SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION -- SECOND DEPARTMENT

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_x

Ruth M. Pollack, pro se and In Propria Persona,

Plaintiff-Appellant,

-versus- **Appellate Division Case No. 11-11394**

Arthur J. Cooperman, Michele

Filosa, “Jane or John Doe(s)”

1 through 99, “Black Corporations”

1 through 10,

Defendant-Appellee.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_x

**BRIEF FOR PLAINTIFF-APPELLANT**

QUESTIONS PRESENTED

1. Whether the trial court (Asher, W. Gerard, J.) erred and abused its discretion in dismissing plaintiff’s complaint under CPLR §§3211(a)(5) and/or (7) as requested by defendants? R. 7.

ANSWER BELOW: The trial court, in effect, answered this question in the negative and granted defendants’ motion to dismiss on other grounds.

1. Whether the trial court (Asher, W. Gerard, J.) erred and abused its discretion in refusing to consider plaintiff’s opposition to the motion to dismiss and her cross-motion to strike defendants’ motions, by its failure to disqualify the New York State Attorney General as defendants’ defense counsel in the underlying action based on a violation of the Separation of Powers Doctrine? R. 7.

ANSWER BELOW: The trial court completely avoided this question and did not expressly rule upon plaintiff’s motion to strike and disqualify or even address the issue.

1. Whether the trial court erred and abused its discretion in depriving plaintiff of the Supreme Court, a court of original jurisdiction, as the jurisdiction in which this case must ultimately be fully heard on the merits?

ANSWER BELOW: The trial court avoided an analysis of this issue and ruled that only the Appellate Division, not the Supreme Court, has exclusive jurisdiction “to determine what constitutes professional misconduct. Pursuant to Judiciary Law §90, the power to remove an attorney from the practice of law and re-admit that attorney is exclusively vested in the Appellate Divisions (*see Matter of Kuriakose*, 206 A.D.2d 481, 614 N.Y.S.2d 577).” R. 7-8.

1. **PRELIMINARY STATEMENT:**

Procedural History in State Trial Court

Plaintiff-Appellant, Ruth M. Pollack, (“Appellant”) an attorney admitted to the Second Department since 1983, filed a summons and complaint against Defendants-Appellees, a) Judicial Hearing Officer Arthur J. Cooperman (“Cooperman”) in his individual capacity, b) Tenth Judicial District Grievance Committee legal counsel Michele Filosa, (“Filosa”) in her individual capacity, c) “Jane or John Doe(s) 1 through 99, (“Jane or John Does”) and “Black Corporations” 1 through 10”, ( Black Corporations”) in their individual capacities. R. 17-18. The complaint contained a brief backdrop of the case for context and clarity. R. 19.

The protections of *Haines v. Kerner* were invoked of the trial court. 404 U.S. 519 (1972) by plaintiff as a *pro se* attorney and an *in properia persona* litigant. R. 18. The trial court erred in refusing to protect plaintiff.

The complaint averred that defendants were believed to have been acting alone and with unknown other parties outside the laws of the United States and State of New York, and outside the authority and color of state law. R. 18.

The action was commenced by filing a summons and complaint, not in equity, on March 10, 2011 in Supreme Court, Suffolk County, New York, [Index No. 11-07871] which is in the Second Department and the Tenth Judicial District of the Grievance Committee. R- 16. Appellant established jurisdiction over known defendants in the complaint. R. 17. Proofs of service were duly filed. R. 28-1and 28-2.

Appellant established proper venue and jurisdiction. R. 17- 18.

Appellant established subject matter jurisdiction under the New York and United States Constitutions. *Id.*

At the time of the filing, Pollack disclosed that she had been reciprocally suspended by the Second Department on June 23, 2009 after suspension in the Eastern district of New York without due process. R. 434-435. Her reciprocal suspension was alleged to have been based on a forty five day suspension followed by a two year suspension in the Eastern District of New York that commenced on December 31, 2008 and consisted of no service of charges, no discovery, no hearing and no due process. It is asked that Judicial Notice be taken of the fact that plaintiff publically testified before the State Senate Judiciary Committee about having been suspended while a witness to official state and federal corruption in the courts on June 8, 2009. R. 25. Senator Sampson Hearings on publicized on the Internet on *YouTube* (June 8, 2009)

Her complaint and all motion papers consistently listed her as a *pro se, in properia persona* litigant, thus seeking all due protections of the Court. *Haines v. Kerner*, 404 U.S. 519 (1972) and progeny. R. 18.

