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February 11, 1994

Hon. Donald M. Sheraw
Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: M/O Sassower v. Mangano

Dear Mr. Sheraw:

This office represents the respondents in the above-referenced appeal. I respectfully submit this response to your letter of January 28, 1994, inviting the parties' views as to the Court's subject matter jurisdiction over this appeal. See 22 NYCRR § 500.3. It is respondents' position that an appeal as of right, pursuant to CPLR 5601(b)(1), does not lie.

Background

In this article 78 proceeding, petitioner-appellant ("petitioner") sought judgment prohibiting further prosecution of a disciplinary proceeding against her for alleged acts of professional misconduct. Petition ("Pet."), ¶ 2. Petitioner claimed that the disciplinary proceeding was jurisdictionally and constitutionally infirm because the Grievance Committee for the Ninth Judicial District ("Committee") failed to follow the administrative procedures prescribed by the Second Department's Rules Governing the Conduct of Attorneys, 22 NYCRR § 691.4(e). Pet., ¶ 7. Petitioner also sought to have the article 78 proceeding transferred to another Department. Pet., ¶ 2.

Respondents moved to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(a)(5), (7), for failure to state a cause of action and as barred by the statute of limitations. Specifically, respondents argued that the extraordinary remedy of prohibition was unavailable because petitioner had an adequate remedy at law in the underlying disciplinary proceeding, or by way of a motion to confirm or disaffirm a referee's report, on an appeal. The motion also demonstrated that petitioner did not have a clear legal right to the relief sought because the pertinent administrative procedures were

properly complied with and petitioner received adequate notice and opportunity to be heard. In addition, respondents showed that petitioner was not entitled to have the proceeding transferred, because it did not seek relief against respondent Justice Mangano. (A copy of the Memorandum of Law in Support of Respondents' Motion to Dismiss the Petition is annexed as Exhibit 1).

Petitioner then cross-moved for an order: staying prosecution of the disciplinary proceeding; recusing the Second Department; compelling discovery of various documents; granting summary judgment; assessing costs and sanctions; and permitting leave to amend the petition. Respondents submitted a Memorandum in Opposition to the cross-motion, annexed hereto as Exhibit 2.

By a decision, order and judgment dated September 20, 1993, the Appellate Division, Second Department granted respondents' motion to dismiss, denied petitioner's cross-motion, and dismissed the article 78 proceeding on the merits. See Petitioner's Jurisdictional Statement ("Juris. Stmt."), Exhibit A.

The Appeal Should Be Dismissed

Petitioner asserts that she is entitled to appeal as of right because the appeal raises a constitutional issue, namely, that of "due process and equal protection in the context of disciplinary jurisdiction exercised under Judiciary Law § 90." Juris. Stmt., ¶ 9. Petitioner claims that the denial of her motion for recusal in the article 78 proceeding violated her "right to a fair and impartial tribunal." Juris. Stmt., ¶ 27. With respect to this claim, it should be noted that despite the jurisdictional statement's repeated references to "respondent Second Department," the Second Department was not a party to the article 78 proceeding; rather, petitioner named the Hon. Guy Mangano in his capacity as Presiding Justice. As respondents noted below, the article 78 petition sought no relief as against Justice Mangano. In any event, Justice Mangano was not on the panel which decided the article 78 proceeding. Petitioner also asserts that this appeal would raise the issue of an allegedly unconstitutional deprivation of her right to an unbiased hearing officer, based on the referee's alleged status as an "at-will, per diem paid appointee" of the Second Department. Juris. Stmt., ¶ 27. However, petitioner did not raise this claim in the petition or cross-motion below.

Petitioner does not meet her burden of showing that the purported constitutional questions sought to be raised are substantial and decisive of the determination appealed from. M. Cohen & A. Karger, The Powers of The New York Court Of Appeals, §§ 55-57 (1952 ed.). As noted, the issue of the referee's bias was not raised below, and therefore is not presented for review. See, e.g., Matter of Barbara C., 64 N.Y.2d 866 (1985). In addition, the judgment appealed from was not based upon the other constitutional question petitioner

purports to raise on appeal, namely, whether the denial of her recusal motion violated her due process rights.

The judgment below was explicitly grounded on the court's application of well-settled state law to the facts of the case. The court below rejected petitioner's jurisdictional challenge to the underlying disciplinary proceeding based on the unavailability of the extraordinary remedy of prohibition where, as here, petitioner has an adequate remedy at law. The court below held that "[i]nasmuch as the petitioner's jurisdictional challenge can be addressed in the underlying disciplinary proceeding, or by way of a motion to confirm or disaffirm a referee's report, the petitioner is not entitled to the extraordinary remedy of prohibition." Juris. Stmt., Exhibit A. Accordingly, there is no substantial constitutional question directly involved on this appeal. The appeal, therefore, should be dismissed.

Respectfully submitted,



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Assistant Attorney General

JJS:ep

cc: Doris L. Sassower