent,

-against-

DORIS L. SASSOWER,

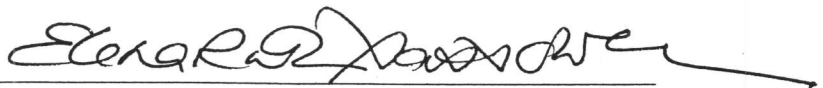
Respondent,

ELENA SASSOWER,

Appellant.

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APPELLANT'S REPLY BRIEF  
to the Solicitor General's  
"Brief for Non-Party Respondent Patricia Lupi"



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**\*Appeal 3: Judge Jo Ann Friia's July 3, 2008 Decision & Order  
July 21, 2008 Judgment of Eviction  
July 21, 2008 Warrant of Removal**

**\*Appeal 4: Judge Jo Ann Friia's October 14, 2008 Decision & Order**

(Westchester City Court #SP-651/89 & #SP-2008-1474)

ED-2

## INTRODUCTION

This reply brief of appellant Elena Sassower [Sassower] responds to the “Brief for Non-Party Respondent Patricia Lupi” – Chief Clerk of White Plains City Court – signed by Assistant Solicitor General Diana R.H. Winters, acting “of counsel” to New York State Attorney General Andrew Cuomo.

Such timely-filed reply brief (Exhibit R-4)<sup>1</sup>, which Sassower was burdened to prepare and which this Court is now burdened to review, is the result of Ms. Winters’ failure to withdraw her frivolous, indeed fraudulent, non-party brief – as Sassower demanded she do on May 26, 2009, by copy of a letter of that date addressed to this Court’s Clerk (Exhibit R-1).

As Sassower’s May 26, 2009 letter embraces the threshold issue as to whether the Attorney General’s representation of Clerk Lupi before this Court is lawful, as, likewise, whether it was lawful before the White Plains City Court in #SP-1474-2008 & #SP-651/89, the letter is reproduced herein, in pertinent part:

“Dear Mr. Kenny:

“...the Attorney General’s May 12, 2009 non-party brief, signed by Assistant Solicitor General Diana R.H. Winters, is based on flagrant falsification and omission of material facts. This requires either that Ms. Winters withdraw her non-party brief – as I am hereby demanding she do by copy of this letter to her – or that I be burdened with a reply brief lest her materially false and deceptive non-party brief mislead the Court.

As illustrative, Ms. Winters’ non-party brief claims that White Plains City Court Clerk Lupi was ‘represented by the Attorney General under Executive

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<sup>1</sup> The exhibits annexed hereto continue the sequence of Sassower’s two-part compendium of exhibits which accompanied her appellant’s brief, which were A-L and M-Q.

Law §63(1)' when she cross-moved in White Plains City Court to dismiss my September 18, 2008 motion. This appears at page 4 of her non-party brief – a copy of which is enclosed for your convenience.

The foregoing assertion – for which Ms. Winters furnishes NO record reference – is without denying or disputing page 62 of my appellant's brief, a copy of which I also enclose. I there state:

'the Attorney General's appearance on behalf of Clerk Lupi was unlawful, as Clerk Lupi was not a party to the proceeding for which representation was available to her under Public Officers Law §18. Nor was her challenged conduct 'in the interest of the state', nor even alleged to be – the predicate for representation under Executive Law §63.1.<sup>fn.50</sup> (underlining added).

My annotating footnote 50 identified my attempts to ascertain the basis for the Attorney General's representation of Clerk Lupi, including by F.O.I.L. correspondence with the Attorney General's Office. Such F.O.I.L. correspondence, which I annexed as Exhibit P to my compendium of exhibits accompanying my appellant's brief, sought:

(1) any and all publicly available records pertaining to the Attorney General's approval of Clerk Lupi's request for representation – 'including any and all records establishing that the Attorney General made the predicate determination that Clerk Lupi's requested representation was 'in the interest of the state', as Executive Law §63.1 expressly requires, or that the Attorney General's representation of Ms. Lupi fell within some other statutory provision.' (Exhibit P-2: my November 5, 2008 letter, underlining in the original); and

(2) any and all publicly available records in support of MY request, pursuant to Executive Law §63.1, 'for the Attorney General's representation &/or intervention 'in ensuring the integrity of court records and the proper functioning of the White Plains City Court Clerk's Office'' (Exhibit P-2: my November 5, 2008 letter, underlining in the original).

The Attorney General's Office asserts it has no records pertinent thereto – as may be seen from its letters responding to my F.O.I.L. correspondence,

annexed as part of that Exhibit P and by its subsequent April 29, 2009 letter to me, annexed hereto.

I, therefore, demand that Ms. Winters IMMEDIATELY substantiate the bald claim in her non-party brief that the Attorney General's representation of Clerk Lupi in the White Plains City Court was pursuant to Executive Law §63.1 and that she state, under oath, with accompanying documentary proof, that the Attorney General made the requisite determination that it was Clerk Lupi, and not me, who was advancing 'the interest of the state'.