The gravamen of the complaint was human rights and constitutional violations, malicious prosecution in the form of civil harassment, retaliation and negligence, in the context of total deprivation of due process against a bonafied whistle blower. No monetary relief is sought in the complaint as it was not in equity. R. 3, 15. Specific averments were listed in the complaint. R. 20 to 69. Appellant made it patently clear that she had been suspended twice in federal court without due process or proof of guilt, beaten by New York State Court Officers without cause, and was now again being subjected to further punishment by the suspension of her state license by defendants who acted outside the scope of their duties. A mock “hearing” was the vehicle for the next stage of McCarthy-like retaliation.

No discovery from the Appellate Division or Tenth Judicial District was ever provided to Appellant despite her consistent and repeated demands and motions for it pre-hearing. R 269, 270, 293, 315, 427, 455, et *seq*. Jud. L. §90 affords discovery of all materials to a respondent before a hearing or proceeding.

Within both the state and federal courts, Appellant at all times proclaimed her innocence and demanded proof of the claims against her, to no avail. No competent proof was ever produced.

She established her disability from cancer. R. 391.

She established that she was being systemically defamed, beaten, bullied and penalized beyond any penalty appropriate under Judiciary L. §90 by known and unknown actors.

Given the history of her mistreatment, Appellant asked the Court for a declaration that her rights were violated, a restraining order against defendants and their agents, and appropriate ancillary relief.

Appellees Cooperman and Filosa, known defendants, each members of the Judicial Branch, appeared in the court below by the publically funded Executive Branch New York State Attorney General Eric T. Schneiderman, via a “volunteer” Assistant Attorney General. R. 13. It is unclear as to whether or not that attorney took an oath of office to act on behalf of the Attorney General at all or what authority, if any, he as a “volunteer” could have by law. Service of the motion omitted Plaintiff’s post office box by design and thus was not served on Appellant. Defective affidavit of service annexed at R. 14.

The Attorney General filed a motion to dismiss the complaint on behalf of all “defendants” seeking an order pursuant to CPLR§§3211(a)(5) and (7) citing as the basis a) absolute and/or quasi-judicial immunity, b) res judicata, c) collateral estoppel, and d) failure to state a cause of action. R. 9. The Attorney General annexed over four hundred irrelevant, incomplete, prejudicial and unexplained documents from the Tenth Judicial District Committee and federal court as exhibits to its motion. R. 15 - 442.

The Doctrine of Separation of Powers prohibited the Attorney General from appearing in any of the matters Appellant filed in the matters before the federal court; however, in its arrogance and/or ineptness, the State Attorney General, in concert with the Grievance Committee, and with no comment or ruling by the federal courts, defied that doctrine and unlawfully represented Judicial actors. This is seen throughout the 400 some exhibits. R. 15 - 442. *Noto bene*: R. 451 at Para. 27.

The conflict of interest issue was ignored by the Attorney General here in the trial court and in the federal matters in which it injected itself. It cannot ever explain or justify representing both a hearing officer and a prosecuting member of the Grievance Committee in either case. DR5- 105, DR8-101(A)(1)(2), DR9-101, EC8-5. R. 453. Moreover, it asked for an order preventing Appellant from commencing actions without leave of court, another constitutional violation. R. 472.

On April 15, 2011, Appellant filed an affidavit/memorandum in opposition to the motion. R. 443. Appellant relies on her legal and factual averments set forth in detail in the motion practice in the trial court below, in the interests of judicial economy and because her papers were on point and correctly cited and applied the law. Appellant filed an affidavit/memorandum of law in sur-reply to the motion to dismiss. R. 473. This was followed by a motion to strike the papers of the Attorney General on Separation of Powers and conflict of interest bases. R. 479.

