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DATE:

11-15-07

TO:

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FROM:

LEONARD A. SCLAFANI, ESQ.

RE:

NUMBER OF PAGES (INCLUDING COVER PAGE):

19

IF THERE ARE ANY PROBLEMS, PLEASE CALL 212-696-9880

SPECIAL INSTRUCTIONS:

CITY COURT OF THE CITY WHITE PLAINS  
COUNTY OF WESTCHESTER

-----X

JOHN MCFADDEN

Petitioner

Index #SP1502/07

**NOTICE CROSS-MOTION**

-against-

ELENA SASSOWER

Respondent.

-----X

MOTION BY: Petitioner

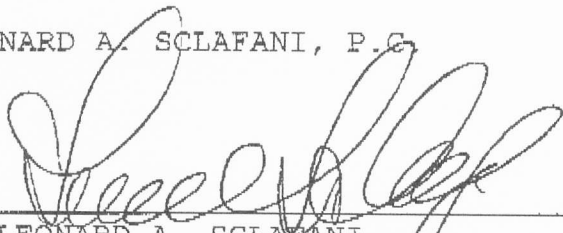
TIME DATE & PLACE OF MOTION: November 16, 2007 at 9:30 A.M.  
White Plains City Court  
77 South Lexington Avenue  
White Plains, New York

SUPPORTING PAPERS: Affirmation of Leonard A. Sclafani dated  
November 15, 2007

RELIEF REQUESTED: An order, granting petitioner's cross-  
motion for re-argument and/or  
consolidation and awarding to petitioner  
such other and further relief as this  
Court deems just, proper and equitable.

Dated: November 15, 2007

LEONARD A. SCLAFANI, P.C.

BY: 

LEONARD A. SCLAFANI  
Attorneys for Petitioner  
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To: Elena Sassower  
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CITY COURT OF THE CITY OF WHITE PLAINS  
COUNTY OF WESTCHESTER

-----X

JOHN MCFADDEN

Index #SP1502/07

Petition,

-against-

ELENA SASSOWER

**AFFIRMATION IN  
SUPPORT OF CROSS-  
MOTION AND  
OPPOSITION FOR  
DISQUALIFICATION  
AND OTHER RELIEF**

Respondent.

-----X

Leonard A. Sclafani hereby affirms under the penalty of perjury as follows:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York. I am a member of the firm of Leonard A. Sclafani P.C., attorneys for petitioner John McFadden in the above captioned matter. As such, I am fully familiar with the facts and circumstances surrounding this matter and hereinafter set forth.

2. I submit this affirmation in support of petitioner's within cross-motion for re-argument of petitioner's motion for summary judgment and the October 11, 2007 Decision and Order that denied it.

3. A copy of the said Decision and Order appears as Exhibit "H" to respondent moving papers herein.

4. I also submit this affirmation in opposition to respondent's application for an order disqualifying Judge Brian Hansbury on the grounds of alleged bias and for "re-argument and renewal" of the October 11, 2007 Decision and Order insofar as it denied respondent's cross-motion for dismissal of the petition on various grounds.

#### Petitioner's Motion For Re-Argument

5. There were two branches of the motion of petitioner that were decided by the October 11, 2007 Decision and Order; to wit, petitioner's motion for a default judgment and petitioner's motion for dismissal of respondent's various "affirmative defenses" and "counterclaims" pursuant to CPLR §3211.

6. In petitioner's reply papers in further support of his motion (part of Exhibit "A" annexed), he withdrew that branch of his motion as sought a default judgment against respondent on the ground that she had not timely answered the petition. The Court, consistent with petitioner's withdrawal, denied that branch of

petitioner's motion.

7. The Court, unfortunately, also denied that branch of petitioner's motion as sought dismissal of respondent's affirmative defenses and counterclaims based solely on the proposition that petitioner supported the motion only by an affirmation of its attorney who, the Court stated, had with no personal knowledge of the facts underlying the motion.

8. In reaching this conclusion, it is submitted, the Court both misunderstood the applicable law and overlooked the fact that petitioner's motion was, in fact, supported not only by the affirmation of petitioner's counsel, who did have personal knowledge of the facts regarding several of respondent's "affirmative defenses" and "counterclaims" but also by the affidavit of petitioner himself, petitioner's verified petition, respondent's own averments, other admissible documentary evidence and by the applicable law.

