SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

----------X

RICHARD A. BRUMMEL

Petitioner-Appellant

- against -

VILAGE OF EAST HILLS N.Y. for the East Hills Architectural Review Board, and
BRADLEY MARKS and/or Owner/Developer of 90 Fir Drive, East Hills., N.Y.,

Respondents-Appellees

----------X

Appellate Division Docket Number

2014-08342

MEMORANDUM OF LAW IN SUPPORT OF AFFIDAVIT IN REPLY TO OPPOSITION TO MOTION TO RE-ARGUE

AND IN OPPOSITION TO MOTION FOR SANCTIONS

RICHARD A. BRUMMEL
Petitioner-Appellant, Pro Se
15 Laurel Lane, East Hills, N.Y.
Tel. (516) 238-1646

Table of Contents

Table of Authorities

Introductory Remarks

Respondent-Appellee's memorandum of law in support of its cross-motion for sanctions ("motion for sanctions"), is unfortunately an exercise in theatrics empty of substance, just as Respondent-Appellee's affirmation in opposition to Petitioner-Appellant's motion to re-argue becomes once subject to scrutiny.

It is troubling that Respondent-Appellee cites the same cases it cited before the lower court, which Petitioner-Appellant directly addressed and revealed to be inapposite. But Respondent-Appellee compounds this error by adding many more such totally inapposite cases, as will be illustrated below.

The best that can be said of Respondent-Appellee's 'exploration of the case law', as a charitable reading would describe it, is that it consists of a set of circular arguments.

Respondent-Appellee cites cases that impose sanctions for frivolous lawsuits, but cites no standards set by those cases upon which to base a finding that conduct is frivolous. The whole of Respondent-Appellee's legal presentation is simply, 'This is a sanction for frivolous conduct, Petitioner-Appellant engaged in frivolous conduct, ergo this sanction is just.'

Respondent-Appellee's Memorandum of Law shows the Court nothing of how the courts have determined conduct to be frivolous or deserving of sanction, and how the standards apply here. In fact, with the cases cited it cannot do so because they don't apply, as Petitioner-appellant will show. Nor does the law support its application for sanctions.

In the Memorandum of Law it is the Respondent-Appellee's burden to demonstrate what the law that it asks to be applied actually is, and how the facts and law support

Respondent-Appellee's application. Respondent-Appellee absolutely fails to do so. It is an impossible task anyway, because the facts and law abandon its application.

Respondent-Appellee expects the Court to rely on Respondent-Appellee's repeated assertions in its affirmation and memorandum of law -- with no proof outside of supposed self-evidence -- that all of Petitioner-Appellant's litigation has been frivolous, motivated by malice, knowingly without any merit, etc. But in the real world, especially before the courts, that type of argument is far from sufficient.

The argument is a chimera in any case. It doesn't exist.

Respondent-Appellee uses its memorandum of law to expand on and add frankly horrendous allegations that somehow escape appearing in its affirmation.

Respondent-Appellee states:

> "[Petitioner-Appellant] files, routinely and frequently, frivolous lawsuits. Though they are dismissed in due course [Petitioner-Appellant] is undeterred....This special proceeding is entirely frivolous because [Petitioner-Appellant] lacks standing....[Petitioner-Appellant] knows and understands he lacks standing." (p. 1) "...[Petitioner-Appellant] recognizes that he does not have standing." (p. 2) "His now dismissed appeal never served any purpose and his motion...is without any basis in fact or law." (p. 3) "[Petitioner-Appellant's] litigation history can only be described as vexatious and harassing."
>
> (Respondent-Appellee memorandum of law, p. 4)

For the Court's benefit Petitioner-Appellant has included synopses and the opening pages of various pleadings (Petitioner-Appellant's Affidavit in Opposition to Cross Motion, pp. 21 *ff*., hereinafter "Petitioner-Appellant's affidavit") in order that the falsity of Respondent-Appellee's claims can be judged from the original facts, not Respondent-Appellee's reckless claims, or the imperfect prism of the lower courts' decisions.

As demonstrated in Petitioner-Appellant's affidavit, Petitioner-Appellant's cases have

been diligently and responsibly argued, based on the law and facts carefully adduced, in good faith, following the rules, and for legitimate purposes of bettering the community.

Respondent-Appellee's calumny is not made more persuasive by its repetition.