**ARGUMENT**

I. THE SHORT FORM ORDER

**A. THE TRIAL COURT (ASHER, W. GERARD, J.) ERRED AND ABUSED ITS DISCRETION IN DISMISSING PLAINTIFF’S COMPLAINT UNDER CPLR §§3211(A)(5) AND/OR (7) AS REQUESTED BY DEFENDANTS**

The Short Form Order appealed herein attempts to set the tone for a negative inference to be drawn against Appellant to prejudice her. By calling her “suspended” up front, it created an automatic inference of guilt. The Court through inadvertence or purposeful aforethought, mischaracterized the complaint too, which was crystal clear and met the standards of pleading of both F.R. Civ. P. §8 and C.P.L.R. §3016. Appellees never claimed that the pleadings were deficiently pled. R. 7. They never moved for a more definite statement.

The trial Court’s order is so terse that it provides little on which to comment. In its many omissions is the critical fact that Pollack, as “a suspended attorney”, was “reciprocally” suspended by the State based on federal allegations. All of the papers submitted by the Attorney General, both in the trial court and in the Southern District omit any copy of charges against appellant. This is because there never were any charges against her for violating her 45 day suspension. The remand orders of Hon. Judges Chin and Crotty make no reference to any charges, yet seem to imply that they existed. In fact, they did not. R. 29-36. The trial court erred in failing to consider the context in which plaintiff commenced this action.

Completely omitted was the manner in which she became “suspended” – suddenly, indefinitely, and without a hearing, discovery or due process. Thus, Pollack’s status was a mischaracterization in the first part of the order. This language and omission in the prologue of the order created a negative inference about her and was prejudicial. She is presumed innocent until proven guilty under the modern heightened standard of attorney disciplinary cases in New York and in federal law*. In re: Kirsten Peters*, Docket No. 09–90098–am [SDNY No. M-2-238] (Second Circuit April 2011, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) (affirming that the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court).

By the words Defendant Cooperman, as “a retired justice of the Supreme Court appointed by the Appellate Division…” created a positive inference for him and omitted the fact that he abruptly replaced, without any explanation by the Court, former Hon. Supreme Court Justice James Gowan. R. 7. Filosa was also simply characterized as “Assistant Counsel….” R. 7. But defendant Filosa was a public employee, likewise a member of the Judicial Branch in her role as prosecutor for the Appellate Division Grievance Committee, who acted outside her role herein.

The trial court then used the term “**unspecified** Jane and John Does and Black Corporations”. *Emphasis added*. R. 7. This superfluous language is prejudicial as in a pleading any Jane and John Does and Black Corporations would by definition and rule be “unspecified” – actually unidentified -- at the pleading stage because their identity is not known to the party at the time of initial pleading. C.P.L.R. §1024.

The prologue then makes a loaded, conclusory statement, “After **unsuccessfully** suing in the United States District Court for the Southern District of New York (“SDNY”), Plaintiff now turns to the state courts seeking the same or similar relief she was denied by the federal courts.” *Emphasis added*. R. 7. Again, through inadvertence or as a result of the confusion created by the Attorney General in its 400 plus pages of incomplete and out of context exhibits, the trial Court erred in making such a statement in its introductory paragraphs. Appellant fully set forth a description of the attachments while preserving her right to object to them as inappropriate, vexatious and intentionally prejudicial in such a motion. The inclusion of the 400 plus documents was clearly done with malice aforethought and intended to prejudice Appellant.

The trial court erred and abused its discretion in accepting as true the allegations of the Attorney General, all hearsay, all inappropriate to the CPLR 3211 motion. Appellant

herein incorporates by reference as if fully duplicated herein to include but not be limited to all arguments and all evidence set forth in her motions in the trial Court. The papers attached to the motion papers below are replete with true statements and evidence of the actions contained in the complaint herein.

The Attorney General intended to and did create the false impression that plaintiff recklessly or intentionally commenced multiple suits in a number of courts about the same parties and about the same issues. It is noted in this Court’s own three lawsuits concerning judicial compensation that similar suits have erupted in the past over compensation between then Governor Mario Cuomo and the Judiciary with extensive litigation. See, *Maresca v. Cuomo*, 64 N.Y.2d 242 (1984) as noted by Judge Pigott in *Maron v. Silver, Larabee v. Governor and Chief Judge v. Governor*, at III. (2010).

