SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ELENA RUTH SASSOWER, Coordinator of The Center For Judicial Accountability, Inc., Acting Pro Bono Publico,

Petitioner,

-against-

COMMISSION ON JUDICIAL CONDUCT OF THE STATE OF NEW YORK,

Respondent.

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Index No.: 99-108551

RESPONDENT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF A MOTION TO DISMISS AND IN OPPOSITION TO PETITIONER'S MOTION FOR "OMNIBUS RELIEF"

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Preliminary Statement

This memorandum is respectfully submitted on behalf of respondent, Commission on Judicial Conduct of the State of New York (the "Commission") in reply to petitioner's opposition to the Commission's motion to dismiss this Article 78 proceeding and in further support of the Commission's motion. It is also submitted in opposition to petitioner's motion to (a) disqualify the Attorney General as counsel for respondent Commission in this CPLR Article 78 proceeding, and (b) vacate Judge Lebedeff's order granting respondent's application for an extension to respond to the

petition. See Petitioner's "Notice of Motion For Omnibus Relief" dated July 28, 1999; Affidavit of Elena Ruth Sassower, sworn to on July 28, 1999 ("Sassower aff."), ¶¶ 1-113; Petitioner's Memorandum of Law dated July 28, 1999 ("Pet. Mem."), passim. It is also submitted in opposition to plaintiff's additional application which, although not noticed in her notice of motion, see CPLR 2215, seeks sanctions against the Attorney General and his assistants for appearing and asserting the defenses that have been raised on behalf of the Commission in this lawsuit. Sassower aff. ¶¶ 114 - 120; Pet. Mem. at passim.

ARGUMENT

A. Plaintiff's Motion to Disqualify the Attorney General

Plaintiff argues that the Attorney General should be disqualified from representing the Commission because she and/or CJA has filed ethics complaints against the Attorney General and various Assistant Attorneys General who have rejected her requests for investigations. Sassower aff. ¶¶10-103. Petitioner also complains about the manner in which Assistant Attorneys General have responded to her mother's cases in state and federal courts against the judges of the Appellate Division, Second Department, who suspended her. Id. at ¶¶ 21-23. However, none of these assertions establish any conflict between this petitioner and the

Attorney General's office which would require the Attorney General's disqualification. Compare Solow v. W.R.Grace & Co., 83 N.Y.2d 303 (1994). None of the complaints that petitioner has allegedly filed against the Attorney General and his Assistants are pending before the respondent Commission. Additionally, petitioner was not a party to her mother's lawsuit and, thus, has no standing to asserts any claims about the manner in which it was defended.

Petitioner also argues that the Commission is not entitled to representation by the Attorney General pursuant to Exec. L. §63(1) because there has been no articulated "finding" that it would be in the interests of the State to defend this proceeding. Sassower aff. ¶¶ 14, 54-103. However, as more fully argued in footnote 1 of the Commission's Memorandum in Support of a Motion To Dismiss dated May 24, 1999 ("Commission's Mem."), petitioner lacks standing to challenge the Attorney General's decision to represent the Commission. Compare Zaccaro v. Parker, 169 Misc.2d 266, 268-69 (Sup. Ct., Onadaga Co., 1996)(plaintiff lacks standing to object to the Attorney General's representation of the defendant under P.O.L. §17 because plaintiff can not demonstrate that he has sustained special damage, different in kind and degree from the community in general, by the Attorney General's representation), affirmed, 249 A.D.2d 1003 (4th Dep't 1998). As in

Sassower v. Signorelli, 99 A.D.2d 358 (2d Dep't 1984), the respondent here is entitled to representation and the Attorney General is statutorily authorized to defend this proceeding. Exec. L. §63(1). Additionally, the Attorney General is expressly authorized to appear in this proceeding and defend petitioner's constitutional challenges. See CPLR 1012(b); Exec.Law §71.

In any event, this office has made its determination that the Commission is entitled to representation in the CPLR Article 78 proceeding and that it is proper for the assigned Assistant Attorneys General in the Litigation Bureau to do so. In fact, petitioner acknowledges that she was expressly advised on numerous occasions that we were representing the Commission, see e.g. Sassower aff. ¶¶ 20, 81, and that she was later advised by the Attorney General's executive staff that the Office is comfortable with that decision. Sassower aff. ¶¶ 98, 101. No further explanation is necessary nor warranted.

For all the foregoing reasons, petitioner's motion for disqualification of the Attorney General should be denied.

B. Plaintiff's Motion to Vacate Justice Lebedeff's Order Granting Respondent An Extension To Respond To the Petition

It is generally well-settled that a judge does not have the authority to vacate or set aside an order of a judge of co-

ordinate jurisdiction. Powell v. All City Insurance Co., 74 A.D.2d 942 (3rd Dep't 1980). As the Court of Appeals stated Martin v. City of Cohoes, 37 N.Y.2d 162, 165 (1975):

> The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges of courts of co-ordinate jurisdiction are concerned (citations omitted).