Furthermore, Respondent-Appellee has not clearly articulated a case that Petitioner-appellant has violated any of the specific provisions of 22 NYCRR 130-1.1. Nor has it presented clear evidence to support any allegation it has made that bears upon such a violation.

Point 1: Sanction for Frivolous Or Other Misconduct Is Typically Determined By The Court In Which Such Conduct Was Allegedly Committed

Respondent-Appellee's memorandum of law recites a litany of cases that supposedly make out a case for sanctioning Petitioner-Appellant based on Petitioner-Appellant's alleged pattern of frivolous lawsuits.

As Petitioner-Appellant stated in Petitioner-Appellant's affidavit, all of the allegations Respondent-Appellee makes on its own behalf -- except the objection to the motion to re-argue -- have been adjudicated by the lower courts, rejected, not appealed, and are governed by *res judicata*.

Furthermore, of the other cited cases allegedly part of some pattern, Respondent-Appellee has no standing to seek relief, and the cases are similarly governed by *res judicata*.

But one other point is clear from a review of the law of sanctions for frivolity: it is apparently always the practice, that the court before whom the alleged misconduct occurred is the court that makes the finding and levies the sanctions.

In every case cited by Respondent-Appellee, it was the lower court that made the determination, at least initially, as concerned matters that occurred before them.

There appeared to be no case cited by Respondent-Appellee where the appeal itself began the judicial system's finding of frivolity, harassment, or other sanction-worthy action by a party at the lower court level. Yet Respondent-Appellee here urges the Court to act on such prior alleged conduct (Respondent-Appellee memorandum of law, p. 4), barred though it be.

To illustrate the principle by the cases cited by Respondent-Appellee:

> "In short, Special Term acted properly in putting an end to plaintiffs' badgering of the defendant and the court system. For the reasons stated, the order should be affirmed insofar as appealed from, with costs."
>
> Sassower v. Signorelli, 99 AD 2d 358, (Second Dep't., 1984) at 359 (internal quotations and citations omitted)

And

> "Here, the Supreme Court properly granted that branch of the Pinnacle defendants' motion which was, in effect, to enjoin the plaintiff from, inter alia, commencing any new actions against them, purchasing any new index numbers, or filing any motions or cross motions, without leave of the court...."
>
> Breytman v. Pinnacle Group, 110 A.D.3d 754 (Second Dep't, 2013) at 755 (internal quotations and citations omitted)

And:

> "The Supreme Court properly imposed a sanction upon the plaintiff for his frivolous conduct in connection with his motion, inter alia, for leave to reargue his opposition to the Schechter defendants' motion, among other things, for summary judgment dismissing the complaint insofar as asserted against them, as the plaintiff's motion was completely without merit in law and was undertaken primarily to harass Roberta S. Schechter."
>
> Breytman v. Schechter, 101 AD 3d 783 (Second Dep't, 2012) at 785 (internal quotations and citations omitted)

And:

> "The IAS Court properly dismissed this action....
> .....
> The court also properly imposed sanctions against plaintiff pursuant to 22 NYCRR 130-1.1 for persisting in the prosecution of frivolous litigation...."
>
> Matter of Sud v. Sud, 227 A.D.2d 319 (First Dep't., 1996) at 319 (internal quotations and citations omitted)

The case Gordon v. Marrone, 202 AD 2d 104 (Second Dep't, 1994), Respondent-Appellee memorandum of law, p. 1, and the cases cited by Respondent-Appellee as lower court decisions, also follow the practice as described: The decision of misconduct was made by the trial court, based on its direct evidence, not the appellate court.

Clearly, the practice is firmly established that the trial court makes the finding of what is essentially a factual determination as to alleged malice, frivolity, and such other questions as bear upon a determination that a plaintiff's conduct is not diligent and honorable, but "vexatious and harassing," in Respondent-Appellee's words, or "frivolous" in the statutory language.

In each of the cases in which Respondent-Appellee does have a stake, the question of frivolity was either not raised by Respondent-Appellee before the lower court, or was raised -- three times! -- and decided *against* Respondent-Appellee (*see* Point 2, *infra*).

As the trial courts ruled against Respondent-Appellee on the question of sanctions, and the time to challenge those rulings has passed, Respondent-Appellee has no legal basis for asserting them again before this Court.