Omitted from the trial Court’s order is the fact that Appellant’s one action and two removals of the unconstitutional “Star Chamber” proceeding to federal court by Appellant in the Southern District did not involve the same causes and were never decided on the merits. [[1]](#footnote-1) Both removal petitions were never denied without discovery or any litigation and the instant case was dismissed in the same manner.

This honorable Court must also reverse, remand and perhaps reassign the case based on the prejudicial and biased miss-characterization of Appellant’s litigation is in the next sentence that states: “Plaintiff alleges federal and state claims, contending that Defendants engaged in a **vast conspiracy** of harassment and mail and wire fraud, in violation of her procedural and substantive due process rights and her equal protection rights.” *Emphasis added*. R. 7.

The complaint does not use the word conspiracy at all. Written in simple, plain language, the complaint speaks for itself and stands on its own without having to be dramatized or distorted in this manner.

While the trial court mentioned the statutory grounds relied on by defendant-respondent (“Appellee”), it did so without citation and without any analysis. (R. 7-8.

The order omitted any clear reference to or reliance on the statutes used in the motion. In fact, of the one page short form order, two thirds are a summary, incomplete recapitulation of the applications made by the parties, and only the final one third of the order provides any analysis of the law applied at all. Appellant continues to object to the false characterization of the 400 plus exhibits included in the Attorney General’s motion papers, even if that office is not immediately disqualified.

Even in the Third Department stage of *Maron v. Silver*, Judge Peters, concurring in part and dissenting in part stated that “As the majority notes, since this matter involves a motion to dismiss for failure to state a cause of action (*see* CPLR 3211 [a] [7]), **we must liberally construe the pleadings, grant petitioners the benefit of each favorable inference, and limit our review to a determination as to whether the facts they allege fall within a knowable legal theory** (citations omitted) (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Applying this standard of review, Supreme Court permitted petitioners' separation of powers claim to proceed under two theories: (1) that the diminished actual value of their compensation impacted judicial independence by forcing judges to prematurely abandon their positions and (2) that a motivating force behind stagnant judicial compensation was retaliation for recent court rulings…Given the **early pre-discovery phase of this litigation**, I agree…with Supreme Court that petitioners sufficiently pleaded a viable separation of powers claim.” 2008 NY Slip Op 08573 [58 AD3d 102]

*Emphasis added.*

**B.** **THE TRIAL COURT ALSO ERRED AND ABUSED ITS DISCRETION IN REFUSING TO CONSIDER PLAINTIFF’S OPPOSITION TO THE MOTION TO DISMISS AND HER CROSS-MOTION TO STRIKE DEFENDANTS’ MOTIONS, BY ITS FAILURE TO DISQUALIFY THE NEW YORK STATE ATTORNEY GENERAL AS DEFENDANTS’ DEFENSE COUNSEL IN THE UNDERLYING ACTION BASED ON A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE**

This seminal threshold issue was the most important one in the case, because had it been addressed, defendants would have had to obtain proper counsel. The Court was bound to report the misconduct of the State Attorney in appearing in the first place in not one, but two cases, state and federal.

In stark contrast to the personal, *ad hominen* attack on Appellant’s pleadings, the trial court never mentioned or evaluated the statutory authority miss-used by appellees and never once discusses the lack of merit of its motion to dismiss.

The trial court’s failure to address the undeniable fact that the Attorney General of the State of New York had no standing or right to defend members of the Judicial Branch under settled law and the New York State and United State Constitutions warrants reversal of the order and remand of the case for further proceedings below. The trial court was required to disqualify the Attorney General, deny its motion as inappropriate, and grant Appellant’s motion.

