CITY COURT OF THE CITY WHITE PLAINS
COUNTY OF WESTCHESTER

- -X

JOHN MCFADDEN

Petitioner

Index #SP1502/07

NOTICE MOTION

-against-

ELENA SASSOWER

Respondent.

- -X

MOTION BY: Petitioner

TIME DATE & PLACE OF MOTION: August 27, 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 with supporting Exhibits dated August 23, 2007

RELIEF REQUESTED: An order, for a default judgment against respondent or other relief due to respondent's failure timely to respond to the petition or to pay Court ordered use and occupancy, or, in the alternative dismissal of respondent's "affirmative defenses" and "counterclaims" pursuant to CPLR §3211 together with such other and further relief as this Court deems just, proper and equitable.

Dated: August 23, 2007

LEONARD A. SCLAFANI, P.C.

BY: _____

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To: Elena Sassower
16 Lake Street - Apt 2C
White Plains, New York 10603

CITY COURT OF THE CITY OF WHITE PLAINS
COUNTY OF WESTCHESTER

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JOHN MCFADDEN

Petition,

-against-

ELENA SASSOWER

Respondent.

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Index #SP1502/07

AFFIRMATION IN SUPPORT OF A DEFAULT JUDGMENT AND OR STRIKING RESPONDENT'S DEFENSES AND COUNTERCLAIMS

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 referenced matter.

2. I submit this affirmation in support of petitioner's within motion for a default judgment against respondent or such other relief as the Court deems appropriate as a result of respondent's failure timely to answer or otherwise move with respect to the petition herein and/or to pay Court ordered use and occupancy. To the extent that such relief is not granted, I submit this affirmation in support of petitioner's within motion

for dismissal of respondent's "affirmative defenses" and "counterclaims", pursuant to CPLR §3211 on the grounds that the said "affirmative defenses" and "counterclaims" fail to state legally sufficient defenses and/or counterclaims.

3. The instant holdover proceeding was commenced by petitioner, John McFadden on July 2, 2007. A copy of the petition herein is annexed hereto as Exhibit "A".

4. Respondent was duly served with a petition and notice of petition on July 9, 2007 as per the affidavit of service of Martin Lichtig annexed hereto as Exhibit "B".

5. Pursuant to the notice of petition, the hearing at which respondent was required to appear and at which time respondent was required to file and serve her answer herein was set for July 16, 2007 at 9:30 a.m.

6. At the call of the Court's calender on that date and time, respondent did appear; however, respondent did not file or serve her answer or otherwise move with respect to the petition as required

7. Instead, respondent requested an extension of her time do so.

8. Respondent had handed up to the Court, during the proceedings, a documents which she asserted was her response to the petition. She represented that she required time to make minor edits and additions to the papers.

9. After some discussion on the matter, the Court ruled that respondent was to respond to the petition by service upon counsel for petitioner of her papers so that counsel would receive them on or before July 29, 2007 so that counsel could study them before he set off for a vacation out of the country that evening.

10. The Court also directed that respondent pay to petitioner use and occupancy for the months of June and July, 2007 and that petitioner could accept said payment without prejudice.

11. Your affirmant had advised that Court that respondent had tendered to petitioner checks for those months but that the

tender of those checks had been rejected by petitioner and promptly returned to respondent, upon your affirmant's direction.

12. Your affirmant has personal knowledge that the checks were, in fact, returned to respondent because, in accordance with my instructions to petitioner, petitioner, on receipt of the checks, delivered them to me and I, in turn, forwarded them to respondent under cover of my correspondence.

13. Annexed hereto as Exhibit "C" are my letters to respondent under cover of which respondent's checks for use and occupancy for the months of June and July, 2007, were rejected by petitioner and returned to respondent.