In this case, Justice Lebedeff determined that respondent demonstrated sufficient grounds to support its application for an extension to move to dismiss the petition, in lieu of an answer, pursuant to CPLR 7804(f). Her determination is not reviewable by this Court. Such review, if any is necessary, should be made on any appeal from this Court's final judgment to the Appellate Division or, because this is an Article 78, on a motion for leave to appeal this interlocutory order to the Appellate Division. See CPLR 5701(b)(1); Antonious v. Muhammed, 188 A.D.2d 399 (1st Dep't 1992).

Petitioner, nevertheless, asks this Court to vacate or modify Justice Lebedeff's order which granted respondent's application for an extension within which to make its motion to dismiss the petition pursuant to CPLR 7804(f). Petitioner claims

that Justice Lebedeff lacks subject matter jurisdiction to grant respondent's application for an extension of time in the proceeding where she had already recused herself and that, in any event, her jurisdiction was limited to extending respondent's time to serve and file an answer, rather that a motion to dismiss.

However, the only proper venue for a challenge to a Supreme Court Justice's exercise of her subject matter jurisdiction is the Appellate Division. In any event, even if Justice Lebedeff's order was reviewable in this Court, her constitutional, statutory and inherent jurisdiction as a Supreme Court justice authorized her to grant the adjournment that respondent requested in the same proceeding that she recused herself. Additionally, the fact that petitioner does not mention, much less demonstrate, that she was at all prejudiced by the short extension that Justice Lebedeff granted, coupled with the one month extension that this Court granted petitioner in which to reply, supports a finding that the extension should be confirmed in all respects. See Antonious v. Muhammed, 188 A.D.2d at 399 (trial court order granting defendant's application for extension upheld where plaintiff failed to demonstrate any prejudice by reason of the relatively short delay); Matter of Russo v. Jorling, 214 A.D.2d 863, 864 (3rd Dep't) (trial court did not abuse its discretion in excusing a late filing of

three weeks after the statutory deadline where, inter alia, "petitioner has suffered no significant prejudice as a consequence of the modest delay...") lv. to appeal denied, 86 N.Y.2d 705 (1995). Moreover, petitioner demonstrates no prejudice by reason of respondent's filing a motion to dismiss in lieu of an answer, which, notwithstanding petitioner's claim otherwise, is authorized pursuant to CPLR 7804(f).

Indeed, it is well-settled that defaults are not favored and that courts prefer to proceed and resolve issues on the merits. See Crawford v. Perales, 205 A.D.2d 307 (1st Dep't) (a trial court should not grant relief against a State agency before it has filed an answer, unless the failure to answer is intentional and the administrative body had "no intention to have the controversy determined on the merits"), appeal dismissed, lv. To appeal denied, 84 N.Y.2d 987 (1994). Accordingly, petitioner's motion to vacate the extension should be denied.

C. Petitioner's Motion For Sanctions

Petitioner argues that the Attorney General's conduct in appearing and asserting the Commission's defenses in its motion to dismiss is frivolous conduct that warrants the imposition of sanctions. She also seeks sanctions against Assistant Attorney General Olson for applying to Justice Lebedeff for an extension and

for the content of her letter to the Court, dated May 28, 1999. However, petitioner's application for sanctions should be denied.

Initially, it is noted that, because petitioner has failed to designate her sanctions application in the Notice of Motion, such relief may not be granted. See Matter of Barquet v. Rojas-Castillo, 216 A.D.2d 463 (2d Dep't 1995) (vacating trial court order imposing sanctions where movant failed to serve a notice of cross-motion demanding such relief, as required by CPLR 2215). However, despite this procedural defect, petitioner's application should be denied because the Attorney General has not engaged in any frivolous conduct as defined by 22 NYCRR § 130-1.1(a) that would warrant sanctions under 22 NYCRR Part 130-1 or any other sanctions that petitioner seeks.

For the purpose of Part 130-1 of the Rules of the Chief Administrator, conduct is frivolous if: (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. 22 NYCRR 130-1.1[c].

AAG Olson's application for an extension to respond to the petition on behalf of respondent and her May 28, 1999 letter to

this Court requesting a scheduling conference or order is not sanctionable conduct under the aforementioned or any standards. Additionally, in this cases, all of the arguments raised in AAG Kennedy's affirmation and in respondent's memorandum in support of its motion to dismiss are meritorious and fully supported by the referenced caselaw in its memorandum of law. See Respondent's Memorandum In Support of a Motion to Dismiss ("Resp. Mem.").

Nevertheless, petitioner now attempts to rely upon the confusion she has created to say that the Attorney General should be sanctioned because Respondent's Motion to Dismiss has, allegedly, misinterpreted her litigation status and arguments.