To permit otherwise would sanction an improper extension of the time to appeal, and overturning *res judicata*, among other issues as outlined above.

Point 2: All The Cases Cited By Respondent-Appellee Are Either Governed By *Res Judicata*, Or Respondent-Appellee Has No Standing

Respondent-Appellee has raised the issue of Petitioner-Appellant's alleged misconduct in three cases so far, and been denied in each. Only in the first case filed against it by Petitioner-Appellant did Respondent-Appellee not seek sanctions.

As the issues have been raised and settled, *res judicata* applies. In no case did Respondent-Appellee appeal the lower-court decisions.

> "Under the doctrine of *res judicata*, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding."
>
> Elliman v. Bergere, 98 AD 3d 642 (Second Dep't., 1989), at 642-3 (where the court sustained a dismissal of a claim for broker fees that could have been asserted in a prior action) (internal quotations and citations omitted)

Respondent-Appellee has repeatedly asked for sanctions and been denied, including before the lower court in the present case. A review of the three cases in which Respondent-Appellee sought sanctions follows.

In Brummel v. Village of East Hills, East Hills Architectural Review Board and Zoning Board of Appeals, ("EH-II-ARB/ZBA") Respondent-Appellee's affirmation in support of the motion to dismiss p. 7, Conclusion, states:

> "Brummel has launched, for the second time... a special proceeding by an Order to Show Cause that is entirely meritless....This special proceeding is particularly objectionable because Brummel attempts to block the designs, plans and actions concerning eight properties...He offers his intransigent objections to any tree being removed....This special proceeding is just one example of how Brummel wastes the time, efforts, resources, and money of [the Village]. The amended petition is without merit and should be dismissed with prejudice and with costs awarded."

In Brummel v. Village of East Hills, East Hills Architectural Review Board, and Bradley Marks, 90 Fir Drive ("EH-III-90 Fir Drive"), Respondent-Appellee's Memorandum of Law in Opposition to Petition, p. 23, Respondent-Appellee states:

> "[The Village] is entitled to costs, including attorneys' fees....Brummel's sanction should also include enjoining him from bringing additional special proceedings against [the Village] concerning other people's homes. Brummel's third special proceeding is 'frivolous'."

In Brummel v. Board of Trustees, Michael R. Koblenz, as Mayor and Individually, Blank Slate Media et al., Nassau County Supreme Court Index #2772/2014, ("EH-IV-Defamation"), Respondent-Appellee's Affirmation in Support of Motion to Dismiss, p. 10, Respondent-Appellee states:

> "...[A]s discussed at length above, plaintiff has engaged in repeated abusive and harassing litigation that needs to be deterred....Wherefore defendants respectfully request that the Court grant this motion and issue an Order: ...dismissing plaintiff's complaint...awarding sanctions and costs against plaintiff pursuant to 22 NYCRR 130-1.1, and requiring plaintiff to seek leave of court to commence any future actions against these moving defendants...."

(The sources of the foregoing statements are attached in Exhibit 10 of Petitioner-Appellant's affidavit, and the decisions denying the requests are contained in Respondent-Appellee's affirmation Exhibit 3 and Exhibit 2, and in Petitioner-Appellant's Exhibit 11, respectively.)

Respondent-Appellee is in essence trying to appeal settled issues controlled by *res judicata,* including the present case, well after the statutory period for any appeal has expired (*cf*. CPLR 5513).

In every case brought against Respondent-Appellee by this Petitioner-Appellant, with the exception of one that Petitioner-Appellant withdrew at the outset, Respondent-

Appellee made the assertion of frivolousness with increasing aggression and requested sanctions, but in each case it was rejected by the Court.

In all cases aside from the single motion of Petitioner-Appellant to reargue or appeal, Respondent-Appellee is prevented by *res judicata* from making the argument that the prior proceedings were frivolous or merited sanction; the claim is barred.

Further, the entire stretch of Petitioner-appellant's cases that Respondent-Appellee lays out for scorn in its motion for sanctions -- wholly unconvincingly, when the facts are balanced as is done in Petitioner-appellant's affidavit -- is also barred, by standing as well as by *res judicata*. The theatrics thus serve no judicial purpose, but to inflame the case.

Furthermore, the "evidence" is wholly invalid for the Court to consider as it is second-hand and largely scurrilous, as the innuendo about seeking "infirm" plaintiffs in North Hills.