14. Notwithstanding the Court's ruling, respondent did not pay the said use and occupancy. Instead, by letter dated July 20, 2007 (a copy of which is annexed as Exhibit "G-3" of respondent's answer), filled with vitriol, revisionist history and personal attacks, accusations and innuendo against your affirmant, respondent attempted to re-litigate the Court's ruling and requested permission to deduct $60.00 from the amount of use

occupancy that she was required to pay as recourse for what she claimed was the cost of placing "stop payments" on her two earlier rejected and returned checks.

15. To your affirmant's knowledge, the Court has not granted respondent's request or amended its prior ruling.

16. As of the date hereof, respondent has failed to tender use and occupancy for the months of June and July, 2007 as the Court had ordered with or without the deduction that she requested the Court to approve.

17. As a result, respondent is in violation of the Court's order of July 16, 2007.

18. On the basis of the foregoing, petitioner submits, respondent's answer, belatedly served as hereinafter set forth, must be stricken and a default judgment or such other relief as the Court deems appropriate, granted to petitioner.

19. Not only did respondent fail to pay use and occupancy as per the Court's ruling, but she also failed to serve or file any

response to the petition so that counsel for petitioner would receive it on or before July 29, 2007 as the Court had directed.

20. Instead, once again, respondent chose, inappropriately, by a letter to the Court dated July 26, 2007, again filled with vitriol and personal attacks and accusations against your affirmant, to request a further extension of her time to respond to the petition until August 20, 2007. (Exhibit "G-14" of respondent's answer)

21. Forced to respond to respondent's inappropriate correspondence in order to prevent any impression that the Court might have drawn that petitioner's failure to respond was the product of his lack of opposition to respondent's requests or admission of the truth of the contents of respondent's letters, your affirmant responded by letter to the Court dated July 26, 2007 (Exhibit "D") setting forth petitioner's objections to respondent's request.

22. As of today's date, to your affirmant's knowledge, the Court has not granted respondent's request.

23. Accordingly, respondent was required to respond to the petition herein so that counsel would receive her response on or before July 29, 2007 as per the Court's July 16, 2007 Order.

24. Respondent failed to do so.

25. Instead, it was not until August 21, 2007 that respondent served, by mail, her answer to the petition. The Answer was not actually delivered to your affirmant's office until late afternoon on August 22, 2007.

26. As a result, Respondent's service of her answer was untimely.

27. It is respectfully submitted that respondent's failure to serve her answer or otherwise move with respect to the petition within the time set by the Court was willful, intentional, contumacious and intended to stall, delay and frustrate the orderly administration of the proceedings herein.

28. Respondent was provided more than ample time to have timely responded to the petition herein.

29. This is particularly so when it is considered that, as of July 16, 2007, respondent had already prepared a legnthy response to the petition and had advised the Court that the document required only minor edits.

30. Respondent's letter provided no legitimate basis for the extension that she sought, nor can respondent provide such a basis now.

31. Even had the Court granted petitioner's request for additional time until August 20, 2007 to serve her response to the petition, she, nevertheless, would have been in default because her answer was not given out for service until August 21, 2007 and was not delivered until August 22, 2007.

32. As a result of the foregoing, respondent's answer must be stricken and a default judgment for the relief requested in the petition must be granted.

Respondent's First Affirmative Defense Must Be Stricken

33. Respondent asserts that the petition must be dismissed

because of "prior eviction proceedings against respondent in White Plains City Court under Index #504/88 and #651/89, the latter of which [respondent's claims] remains open."

34. Assuming arguendo that such were true, such would provide no basis for dismissal of the petition.

35. The prior eviction proceeding that respondent claims is "open" sought eviction of respondent as a holdover under a written occupancy agreement contained in a contract of sale for the subject premises, a coop apartment, the term of which had expired by its terms in 1987 when the coop board refused to consent to the sale of the apartment to petitioner and her mother.

36. As the petition herein plainly sets forth, the instant proceeding seeks eviction of respondent as a holdover upon the termination of the term of a month to month agreement between petitioner and respondent made subsequent to the end of the term of the written occupancy agreement. Here, petitioner asserts, and respondent has admitted, in open Court and in her correspondence annexed to her answer, that, in April, 2007, she

was served with a written notice stating that petitioner had elected to terminate respondent's tenancy as of May 31, 2007. See, for example, paragraph "37" of respondent's answer and respondent's April 29, 2007 letter to petitioner which is annexed as Exhibit "G-9" thereto.