The named defendants must be represented by proper counsel; otherwise the papers submitted must be stricken. As in the Olympics, the Attorney General is disqualified from this game. Compare what occurred in in Appellant’s Article 78 proceeding, *Pollack v. Kiernan, et al,* Index No. 18716/11 (Kramer, Herbert, J.) where the Supreme Court, Kings County exercised its powers and promptly issued an order mandating that the Appellate Division Clerk provide all outstanding file materials to Appellant. The Order dated Nov. 10, 2011 is on file with this Honorable Court. That order was appealed by the Office of Court Administration (“OCA”) -- representing the clerks, members of the Judicial Branch. [[2]](#footnote-2) OCA initially appealed to the Second Department in a motion that was denied by that Court and two orders issued, one transferring the case to the First Department where it resides unperfected, and one ordering the clerks to turn over Appellant’s records to Appellant. OCA has failed and refused to obey a single order to date. It is requested that this Honorable Court take Judicial Notice of these orders, dated January 26, 2012, Second Dept. Docket No. 2009-00948 and the second order dated February 15, 2012, Second Dept. Docket No. 2012-01397. The transfer was pursuant to New York Constitution, article VI, §4(i).

The trial Court erred and abused its discretion when it mistakenly took the escape route of claiming that the Supreme Court that has jurisdiction over the Appellate Division itself on all matters, attorney matters and otherwise, yet does not have jurisdiction over Appellant’s case. As will be developed below, this is not our state’s law and is error that requires reversal and remand.

The trial court erred and abused its discretion in failing to address plaintiff-appellant’s correct averment that the Attorney General of the State of New York is prohibited under the New York State Constitution and United States Constitution) as applied to our government from representing members of the Judicial Branch under any circumstances.

Recently, this issue was the subject of extensive litigation in the ongoing efforts of this honorable Court for over thirteen (13) years to secure a pay increase for the judges and justices of the courts of this State.

Indeed, “[t]his conduct, ruled the Appellate Division, “necessarily denigrated the third branch of government,” constituted a “manifest

affront to the Judiciary’s structural independence,” and “violated…[t]he basic tenet of the separation of powers doctrine”—which is “to promote and maintain the independence and stability of each branch of government.” (Brief of Plaintiff- Appellants –Respondents at 3) (Quoting *Larabee v. Governor of the State*, 65 A.D.3d 74, 78, 84, 89 (1st Dep’t 2009) at fn 9 of brief). 880 N.Y.S.2d 256 (App. Div. 1st Dep't 2009), *aff'd, Maron v.* *Silver,* 2010 WL 605279(N.Y. 2010). *Chief Judge v. Governor, et al*. (Collectively referred to here as the “*Maron* Cases”)

It is of no consequence that the core theme of the Maron cases was that a raise is overdue for our state judiciary. Press releases abound showing former Chief Judge Kaye and Chief Administrative Judge Pfau testifying in support of a pay increase, a humiliating picture of the plight of our judicial branch that has yet to be fully rectified.

The winning argument in the cases was that judicial compensation in New York has long been inadequate and thereby violates the separation of powers created and guaranteed by the State Constitution. The separation of powers arises from the text of the Constitution, which creates three separate and co-equal branches of government: the Legislature, the Executive, and the Judiciary. The doctrine has been reaffirmed by this Court time and again, going back at least a century, when the Court made clear that the separation of powers is necessary “for the preservation of liberty itself.”

Out of these deeply rooted principles arises the proposition that, in order to protect the independence of the Judiciary and its status as a co-equal branch of government, the legislative and executive branches must provide judges adequate compensation. [[3]](#footnote-3)

The point is made in that the case of the judges and justices of the State of New York and Unified Court System were represented by both a private law firm and counsel to the Office of Court Administration. At no time was this branch ever represented by the New York State Attorney General.

The reason for this is that do to otherwise would be to violate the powers clause and as the Chief Judge pointed out later, this was the first time in history that "first decision **by** a state court of last resort to find a violation of the separation of powers doctrine based on a legislature's failure to address, on the merits, the issue of judicial compensation." Judge Jonathan Lippman, Chief Judge New York Court of Appeals, Public Statement Regarding Judicial Compensation Cases (February **23,** 2010), *available at*

http://www.courts. ny.us.gov.