For example, petitioner now argues that she is not suing the Commission "as coordinator of CJS" or on behalf of the corporation. She discloses -- for the first time in her opposition to the Commission's motion to dismiss -- that CJA's Director, Doris Sassower, told petitioner that she would "not authorize this lawsuit" and that she "will not be involved in it." Sassower aff. ¶ 117. Doris Sassower's directive notwithstanding, petitioner commenced this proceeding and put CJA in the caption. The petition and blueback list the address for CJA, and petitioner corresponds on CJA stationary.

Petitioner now claims that her reference to CJA in the caption and throughout the petition was merely for the purpose of describing who she is. She asserts that this Article 78 proceeding is commenced by her as an "individual," and that the Attorney General should be sanctioned for raising CPLR 321 as grounds for dismissal.

It is respectfully submitted that the petition, together with the exhibits annexed, support the Commission's view that this proceeding should be deismissed pursuant to CPLR 7804(f) and 3211(a)(3) because it was commenced by a non-attorney pro se petitioner on behalf of a corporation in violation of CPLR § 321. Resp. Mem., Point I at 11-12. However, if, as petitioner now claims, she is suing as an individual, there can be no dispute that, as a non-attorney, petitioner can not maintain this lawsuit pro bono publico, as she again tries to do. See Sassower aff. ¶ 3. Additionally, if she is suing as an "individual," the petition should, nevertheless, be dismissed for all the reasons set forth in the Commission's Memorandum of Law and for the additional reason that petitioner lacks standing to bring this Article 78 proceeding in the nature of mandamus as an individual.

It is well-settled that, in order to maintain an Article 78 in the nature of mandamus, the petitioner must demonstrate that

she made a prior demand for action and the respondent agency failed to act as it was required to do. See, e.g., Austin v. Board of Higher Ed. of City of New York, 5 N.Y.2d 430, 442 (1959). Here, petitioner never made a demand of the Commission as an "individual." Petitioner filed complaints "as Coordinator" of CJA and emphasized that CJA, not petitioner "individually," was the complainant in a letter to the Commission dated December 29, 1998. See Petition, Exh. F-4. Because petitioner never filed a prior demand as an "individual" -- and because CJA's Director does not authorize this lawsuit based upon CJA's complaints to the Commission, see Sassower aff. ¶ 117 -- petitioner has failed to meet a necessary prerequisite to filing this suit as an individual and lacks standing to do so.

Petitioner also argues that Respondent's res judicata and collateral estoppel defenses are "sanctionable" because she is suing as an "individual," and not as the Coordinator of CJA, which "spearheaded" the 1995 proceeding. Sassower aff. ¶ 119. This assertion -- if accepted by this Court -- modifies Respondent's Point II to a limited extent. Accepting petitioner's argument that she and her mother commenced separate proceedings as separate individuals, they are still privies to the same causes of action for res judicata purposes. See Resp. Mem. At 14-16. Indeed,

petitioner reaffirms that she and her mother are "in privity" as she tries, in this lawsuit, to reassert issues concerning the 8 complaints that her mother filed with the Commission and referenced in the prior lawsuit (see e.g., Pet. ¶ Fifty-Third; Pl. Mem. at 39-40), and claims that she has standing to bring this lawsuit to compel the Commission to investigate her claims against Justice Rosenblatt because, in petitioner view, an investigation would lead to Judge Rosenblatt's removal from the bench and that would result in the immediate restoration of her mother's license to practice law. Pet. Mem. at 78-79. If that is so, the parties are in privity and this case is barred by res judicata. If that is not so, then for ther easons set forth in Point III of Respondent's memorandum of Law, petitioner lacks standing to bring this suit.

Finally, petitioner seeks sanctions because the Attorney General has raised defenses of justiciablity, standing and failure to state a claim upon which relief can be granted in Points III and IV of respondent's memorandum. Pl. Mem at 68 - 95. It is respectfully submitted that each of these defenses are meritorious in law and fact, and are supported by a reasonable argument based upon existing caselaw. Indeed, for all the reasons set forth in Respondent's Memorandum, and for the reasons set forth in the July 13, 1995 decision in Sassower v. Commission on Judicial Conduct, NY

Co. Index No.95-109141 (Cahn, J.), see Kennedy aff., Exhibit 2, the petition should be dismissed in its entirety. Further, any and all other relief that is being sought in petitioner's "omnibus motion" should be denied.

CONCLUSION

For all of the foregoing reasons, and for all the reasons set forth in Respondent's Memorandum, petitioner's "omnibus" motion should be denied, respondent's cross-motion should be granted, and the verified petition should be dismissed in its entirety.

Dated: New York, New York
August 13, 1999

Respectfully submitted,

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