37. Because the claims in the instant proceeding are different than those in the prior proceeding cited by respondent, even were it the case that the prior proceeding remained open, such would not bar the instant proceedings.

38. Accordingly, respondent's "First Affirmative Defense" must be stricken.

Respondent's Second Affirmative Defense Must Be Stricken

39. Respondent asserts that the petition herein must be dismissed because petitioner did not allege in the petition that he had returned the checks that respondent has tendered for the months of June and July, 2007 as above described.

40. It is respectfully submitted that no such allegations are required to sustain a holdover petition.

41. Petitioner did, however, expressly allege that he had not received payment for the June and July rents. This was so because petitioner refused to cash the checks that respondent had sent to him and, therefore, had never received payment of them.

42. Moreover, as is set forth and demonstrated above, petitioner did not accept any payments from respondent after the date on which respondent's tenancy terminated and/or before the instant proceedings were commenced.

43. Respondent has not alleged, and can not demonstrate, that either of her two checks was accepted or negotiated by petitioner, because they were not.

44. As Exhibit "C" annexed hereto demonstrates, the petition herein was filed on July 2, 2007. Respondent check for July is dated June 30, 2007 and was sent to petitioner by regular mail.

45. It was not received until after the date that the

proceeding herein was commenced, and it was returned promptly to respondent on July 7, 2007.

46. Respondent's check for June dated May 31, 2007 was received by petitioner through the mails in early June and was returned to respondent on June 7, 2007.

47. To the extent there exists a body of law which provides that the acceptance of "rent" after the expiration of the term of a lease but before summary holdover proceedings are commenced requires dismissal of a holdover petition (see, for example, *Connecticut Investors Corp. v. Strasser*, 14 Misc.2d 1061, 180 NYS.2d 180 (1958), in the case at bar, petitioner did not accept the tender of respondent's checks but, promptly returned them to her.

48. Significantly, respondent, herself, identifies her tender of the two checks in question as payment for "use and occupancy" and not for rent. Accordingly even had petitioner accepted and cashed respondent's checks and, therefore, "received" the payment for which they were intended, such would not have created a new month to month tenancy or served as a

basis for dismissal of the petition herein.

49. Since, what respondent tendered, by her own admission, was not "rent" but "use and occupancy", respondent cannot be heard to argue that she had any doubt as to whether petitioner had determined to permit her to remain in possession of the subject premises despite service of his Notice to Quit.

50. Accordingly, respondent's "Second Affirmative Defense" must be stricken.

Respondent's Third Affirmative Defense Must Be Stricken

51. Respondent claims, by her "Third Affirmative Defense", that the Court lacks subject matter jurisdiction over the proceeding, because the October 30, 1987 "temporary occupancy agreement" into which respondent had entered with petitioner provides that "in no way do the parties intend to establish a landlord-tenant relationship".

52. Petitioner's claim is unavailing as a matter of

undisputed fact and as a matter of law.

53. In the first instance, as petitioner affirmatively sets forth in his petition, and as is also above discussed, petitioner herein seeks eviction of respondent as a month to month tenant under an agreement made between petitioner and respondent subsequent to the expiration of the term of the October 30, 1987 occupancy agreement, and not under that October 30, agreement.

54. Notably, the monthly amounts that respondent admits that she had been paying as of the commencement of these proceedings were $1,660.00 per month while the "temporary occupancy agreement" in question called for payment of only $1,000.00 per month. Respondent concedes that the increase was as a result of agreements between the parties made long after the respondent's right to remain in occupancy of the premises under the occupancy agreement had expired and long after the contract containing the said agreement was cancelled.