9. In determining to deny petitioner's motion, the Court relied on the cases of *Nahrebeski v. Molnar*, 286 A.D. 2d 891; *Arriaga v. Laub Co.*, 233 A.D. 2d 244 and *Subgar Realty Corp. v.*

*Gothic Lumbar & Millwork, Inc.*, 80 A.D. 2d 774.

10. In each of these cases, the Appellate Division denied a motion to dismiss on the grounds that factual allegations were not supported by either the affidavit of a person with personal knowledge of the facts "or other evidentiary proof".

11. In the case of petitioner's motion, petitioner submitted the affirmation of his attorney who, unlike the movants in the cases cited by the court, did have personal knowledge of facts necessary for the Court to have dismissed respondent's affirmative defenses and counterclaims.

12. Thus, for example, with respect to that part of petitioner's motion as sought dismissal of respondent's "Second Affirmative Defense"; i.e., that petitioner had not plead in its petition that he had returned to respondent the checks that she had tendered for the two month period following the expiration of her month to month tenancy and before petitioner commenced the instant proceedings, petitioner's counsel did have personal knowledge of the facts relevant to respondent's claim because, inter alia, it was petitioner's counsel who actually returned to

respondent the relevant checks (as counsel's correspondence with respondent annexed as Exhibits to his affirmation established).

13. Moreover, to the extent that there were any allegations of fact in petitioner's counsel's affirmation about which counsel had no personal knowledge, petitioner also submitted the affidavit of petitioner, himself, who did have personal knowledge of those facts.

14. Petitioner, in his affidavit, affirmatively attested that he read the affirmation of his counsel, that he knew the facts and allegations set forth therein to be true of his own personal knowledge and that petitioner was incorporating those facts and allegations set forth in his counsel's affirmation by reference into his own affidavit as fully and completely as if they were each and all set forth fully in petitioner's affidavit.

15. Petitioner also supported his motion by and through the submission of "other evidentiary proof" in the form of such documentary evidence as: a) affidavits and other proofs of service of the notice of petition and petition on respondent in this matter; b) correspondence from petitioner's counsel to

respondent evidencing the return to respondent of her rent checks for the period following the expiration date of her tenancy until petitioner commenced the instant proceedings and obtained an order of the Court permitting him to accept respondent's use and occupancy without prejudice to his claims; and c) the opinions, and the Decisions and Orders of the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States in the case of *Sassower v. Field et al*, which cases established that the Board of Directors of petitioner's Coop Corporation had not discriminated against respondent in determining to refuse their consent to the sale of petitioner's coop apartment to respondent.

16. Petitioner also submitted true copies of his stock and lease for his apartment and a Decision of this Court in the case of *McFadden v. Sassower*, Index #651/89 pursuant to which this Court held in abeyance a determination of a motion for summary judgment that petitioner had made in that case pending the outcome of the above cited federal litigation.

17. Lastly, petitioner cited legal authorities that



supported his motion for dismissal of respondent's various "affirmative defenses" and "counterclaims".

18. With respect to some of the "affirmative defenses" and "counterclaims" that petitioner challenged in his motion, the facts necessary for the Court to have adjudicated petitioner's motion on its merits were admitted by respondent and/or were not in dispute; adjudication of them, therefore, turned not on issues of fact but on application of the law as cited in petitioner's moving papers. See, for example, that branch of petitioner's motion as sought dismissal of respondent's defense of "equitable estoppel" on the ground that the facts as respondent alleged them to be failed to support the defense as a matter of law.

19. Because, it appears, the Court overlooked the fact that petitioner's counsel's affirmation set forth facts about which petitioner's counsel did, himself, have personal knowledge, and which facts were, themselves, supported by documentary evidence and because, it appears, the Court also overlooked the fact that petitioner's motion was also supported by the affidavit of petitioner who had personal knowledge of those facts set forth in petitioner's motion about which petitioner's counsel may not have

had personal knowledge as well as other evidentiary proofs and legal authorities submitted by petitioner, and, lastly, because the Court apparently misunderstood or misapprehended the applicable law in denying petitioner's motion in that the Court, apparently, did not understand that, where a motion to dismiss is supported by evidentiary proof or raises issues of a purely legal nature where the facts as respondent pleads them are either not in dispute or are assumed to be true for the purposes of the motion, the motion may not be dismissed solely because it is supported by the affirmation of movant's counsel, re-argument of that branch of petitioner's motion as sought dismissal of respondent's various "affirmative defenses" and "counterclaims" is both warranted and appropriate.