Plaintiff-appellant applied to the Supreme Court for an order striking a motion to dismiss her complaint filed by Defendant-appellant as legally void, unauthorized and unconstitutional. The application was simply based upon the fact that Defendants’ chosen defense counsel, the New York State Attorney General (“Attorney General”) could not, as a matter of law, file the motion it filed because to do so created a conflict of interest on at least three levels. All three levels are constitutional in nature. The argument was and is as follows:

1. **First Conflict of Interest**: The conscious choice of the Attorney General of the State of New York to act as defense counsel of two named agents of the Tenth Judicial Grievance Committee (“Tenth”), not to mention the unknown parties involved, creates the appearance of a conflict of interest. This defense, a *per se* constitutional violation, has the highest public law official in the state in the role of defending at least two (2) defendants with innately conflicting interests. This issue is discussed at length in Plaintiff-appellant’s opposition papers to defendants’ motion to dismiss under CPLR 3211. But the New York State Attorney General has an even more serious problem in the second level of this conflict of interest. Defendant-Appellees cannot argue that it is not a conflict of interest, as it is. Accordingly, we have not only the appearance of conflict, but also the actual innate conflict.

These issues were not addressed by the trial court as a threshold matter. To do so, the trial court would have had to address plaintiff-appellant’s cross motion to strike initially, and grant it. This would have required defendant-appellee’s to obtain separate, independent counsel, before the trial court could rule at all on their motions. Each defendant was named in its individual capacity in the complaint below. However, it is respectfully averred that this approach would have avoided this appeal and provided a simpler solution for the trial court.

In *Pataki v. New York Assembly*, the New York State Court of Appeals held that our courts have the authority to rule on the constitutional boundaries of the three branches of government. 824 N.E. 2d 898, 910-11 (N.Y. 2004) The highest court also expanded the ramifications of that holding to rule prospectively that legislative immunity was not available to the defendants in that case as a shield against any Separation of Powers claims that any of the plaintiff judges may have brought. No individuals were named in the *Larabee* cases, but the point is important. *Id.*

By logical inference, a member of the Judicial Branch, here, defendant-appellees, sued individually, may not use judicial immunity as a shield here either.

1. **Second Conflict of Interest**: Remember, this is an action in equity against defendants in their individual capacities for wrongs committed against plaintiff Pollack as an attorney admitted in the State of New York by the Appellate Division of the Second Department of the Supreme Court of the State of New York, the **Judicial Branch** of the government. The Tenth Judicial District Grievance Committee is part of the Unified Court System of the Appellate Division, and as such, an arm of the **Judicial Branch**. According to the current Official Website of the Unified Court System, the public and bar are told that

**“[e]ach of the three grievance committees in the Second Judicial Department consists of 20 members (16 lawyers and 4 non-lawyers) who are appointed by the court. They are not paid for their work, but nonetheless, they understand the importance of their responsibilities and work diligently to maintain the high standards of the legal profession. The committee is supported by a paid staff of attorneys and investigators who work full time to investigate and, where warranted, prosecute complaints.”**

*Emphasis added*. Thus, the 10th and the Committee itself are directly appointed by and part of the **Judicial Branch** of this State.

In the motion to dismiss, the New York State Attorney, an agent of the **Executive Branch** of the State of New York may not violate the Separation of Powers Clause of the New York State or United States Constitution by acting on behalf of the **Judicial Branch**, here, the Appellate Division. By filing the motion to dismiss plaintiff’s complaint and thus defending the actions of defendants who claim to be acting under color of authority as members of the **Judicial Branch**, the Attorney General undertook to involve itself with substantive issues involving Plaintiff’s license to practice law, her right to earn a living, has maligned plaintiff Pollack and taken a position against plaintiff Pollack. It is not legally empowered to do this. These are state and federal constitutional issues.

Again, this is a civil rights action against at least two known individuals. The New York State Attorney General -- the **Executive Branch** -- was **not** granted authority under the Constitution to act on behalf of the Supreme Court of the State of New York Appellate Division – the **Judicial Branch**.

Separation of Powers is one of the most basic principles that guided the framers of the U.S. Constitution in designing our system of government.  It is axiomatic that the Separation of Powers Doctrine provides the checks and balances between three separate parts of government, each vested with its own powers, unencumbered by the others and subject to the checks and balances to avoid abuse of power. Any powers not specifically enumerated in the Constitution are reserved by the individual citizens. *N.Y. State Constitution*.

The Attorney General, [Executive Branch] cannot check the Judicial Branch. The Appellate Division of the Supreme Court [Judicial Branch] cannot check the Executive Branch. The Judicial Branch does not create the law, it interprets the law. The Executive Branch enforces the law but does not interpret the law. The Legislative Branch creates the law.