55. As is evident from respondent's answer and respondent's failure to deny the allegations of paragraph "6" of the petition herein, the temporary occupancy agreement referred to by

respondent in her "Third Affirmative Defense" was part of a written contract of sale entered into by petitioner as seller and respondent and her mother, Doris Sassower, as purchasers. The contract, at paragraph "17" provides, expressly, that the agreement "can not be changed, discharged or terminated orally.

56. It was also expressly made subject to the coop board's approval of the sale.

57. Assuming arguendo that petitioner was proceeding on the basis of a claim that respondent was a holdover under the written temporary occupancy agreement contained in the October 30, 1987 contract annexed to respondent's answer as petitioner alleges, and not under the parties' subsequent agreement, as the petitioner alleges, then, even if no "landlord-tenant relationship" existed between the parties by virtue of the provision in the contract to the effect, such would not bar the instant proceedings or render them jurisdictionally defective.

58. RPAPL §713 specifically provides that a special proceedings may be maintained by the a vendor against a vendee under as contract of sale, the performance of which is to be

completed within ninety days after its execution, where the vendee is in possession of all or part of the premises and has defaulted in the performance in the terms of the contract of sale and remains in possession without permission of the vendor.

59. In the instant matter, the contract of sale set a closing date of sixty days from the date of the contract's execution. Respondent remained, and remains, in possession of the premises that were to have been sold under the contract despite that the contract was conditioned on the approval of 16 Lake Street Owners, Inc., the coop corporation, which approval was denied.

60. Under the occupancy agreement, respondent was to have vacated the premises in such event, but she failed and refused to do so.

61. Respondent now is in possession of the premises without the permission of petitioner; petitioner having demanded that respondent vacate the premises on or before May 31, 2007.

62. Thus, whether or not the instant proceedings are

pursuant to claims under the written occupancy agreement as petitioner claims or pursuant to those that respondent argues they are; to wit, as a result of petitioner's termination of a subsequent agreement under which petitioner and respondent had a "landlord-tenant" relationship, petitioner has the right to maintain these proceedings and the Court has subject jurisdiction over them.

63. As a result, respondent's "Third Affirmative Defense" must be dismissed.

Respondent's Fourth Affirmative Defense Must Be Stricken

64. Respondent claims that the petition must be dismissed because respondent's mother, Doris Sassower, who was a party to, and signatory, of the October 30, 1987 contract of sale, is a necessary party to the proceeding.

65. There is no merit to this contention.

66. There is no question that Doris Sassower was never an

occupant, or in possession, of the subject premises; nor does respondent allege that she is now, or ever was.

67. Although she was a signatory to the original contract of sale and occupancy agreement, she did not assume occupancy of the premises but, at all times, lived elsewhere.

68. As above set forth, petitioner's claim herein seeks removal of respondent as the only person in possession of the subject premises as a result of the expiration of the term of respondent's tenancy under an agreement reached between petitioner and respondent only after the term of the written temporary occupancy agreement expired.

69. The correspondence and communications between the parties included in respondent's own answer herein make it clear that the only parties to the various agreements relating to respondent's temporary possession and occupancy of the subject premises as of that time and for at least the last twelve years were petitioner and respondent.

70. Accordingly, respondent's "Fourth Affirmative Defense"

must be dismissed.

Respondent's Fifth Affirmative Defense Must Be Stricken

71. Respondent's "Fifth Affirmative Defense" purportedly sounding in "equitable estoppel" and "unjust enrichment" must be dismissed.

72. The allegations set forth in respondent's answer in support of these purported defenses make clear that respondent's allegations do not satisfy the elements of such claims or defenses.