#### Respondent's Motion to Disqualify Judge Hansbury

20. When all of the froth is blown from the surface of that portion of respondent's application as seeks disqualification of Judge Hansbury on the grounds of actual bias, what is left is nothing more than respondent's pique, expressed in vitriolic hyperbole, that Judge Hansbury denial respondent's cross-motion for dismissal of the petition and for relief in this matter.

21. Assuming solely for the purpose of argument herein that the Court had erred in its denial of respondent's cross-motion, this circumstance would not, itself, support a motion for disqualification of the judge that decided the cross-motion.

22. The law in this State is clear that neither the formation of an opinion on a question of law nor judicial rulings in a litigation however erroneous they may be constitute grounds for a charge of bias or prejudice on a part of a judge. *Weiner v. Savarese*, 109 N.Y.S. 2d 14, app. dismissed (AD) 112 N.Y.S. 2d 772; *People v. Byrne*, 163 N.Y.S. 680. See also *Ortiz v. New York*, 136 Misc. 2d 500, 518 N.Y.S. 2d 913.

23. On the basis of the foregoing, respondent's application insofar as it seeks disqualification of Judge Hansbury in this matter must be denied.

### Respondent's Application for Re-Argument and Renewal

#### a. Respondent's Motion is Procedurally Defective

24. Respondent purports to seek "re-argument and renewal" of her cross-motion for dismissal of the petition; however,

respondent's application is procedurally defective and, accordingly, must be denied.

25. CPLR §2221, the section upon which respondent relies for this branch of her application, requires that "a motion seeking re-argument shall be specifically identified as such" (CPLR §2221(d)(2)) and that "a motion seeking renewal must [also] be specifically identified as such" (CPLR §2221(d)(2)).

26. Where a movant seeks both re-argument and renewal in the same motion as respondent has, the movant must separately identify and support each such branch of the motion. (CPLR 2221(f)).

27. Respondent has failed to do so.

28. Respondent has also failed to include a copy of her original cross-motion and supporting papers as the law requires. *Lower Main St. v. Thomas Re Partners*, N.Y. Journal, April 5, 2005, pg. 19, Col.3 (Sup. Ct. Nass. Co.)

29. Accordingly, her motion cannot be considered, and must

be denied as procedurally defective.

30. To the extent that the Court determines to consider respondent's motion on its merits, nevertheless, the Court must deny it.

**b. The Omission Of Respondent's "Answer and Counterclaims From the Order**

31. To the extent that respondent seeks renewal or re-argument of the October 11, 2007 Order on the grounds that the Order did not include her "Answer and Counterclaims" among the best of documents that it considered in determining the motion, it is respectfully submitted that, because, by her own admission, respondent failed to include her Answer and Counterclaim as an Exhibit to her cross motion, the Court was not obliged to consider it.

32. In this regard, it is submitted, to the extent that the Court did, in fact, consider respondent's Answer and Counterclaims, all that is necessary is for the Court, now, to issue an amended order including respondent's Answer and Counterclaims as one of the documents considered.

c. Respondent's Application is a Rehash of the issues raised on Her Cross-Motion

33. Although respondent styles her application as one seeking both re-argument and renewal, respondent offers no additional facts that were not available for her to present at the time that she made her cross-motion or change of law since that time that would effect the outcome of the decision on that cross-motion as she would be required to present on a motion for renewal.

34. Rather, respondent devotes almost the entirety of that branch of her cross-motion as seeks "renewal and re-argument", to a rehash of the arguments that respondent had previously presented through the cross-motion that the Court denied.

35. Indeed, the largest sections of respondent's instant application consist of respondent's quotations from the papers that she submitted in support of her cross-motion.