In this case, the Attorney General further severely overstepped its powers by involving itself in the instant case by filing a motion to dismiss based on, *inter alia,* immunity, which is an issue of material fact. However, the trial court did not address this serious constitutional matter.

The New York State Attorney General went further by attaching and then relying on select out of context documents from various state and federal courts and other sources to support its *ad hominem* attack on Plaintiff-appellant Pollack and defending other *ad hominem* attacks previously made against her.[[4]](#footnote-4) This is how the **Executive Branch** acted, without authority, to assist the **Judicial Branch** to deprive plaintiff of her license, reputation and livelihood, all in contravention of the New York State and United States Constitutions and Jud. L. §90 since 2008.

The Attorney General is not the personal attorney for the Appellate Division, much less its four state departments of multiple Grievance Committees. This blatant separation of powers violation mandates that the motion by defendants be stricken as void, meritless and facially unconstitutional. The Attorney General is paid by public funds and those funds are not intended for use by members of the Judicial Branch.

This deliberate misappropriation of tax payers’ funds by the Attorney General also violates the constitution as well as Lawyers Code of Conduct Canon 5- Conflict of Interest. The correct representation of the respective branches is seen in *Larabee v. Governor et al.* case in the Court of Appeals, wherein the parties were represented as follows:

Richard H. Dolan

SCHLAM STONE & DOLAN, LLP

26 Broadway

New York, New York 10004

(212) 344-5400

Attorneys for Defendant-Respondent

Governor of the State of New York and

Appellant-Respondent State of New York [Executive Branch]

Hon. Andrew M. Cuomo

ATTORNEY GENERAL OF THE

STATE OF NEW YORK

The Capitol

Albany, New York 12224

(518)486-5355

Attorney for Appellants-Respondents

New York State Senate and New York State

Assembly [Legislative Branch]

J. Carson Pulley

CHADBOURNE & PARKE LLP

30 Rockefeller Plaza

New York, New York 10112

(212) 408-5100

Attorneys for Respondents-Appellants [Judges Larabee, et al.]

*Larabee v. Governor, et al. 880 N.Y.S.2d 256 (App. Div. 1st Dept. 2009), aff’d. Maron v. Silver, WL 605279 (N.Y. 2010).*

*See the Amicus Brief of the New York County Lawyer’s Association (2009) for a detailed examination of the history of the Separation of Powers doctrine.* In the related case of In re: *Maron v. Silver*, the parties were represented as follows:

Third Department Brief:

Law Office of Steven Cohn, P.C., Carle Place (Steven Cohn of counsel), for appellants-respondents.

Andrew M. Cuomo, Attorney General, Albany (Julie M. Sheridan of counsel), for Sheldon Silver and others, respondents-appellants.

Schlam, Stone & Doland, L.L.P., New York City (Richard H. Dolan of counsel), for Eliot Spitzer and another, respondents-appellants.

Stroock & Stroock & Lavan, L.L.P., New York City (Joseph L. Forstadt of counsel), for The Association of Justices of the Supreme Court of the State of New York and others, amici curiae.

2008 NY Slip Op 08573 [58 AD3d 102 (3d Dept. 2008)

Court of Appeals Brief:

Judges were represented by the Office of Steven Cohen, PC, Mineola;

Legislative parties were represented by Shlam, Stone & Dolan, 26 Broadway, NY, New York.

The Governors was represented by New York State Attorney General Andrew M. Cuomo, Albany.

In sum, the Attorney General’s Office had no business appearing in this state case. This is not a case in equity; it is against two citizens of the State of New York appointed by the **Judicial Branch**.

1. **Third Conflict of Interest**: The Attorney General’s Office cannot act in the role of defense counsel in this case for members of the Judicial Branch. Plaintiff Pollack referenced the fact that she filed a Notice of Claim against the New York State Court Officers in 2007 followed by a Claim after she was beaten up in New York City Family Court on June 6, 2007, at 9:30 am at the Family Court at 60 Lafayette at a hearing and also in September 2007 by eight (8) male court officers in a courtroom during child support proceedings in a contested case. The same Attorney General’s Office defended that case thereby taking a position against plaintiff Pollack. The first attack occurred the day after her case against the U.S. Park Police for sex discrimination, hostile work environment against women and the perverted acts of officers of the United States was dismissed on June 5, 2005 by Judge Bianco in EDNY. For this reason as well, the New York State Attorney General is not permitted to take a position in the underlying case here, much less argue immunity on behalf of judicially appointed employees and a Special Referee who acted without authority**.** R. 15-28, 55-93, 269-279.