Absent her doing so and withdrawing her non-party brief, as she is duty-bound to do because it is a fraud on this Court and itself *prima facie* proof that the Attorney General's representation of Clerk Lupi is contrary to 'the interest of the state', I will ask this Court for sanctions and costs against Ms. Winters and her superiors at the Solicitor General's Office, pursuant to this Court's Rule 730.3(g), and that it make disciplinary and criminal referrals of them, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.

Tellingly, Ms. Winters' May 12, 2009 non-party brief fails to include a certification pursuant to 22 NYCRR §130-1.1 that its content is not frivolous, unlike my April 17, 2009 appellant's brief which so-certifies." (underlining, capitalization, and italics in the original).

No response has been received from Ms. Winters, let alone one attesting to and furnishing proof as to the legal authority for the Attorney General's representation of the non-party Clerk Lupi, either here or below. Consequently, Ms. Winters' representation of Clerk Lupi is unauthorized, and her non-party brief must be rejected, *as a matter of law*, for the reasons set forth by Sassower's May 26, 2009 letter (Exhibit R-1), which Sassower so-requests.

In any event, Ms. Winters' seven-page non-party brief is no opposition to Sassower's appeal, *as a matter of law*. Essentially confined to Judge Friia's October 14, 2008 decision & order (Exhibit D) – and, like it, improperly bearing only a single White Plains index

number “SP 1474/08” – Ms. Winters’ brief does not deny or dispute any of the facts, law, or legal argument of Sassower’s brief establishing the October 14, 2008 decision & order to be void *ab initio* as the product of a self-interested and biased judge and insupportable in fact and law. Indeed, Ms. Winters’ brief is completely non-responsive to even the limited portions of Sassower’s 97-page brief which she was duty-bound to confront if she was to file a brief for “SP 1474/08”, urging this Court to uphold the October 14, 2008 decision, *to wit*:

- the first, second, and fifth “Questions Presented” of Sassower’s brief (pp. vi-vii, ix);
- the supporting facts particularized by pages 53-67 of Sassower’s “Statement of the Case”;
- the corresponding “Argument” – in particular Point I (pp. 68-74), Point II (pp. 74-79), and Point V (pp. 92-96) of Sassower’s brief.

That Ms. Winters does not confront any of the facts, law, and legal argument therein makes her non-party brief, urging affirmance of the October 14, 2008 decision, frivolous *per se*. Indeed, when compared to the above-cited pages of Sassower’s brief, Ms. Winters’ brief is utterly deceitful. As hereinafter shown, it consists of her own circumscribed “Question Presented” (at p. 2) predicated on a premise that is both self-serving and meaningless, followed by a skimpy and knowingly false and deceitful “Preliminary Statement”, “Statement of the Case” (pp. 2-4) and “Argument”. Such further reinforces the merit of Sassower’s appeal under applicable legal principles:

‘It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party’s falsehood or other fraud in the preparation and presentation of his cause...and all

similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.' II John Henry Wigmore, Evidence §278 at 133 (1979)."

This conduct, violative of New York's Rules of Professional Conduct for Attorneys, is even more egregious when committed by a government attorney – and when its consequence is to cover-up the manipulations of case records by a city court clerk, at the instance of a city court judge, preventing this Court from having before it the documents and information essential to its appellate review. Under such circumstances, maximum sanctions and costs are warranted against Ms. Winters and her superiors at the Solicitor General's Office, pursuant to this Court's Rule 730.3(g)<sup>2</sup>, as well as disciplinary and criminal referrals of them, pursuant to this Court's mandatory "Disciplinary Responsibilities" under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct<sup>3</sup>, which Sassower hereby requests.

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<sup>2</sup> "Any attorney or party to a civil appeal who, in the prosecution or defense thereof, engages in frivolous conduct as that term is defined in 22 NYCRR subpart 130-1.1(c), shall be subject to the imposition of such costs and/or sanctions as authorized by 22 NYCRR subpart 130-1 as the court may direct."

<sup>3</sup> "A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."

CONCLUSION

WHEREFORE, *as a matter of law*, Assistant Solicitor General Diana Winters' brief on behalf of non-party White Plains City Court Clerk Patricia Lupi must be rejected as legally unauthorized and violative of Executive Law §63.1. Alternatively and/or additionally, by its material omissions, falsifications, and deceit, her non-party brief must be deemed no opposition, *as a matter of law*, and as reinforcing the merit of Sassower's appeal #2009-148-WC.

Maximum sanctions and costs against Ms. Winters and her superiors at the Solicitor General's Office are warranted, pursuant to this Court's Rule 730.3(g), and disciplinary and criminal referrals of them, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.



ELENA RUTH SASSOWER

New York, New York  
July 6, 2009