Point 3: The Conduct Warranting Sanction Is Far More Blatant and Recalcitrant Than The Diligent And Varied Legal Challenges Petitioner-Appellant Has Undertaken Against Respondent-Appellee

Respondent-Appellee refers to both state and federal cases of sanction-worthy conduct. The addition of the federal cases is frankly puzzling.

While making out its supposed case, all the state cases cited except one are appellate reviews of lower court sanction decisions that frankly cast no light on the standards those courts have used to determine if sanctions are appropriate.

It is clear there are standards for frivolity in the court rules, but they describe conduct on general form: cases without any merit, obvious effort to harass, etc. Those conditions do not apply in any of Petitioner-appellant's cases, as a brief review demonstrates.

There was a separate and varied basis for the three different article 78 petitions undertaken against Respondent-Appellee Village, using the designations of the proceedings from Petitioner-Appellant's affidavit (see also, affidavit pp. 21 *ff*. for excerpts and discussions of the cases):

(1) EH-I-37 Laurel: This article 78 proceeding sought to enjoin the village and a developer from demolishing and removing several massive trees from a home about seventy-five feet from his because (i) meetings of a board were not properly announced under the state Open Meetings Law; (ii) when a re-hearing was requested for residents to speak and submit testimony, they were denied; (iii) evidence submitted to the board, in the form of an extensive critique of the plans by a licensed architect, was not considered and demonstrated the board's decision was not rational.

(2) EH-II-ARB/ZBA: This article 78 proceeding challenged decisions of a board because (i) the board failed to obtain a mandated 'tree warden' reports describing the impact of plans to remove multiple massive trees from throughout the Respondent-Appellee Village in the course of demolitions and rebuilding, despite Petitioner-Appellant's having raised the issue repeatedly in public hearings; (ii) other defects in the process of approvals given by the board; and (iii) Petitioner-Appellant was denied the right to appeal the defective decisions of the board to the Respondent-Appellee Village zoning board of appeals despite provisions in both the village code and state law that permitted such appeals by an aggrieved party, as Petitioner-Appellant argued he was.

(3) EH-III-90 Fir Drive: This article 78 proceeding challenged a permit granted to a builder and new resident to cut down several massive trees, one an informal local landmark prized by some neighbors, on the basis that the board granting such permission

had specifically deferred its decision on the controversial tree removal in a public vote on the application, but the Respondent-Appellee Village later granted the permit absent a formal vote by the board, thus violating lawful procedure.

(4) EH-IV-Defamation: The fourth litigation Petitioner-Appellant brought against Respondent-Appellee Village was an action for defamation. The action was against Respondent-Appellee Village, the mayor of Respondent-Appellee Village, and the newspaper that published statements attributed to the mayor. Over the course of almost a year, Petitioner-Appellant sought in writing and verbally to have the various parties retract false and defamatory claims purportedly made by the mayor. Respondent-Appellee Village was on notice for about nine months prior to the lawsuit being filed due to a Notice of Claim Petitioner-Appellant filed.

Petitioner-Appellant's defamation action was in no way frivolous, and was improperly dismissed on the basis that (i) the mayor purportedly enjoyed absolute immunity in comments he made to a newspaper about a resident being profiled (Petitioner-Appellant) and (ii) because part of a defamatory statement was opinion, the entire statement was privileged as fair comment. Both prongs of the decision were thoroughly refuted by Petitioner-Appellant's analysis of the facts and the law, and a notice of appeal was filed immediately. The matter is pending.

Excerpts from papers Petitioner-Appellant filed in all four matters are attached to Petitioner-Appellant's affidavit (*see* affidavit pp. 21 *ff*. for excerpts and discussions of the cases).

Each special proceeding and action was thus different. Each was thoroughly researched by an increasingly experienced *pro se* petitioner.

In no way were the three separate and distinct special proceedings "frivolous" or "vexatious" by way of the irrational, repetitive, utterly fanciful, over-the-top, or deliberately harassing conduct that the cases on record indicate as the test and standard for sanction. And none were found to be.

The three cases regarding the ARB did not in pursue the same ground. They were part of a logical progression. The first case was essentially a sot in the dark by a complete novice at *pro se* litigation based on the experience with one house, one application before the ARB.