73. The essential elements of equitable estoppel are: 1) an act by the party charged constituting concealment of facts or false misrepresentation; 2) the intention or expectation by the party charged that such will relied upon by the other party; 3) an actual or constructive knowledge of the true facts by the wrongdoer; and 4) reliance by the innocent party causing him to change his/her position to his/her substantial detriment. *Gratton v. Divo Realty Co.*, 89 Misc.2d 401, 391 NYS.2d 954, aff'd

63 AD.2d 959, 405 NYS.2d 10001 (2nd Dept, 1977).

74. Respondent's allegations in support of her defense of equitable estoppel fail to satisfy any of those elements.

75. It is apparently respondent's claim that petitioner should have been required to complete the sale of his coop apartment to her despite the coop board's refusal of approval of the sale and despite that she was unsuccessful in her litigation against the Board and others seeking relief from that refusal.

76. Respondent claims that petitioner should be equitably estopped from bringing these proceedings on the basis of his failure to completer the sale.

77. However, estoppel may not be invoked to compel performance of an act which is beyond the power of the other party to perform. *Ossining v. Larkin,* 5 Mic.2d 1024, 160 NYS.2d 1012.

78. Moreover, where a contract governing the respective obligations of the parties is made, no claim can be brought

seeking enforcement of rights other than those set forth in the contract under a theory of an "implied contract".

79. Here, petitioner was unable to complete the sale of his apartment to respondent because 16 Lake Street Owners Inc., the coop corporation, refused to approve respondent's purchase and the contract of sale provided that it, and petitioner's obligation to sell the premises to respondent, were expressly conditioned on the coop board's approval of the sale.

80. Respondent alludes to her five years of litigation over the matter in her "affirmative defense" and elsewhere in her answer; however, she fails to concede that not only were she and her mother unsuccessful in the litigation but respondent avoided paying over ninety thousand dollars in monetary sanctions that were assessed against her mother only because the Court recognized that she was, at the time, destitute. (See Exhibit "E").

81. Respondent's defense of "unjust enrichment" also must fail in that, in the first instance, respondent's allegations make clear that petitioner was never unjustly enriched. The only

monies that he received were those that respondent agreed by her acts and words were fair and reasonable for her month to month use, enjoyment, occupancy and possession of the subject premises.

82. The essential inquiry in determining the merits of any claim for unjust enrichment is whether it is against equity and good conscience to permit one to obtain what is sought to be recovered. *Paramount Film Distributing Corp. v. State*, 30 NY.2d 415, 334 NYS.2d 388, remittiture amd 31 NY.2d 678 336 NYS.2d 911 (1972).

83. In the case here, any such inquiry must be decided in favor of petitioner. Respondent entered into occupancy of the subject premises under a "temporary occupancy agreement" that was a part of a contract of sale of the premises subject to the approval of the sale by the coop corporation that owned the building in which the subject premises are situated.

84. When the coop corporation refused to grant its approval of the sale, respondent engaged in a litigation against the coop corporation in a manner, and raising claims, that the United States District Court for the Southern District of New York found

were frivolous enough to result in the imposition of more than ninety thousand dollars in sanctions. (Exhibit "E")

85. Despite the express terms of the contract and the temporary occupancy agreement therein, respondent failed and refused to remove herself from the subject premises. During the pendency of her litigation, she paid use and occupancy in the amount of $1,000.00 per month.

86. At the conclusion of the litigation, she continued to refuse to remove herself from the subject premises.

87. Exhausted both mentally and financially from the litigation, petitioner took no action to remove respondent from the premises at that time.

88. Instead, as the petition herein sets forth, the petitioner allowed respondent to remain in possession of the premises on a month to month basis in exchange for the payment of varying amounts of rents as, from time to time, the parties agreed.

89. Equity requires clean hands.

90. Petitioner was not unjustly enriched.

91. Here, respondent's hands are anything but clean.

92. Respondent's defense is also barred by CPLR §213 as set forth hereinafter.

Respondent's Sixth Affirmative Defense Must Be Stricken

93. Respondent attempts to plead a defense of "detrimental reliance"; however, the factual allegations made by respondent in support of her claimed defense fail to support her defense.

94. Moreover, the acts and actions ascribed to petitioner by respondent in support of her claimed defense having occurred almost twenty years ago, petitioner's claimed defense herein is barred by the applicable statute of limitations; to wit, CPLR §213.