36. Notably, she again had failed to include in her application a copy of her Anser and Counterclaims.

37. A motion to re-argument (or to renew) a prior motion may not be utilized to authorize the unsuccessful party to argue again of the precise issues previously determined. *American Trading Co., Inc. v. Fish*, 87 Misc. 2d 193, 383 N.Y.S. 2d 943; *Shell Oil Co. v. New York Tax Commission*, 111 Misc. 2d 460, 444 N.Y.S. 2d 392, modified on other grounds, 91 A.D. 2d 81, 458 N.Y.S. 2d 938, motion denied 60 N.Y. 2d 632, 467 N.Y.S. 2d 355.

38. The arguments raised by respondent through that branch of her application as purportedly seeks "re-argument and renewal" address claims and issues precisely the same as those that were litigated, and that the Court decided, in the prior motion practice that the Court determined by its October 11, 2007 Order.

39. Each of respondent's arguments were addressed in petitioner's moving papers on his prior motion for dismissal of respondent's various "affirmative defenses" and "counterclaims" and in petitioner's opposition to respondent's prior cross-motion for dismissal of the petition.

40. Copies of petitioner's said papers are annexed hereto as Exhibit "A".

41. The Court is respectfully requested to consider those papers as part of petitioner's opposition to respondent's instant application and in support of petitioner's within cross-motion.

Consolidation of the Instant Case with  
other Pending Cases between the Parties

42. In its October 11, 2007 Decision and Order, the Court determined that, to the extent that there are pending any prior cases between the parties involving the subject matter of the instant litigation, those cases would be consolidated with the instant case.

43. Respondent has challenged the Court's ruling in this regard, asserting that the law prohibits the Court from consolidating cases pending before it sua sponte and because other parties to the prior litigations were not notified or given an opportunity to be heard on the matter.

44. To the extent there is any merit to respondent's arguments concerning the lack of application of one of the parties for such relief, petitioner hereby seeks such relief to the extent that Court does not determine to abide the request of



petitioner in his original motion for the Court separately to adjudicate the pending cases forthwith.

45. In this regard, it must be noted that, in the specific case that respondent claims is still pending between the parties, *McFadden v. Sassower*, Index #651/89, all of the papers in connection with a motion made by petitioner for summary judgment granting eviction of respondent from the same premises that are also the subject of the instant proceedings had been submitted and a determination of that motion was held in abeyance pending the outcome of respondent's then pending case against the co-op, and its Board of Managers in federal Court.

46. As petitioner stated in his opposition to respondent's prior motion to dismiss on grounds that there existed a prior pending proceeding, since the federal case has been decided against respondent, all that is now necessary is for the Court to determine petitioner's pending motion for summary judgment, the sole remaining issue of which was whether or not respondent would prevail on her federal case. As the Court noted in the last of several decisions rendered in that case (Ex. "E" to petitioner's reply papers on its prior motion annexed hereto as part of

Exhibit "A"), if respondent was unsuccessful in her federal case, petitioner would be entitled to summary judgment.

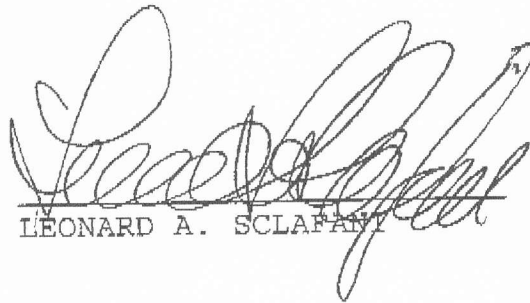
47. Adjudication of petitioner's summary judgment motion in that prior case separate and apart from the instant case would obviate the need for any notice or opportunity of participation to be afforded to any of the other parties in the prior proceedings, at least until the summary judgment motion in the earlier case is adjudicated. That motion was fully submitted.

48. Such would also eliminate a reason for any further delay in the trial of the instant case, which petitioner has asserted proceeds on a different basis than the prior cases in that the agreements underlying respondent's right to remain in occupancy of the subject premises were different in the two cases.

WHEREFORE, your affirmant on behalf of petitioner respectfully requests that petitioner's within cross-motion be granted, that respondent application for disqualification, renewal and re-argument be denied in its entirety and that petitioner be awarded such other and further relief as this Court

deems just, proper and equitable.

Dated: November 15, 2007  
New York, New York



LEONARD A. SCLAFANI