**C.** **THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DEPRIVING PLAINTIFF OF THE SUPREME COURT, A COURT OF ORIGINAL JURISDICTION, AS THE JURISDICTION IN WHICH THIS CASE MUST ULTIMATELY BE FULLY HEARD ON THE MERITS**

# Finally, the order of the trial court must be reversed and remanded because the Supreme Court is not divested of jurisdiction. The Appellate Divisions each act as a subsection of the Supreme Court. *Kuriakose v. Evans*, cited by the Court, is factually different from this case. 206 A.D.2d 481 (2d Dept. 1994). That case stated that an attorney may not challenge a referee’s findings of fact and conclusions of law after a hearing in a disbarment matter in Supreme Court. That is true. An appeal would be the proper method. Nowhere in the instant case did Appellant ever obtain discovery, much less a fair hearing for a referee’s report. Thus, her challenge to the proceeding itself, that her due process rights in the form of discovery violations by the Clerk, OCA and the Tenth, are viable for an Article 78 proceeding in Supreme Court. The Kings County order obtained by Appellant proves that, as does the text of Article 78 itself.

Moreover, the underlying case is about the miss –use of power. That is the proper subject of a state Supreme Court case against the alleged violators. The last sentence cited by the trial court from  *Judiciary Law §90* states that “[ t]he supreme Court shall have power and control over attorneys and counselor-at-law and all persons practicing or assuming to practice law….”

The law includes lawyers and judges and attorney generals.

**II.**  **CONCLUSION**

For the forgoing reasons, Appellant, attorney *pro se* and *in properia persona* in this Court, respectfully defers to this honorable Court and requests that the order of the Supreme Court dismissing her complaint, not ruling on her motion to strike and other relief sought, be vacated or reversed and remanded for further proceedings, in its entirety, with costs to Appellant, together with such other and further relief as is just and proper.

August 14, 2012

Riverhead, New York Respectfully Submitted,

RUTH M. POLLACK, Appellant,

Attorney pro se and in Properia Persona

1288 West Main Street

Post Office Box 120

Riverhead, New York 11901

Tel. 631-591-3160

Fac. 866-521-1596

ruth@ruthmpollack.us

1. “On the merits”, a term of art, is defined as follows: *noun* judgment rendered through analysis and adjudication of the factual issues presented. Word Net by Princeton University (2006); “A simplistic definition of “on the merits” is “accurately”: a case is resolved “on the merits” when it is resolved accurately, on the basis of the law and the facts”. ‘RESOLVING CASES “ON THE MERITS”’, by Jay Tidmarsh, Denver University L. Rev. 87:2 at 408-409 et seq. (2010). This is an important and enlightening article on this subject. Tidmarsh proposes replacing the “on the merits principle with “a fair outcome” principle. *Id* at 407. [↑](#footnote-ref-1)
2. The appeal is not perfected. [↑](#footnote-ref-2)
3. The complete name of the case is “THE CHIEF JUDGE OF THE STATE OF NEW YORK and THE NEW YORK STATE UNIFIED COURT SYSTEM, *Plaintiffs-Appellants-Respondents,* against THE GOVERNOR OF THE STATE OF NEW YORK, *Defendant-Respondent*, THE SPEAKER OF THE NEW YORK STATE ASSEMBLY, THE NEW YORK STATE ASSEMBLY, THE TEMPORARY PRESIDENT OF THE NEW YORK STATE SENATE, THE NEW YORK STATE SENATE, and THE STATE OF NEW YORK, *Defendants-Respondents-Appellants”. Larabee II,* **N.Y.S.2d** at **259.** [↑](#footnote-ref-3)
4. None of the cases ever afforded her the protections of the Americans with Disabilities Act of 1991. [↑](#footnote-ref-4)