Respondent's Seventh Affirmative Defense Must Be Stricken

95. For the same reasons that respondent's "Fifth" and "Sixth" "Affirmative Defense" must be dismissed, so to her "Seventh Affirmative Defense" purportedly sounding in "implied contract", "detrimental reliance" and "fraud" are meritless and are barred by the statute of limitations and must be dismissed.

96. None of the rambling allegations plead by respondent in support of her "Seventh Affirmative Defense" bears any relationship to, or provides any basis for, any of the defenses that she purports to plead.

97. As is, apparently, respondents wont, respondent simply fails to acknowledge the objective facts documented by Court decisions and the exhibits annexed to her own answer surrounding her current circumstances. Instead, she attempts to re-litigate matters already decided in the prior litigations that she lost to which she, herself alludes in her answer.

98. Respondent's allegations are so far removed from any claim or defense sounding in "implied contract", "detrimental

reliance" or "fraud" that any detailed analysis of her allegations in the context of such claims or defenses is impossible.

99. Respondent cites no specific representations allegedly made to her by petitioner that she claims were false or misleading; nor does she cite any act of petitioner that she claims could reasonably have implied an agreement by petitioner to do something or to provide something to respondent that he did not do or provide and on which respondent reasonably could have relied in acting to her detriment.

100. Moreover, respondent fails to provide any indication as to how she acted to her detriment.

101. Rather, she specifically alleges that she relied only on "petitioner's good faith" when she agreed to pay the rent increases that petitioner demanded from time to time for her use, enjoyment, possession and occupancy of the premises.

102. She also alleges that after she lost her federal litigation against the coop, petitioner "fostered in respodnent

the belief that he was honoring the terms of the October 30, 1987 occupancy agreement" essentially by failing, then, to move to evict her and by collecting monthly rent from her.

103. However, the occupancy agreement did not provide for respondent to remain in possession of the premises indefinitely; and, in any event, its term had long since expired once the coop board refused to approve respondent's purchase and the closing on the contract of sale did not occur.

104. Accordingly, respondent could not have reasonably expected that petitioner would sell her the premises even if it could be found that the mere failure of petitioner sooner to seek to evict her after she lost her litigation and to demand that she pay reasonable amounts as long as she continued to enjoy the possession and occupancy of petitioner's premises implied an agreement on his part to sell respondent the premises.

105. Therefore, respondent's defenses of "implied contract" "detrimental reliance" and fraud cannot be sustained or as matter of law and must be dismissed.

Respondent's Eighth Affirmative Defense Must Be Stricken

106. Respondent "Eighth Affirmative Defense" is nothing short of frivolous.

107. The allegations set forth by respondent in support of her claimed defenses of "extortion" and "malice" constitute little more than evidence of respondent's unreasonable pique that petitioner did not see fit to answer questions that respondent unreasonably, at various times, posed to him, and to which he had no duty to respond and/or refused to accept various offers that respondent had made to purchase the subject premises after it was clear that no such sale was possible, none of which he was required to accept. This is particularly so in light of the history of respondent's dealings in this matter.

Respondent's Ninth Affirmative Defense Must Be Stricken

108. Equally frivolous is respondent's "Ninth Affirmative Defense".

109. Respondent's allegations in support of her defense of "breach of covenant of good faith and fair dealing" show nothing other than petitioner's justified wariness in dealing with respondent, who had engaged in five years of frivolous litigation and tied up petitioner's apartment and who had exhausted petitioner mentally, physically and financially in those litigations, but who still remained in possession of respondent's apartment even after she lost the litigation and was sanctioned for her frivolous conduct.

110. Respondent's defense of lack of fair dealing is nothing short of absurd.

Respondent's Tenth Affirmative Defense Must Be Stricken

111. Respondent's "Tenth Affirmative Defense" is no less absurd than those that it precedes.

112. Respondent's allegations in support thereof, even if true, fail to support any of respondents claims of "fraud" "retaliatory eviction" or "intentional infliction of emotional

distress."

113. Assuming arguendo that all of the allegations set forth in respondent's pleadings were true, such would evidence only that respondent was a difficult tenant who failed and refused to act reasonably.

114. Once again, respondent's allegations are so far removed from any of the type that could support any of her claimed defenses that analysis of her allegations in the context of such defenses is impossible.

115. Respondent's "Tenth Affirmative Defense must be dismissed as patently frivolous.

Respondent's First Counterclaim Must Be Dismissed

116. Respondent's "First Counterclaim" is premised on the proposition that petitioner had "a meritorious federal action against the coop and other defendants" notwithstanding the determination of the United States District Court for the

Southern District of New York that respondent's claims was frivolous and notwithstanding that that determination was affirmed by the United States Court of Appeals for the Second Circuit. (Exhibit "E")

117. Thus, respondent's "First Counterclaim" is baseless and must be dismissed.

Respondent's Second Counterclaim Must Be Dismissed

118. Respondent's "Second Counterclaim" sounding in "fraud" is nothing more than a rehash of the same claims that respondent asserts to support her various affirmative defenses of "fraud".

119. As above set forth, those defenses are unavailing because respondent's factual allegations fail to support any of the elements necessary for her to prevail on any claim of fraud.

120. Such being the case, respondent "Second Counterclaim" must be dismissed.

Respondent's Third Counterclaim Must Be Dismissed

121. The same is true with respect to respondent's "Third Counterclaim".

122. Here, respondent's claim appears to be that respondent is guilty of "fraud", "intimidation" and "wrongful eviction" when, having allegedly promised to discuss the sale of his apartment to her in 2006 upon her agreement to allow the coop's workers into the apartment to make needed and necessary repairs following a flood, he ultimately determined, after discussion with respondent and her sister that he did not wish to sell respondent the apartment.

123. Respondent does not allege that petitioner actually agreed to sell the apartment to her at any time other than under the 1987 contract; and in fact, such an agreement would have been futile because the coop board, whose approval of the sale was required, had already refused its approval.

124. Additionally, such an argument would be easily refuted by the correspondence between the parties that respondent

includes as Exhibits "F" and "G" to her answer.

125. Likewise, the correspondence annexed to petitioner's answer at Exhibits "F" and "G" make clear that petitioner fulfilled his alleged promise and committed no fraud against respondent.

126. Moreover, respondent had a legal obligation to allow the coop's workers to repair the damage to petitioner's apartment without petitioner's alleged promise.

127. The facts simply do not support any claim of fraud, "intimidation" or "retaliatory eviction".

128. Respondent's "Third Counterclaim must, therefore, be dismissed.

Respondent's Fourth Counterclaim Must Be Dismissed

129. Perhaps the most frivolous of all of respondent's "Affirmative Defenses" and "Counterclaims", is respondent's

"Fourth Counterclaim" in which she seeks dismissal of the petition and one million dollars in compensatory and punitive damages based upon her claim that the petition is based "on falsification and omission of material facts", none which she identifies.

130. Petitioner respectfully submits that, to the extent that any objective facts can be gleaned from respondent's vitriolic answer and the documents included therewith, it is that each of the allegations in the petition are true and that petitioner is entitled to the relief that he seeks.

WHEREFORE, your affirmant on behalf of petitioner respectfully requests that respondent's answer be stricken and a default judgment be rendered against her or, in the alternative, that such other relief be granted as a result of respondent's failure and refusal to pay Court ordered use and occupancy and timely to file her response to the petition herein. To the extent that the Court determines that such relief should not be granted, you affirmant, on behalf of petitioner, respectfully requests that each of respondent's "Affirmative Defenses" and "Counterclaims" be dismissed on the grounds that they lack merit

as a matter of law based upon the undisputed facts and documentary evidence surrounding this matter and that petitioner be awarded such other and further relief that this Court deems just, proper and equitable.

Dated: August 23, 2007
New York, New York

LEONARD A. SCLAFANI