It was dropped out of fear, and Petitioner-Appellant felt remorse and vowed to try again. In the next year he diligently attended ARB meetings analyzed permits and submitted verbal and written testimony, often including testimony from a certified professional arborist.

By contrast the cases on record, including those referenced by Respondent-Appellee, reflect marked and unusual violations of the norm.

For instance in the Breytman cases cited (Respondent-Appellee memorandum of law p. 3, p. 4), the courts faced a basically deranged individual, both in his papers and in his allegedly-criminal conduct in connection with the judiciary:[1]

---

1 Respondent-Appellee has raised the issue before, and might be expected to raise it again, that Petitioner-Appellant was arrested in November in a confrontation with a resident of a neighboring village and her landscaper, while Petitioner-Appellant was taking photos of a tree removal he happened upon, and was physically accosted by the homeowner. The case is before a local court, and dismissal is sought, as Petitioner-Appellant had initiated the call to the police twenty minutes before, Petitioner-Appellant had retreated hundreds of feet away, and Petitioner-Appellant was being aggressed upon by the complaining parties as police arrived. It is Petitioner-Appellant's publicly expressed contention police arrested him in retaliation for his civic activities. The conduct bears no resemblance to that described in Breytman.

"...In this action, plaintiff continued to harass Schechter by serving papers directly upon Schechter, not Schechter's counsel, in violation of procedure and my preliminary conference order.
.....
The instant action, 'without the prior written permission of the Court,' violates Justice Lewis' February 25, 2009 order,.... Further, nowhere in plaintiff Breytman's opposition papers does he deny sending the extremely offensive letter to Schechter....Moreover, plaintiff Breytman, despite Court directives, served his opposition papers directly upon Schechter. Plaintiff Breytman's abusive conduct toward Schechter must cease...."

Breytman v. Schechter, 2011 NY Slip Op 50125 (Sup. Ct., Kings County, Schack, J.) (internal quotations and citations omitted)

Further:

"...[D]espite the dismissal with prejudice, plaintiff Breytman now moves for various relief, including what the Court deems a motion to reargue. The Court, for reasons that will be explained, finds the instant motion "frivolous." It is completely without merit in law and undertaken primarily to harass and maliciously injure defendants Schechter and the Court.....
.....
...Plaintiff's arguments in his papers...and in the...oral argument are replete with threatening, defamatory and malicious statements about defendants Schechter and the Court. They are frivolous and "completely without merit in law or fact." ...The instant motion is but another example of plaintiff's continued harassment of defendants and abuse of the judicial process, with the addition of personal invective and animus directed at the Court....."

Breytman v. Schechter, 2011 NY Slip Op 51375(U) (Sup. Ct., Kings County, Schack, J.) (internal quotations and citations omitted)

Finally:

"Subsequent to the Clerk scheduling oral argument on this new motion for today, plaintiff Breytman was arrested...by a Court Officer for allegedly committing numerous counts of felony criminal mischief against the motor vehicles of myself and many of my Kings County Supreme Court colleagues. As a complaining witness against Breytman, I signed a supporting deposition....
Therefore, to avoid the appearance of any impropriety on my part, I must recuse myself from this action...."

Breytman v. Schechter, 2012 NY Slip Op 50315(U)(Sup. Ct., Kings

County, Schack, J.) (internal quotations and citations omitted)

Looking at the story with plaintiff Breytman, his bizarre behavior and repeated defiance of the court, it is truly ludicrous for Respondent-Appellee to argue that precedent sustained by the appellate court with respect to the Breytman cases is in any way applicable to Petitioner-Appellant. Yet that is exactly what Respondent-Appellee would have the Court believe -- and act upon.

Other cases cited by Respondent-Appellee tell a similar story:

In the case of Levy v. Carol Mgt. Corp., 260 AD 2d 27 (First Dep't, 1999), Respondent-Appellee memorandum of law p. 2, a subtenant in New York City spent over a decade trying through to wrest a lease from the tenant, and ignored sanctions begun at the lower-court level:

> "...[T]his was a "relatively uncomplicated piece of landlord-tenant litigation. The facts are simple and straightforward, but the procedural route, relentlessly prolonged by the subtenants, has been tortuous. (at 28) Justice Schackman observed the Levys' claim to be "frivolous...[and] completely without merit in law and fact and cannot be supported by reasonable argument" and imposed a sanction of $250. (at 30)
>
> Among the factors we are directed to consider is whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous, or when such was brought to the attention of the parties or to counsel....(at 34)
>
> Motion practice several years after judgment, lacking legal support and intended only to delay enforcement of judgment, is a valid basis for sanctions. Where motions are redundant to matters already decided on the merits, constituting a lengthy barrage of litigation to relitigate those already-decided matters, but that protracted litigation continues, with rulings ignored, despite the court's warnings to cease delaying tactics, sanctions are appropriate to punish frivolous litigation.... Sanctions often are tied directly to abuse of the judicial process and, presently relevant, are especially warranted where the plaintiff remains undeterred despite the prior imposition of sanctions by the Supreme Court or where the court

> otherwise clearly advises a vexatious litigant of the baseless nature of the litigation. These factors are well established throughout the record. (at 34-35)
>
> Levy v. Carol Mgt. Corp., 260 AD 2d 27 (First Dep't, 1999), (various pages as noted above) (internal quotations and citations omitted)

Again the circumstances in Levy, though cited by Respondent-Appellee bear no similarity to the conduct in the present matter of Petitioner-Appellant's actions, and certainly Respondent-Appellee has adduced no evidence to support any such comparison.

Yet Respondent-Appellee represents that the actions of the appellate court in that case are appropriate precedent to apply in the present case.

Attempting to foist such cases on the Court as precedent appears to be sloppy at best, and willful misrepresentation at worst.

Petitioner-Appellant finds it troubling that Respondent-Appellee would engage in such practices, particularly while persisting in labelling Petitioner-Appellant's errors or oversights in carbon-copying routine requests for extension, as a *pro se* petitioner involved in a complicated matter, "duplicitous", even after Petitioner-Appellant explained the circumstances in a sworn affidavit in a prior motion.

Among the federal cases, a similar pattern of *blatant misconduct* appears. The issue before the courts is not mere tenacious, persistent, or diligent advocacy, but bizarre and incontrovertible abuse and excess.

In Doe v. Washington Post Co., 2012 WL 3641294 at (S.D.N.Y. 2012), cited by Respondent-Appellee's memorandum of law, at p. 3, the Court stated:

> "In 2007, Fisch filed a complaint, more than 80 pages long, in the Southern District of New York, asserting claims against the Republic of Poland, as well as various Polish government officers and diplomats....The [Court] dismissed...the complaint as 'baseless,' 'implausible,' and 'fantastic

> and delusional.'
> ...
> In 2011, Fisch filed a 476-page complaint in New York State Supreme Court, New York County, which was subsequently removed to the Southern District of New York. That complaint asserted 42 causes of action against 25 defendants.....The [Court]...dismissed the...complaint as 'prolix and unintelligible'.... with prejudice.
> ....
> Also in 2011...Fisch filed suit in the Northern District of New York. Fisch's 369-page complaint in that action alleged the same factual scenarios as his earlier complaints, and again named as defendants employees of the Embassy of the Republic of Poland, the Consulate General for the Republic of Poland of New York, and federal district and circuit court judges. The [Court] dismissed the 'long, rambling and confusing' complaint.... [The Court] enjoined Fisch from any further filings in the action, without leave of the Court.
> ....
> On or around May 2012, Fisch brought the Complaint in the instant action....The Complaint runs 265 pages long and contains more than 1,000 paragraphs. Fisch sues 31 defendants....The factual narrative and legal claims are rambling and incoherent....Fisch's claims strain credulity, by a wide margin. Fisch's Complaint so lacks traditional logic as to go beyond mere speculation, and pass into the realm of fantasy."
>
> Doe v. Washington Post Co., 2012 WL 3641294 at (S.D.N.Y. 2012), Source: Google Scholar downloaded April 13, 2015 (internal quotations and citations omitted)

Again, to assert the findings of the Court in that matter bear relevance to Petitioner-Appellant's conduct, in this case, in this motion, or otherwise, as Respondent-Appellee does before this Court, is careless at best, deceitful at worst.

And Petitioner-Appellant has been over this ground before, having had to read the cases behind Respondent-Appellee's assertions before the trial court, and finding a comparable level of misrepresentation of the application of precedent.

Respondent-Appellee also cites the federal case Positano v. State of New York et al., E.D.N.Y 2013, as applicable to the present case, yet the facts and circumstances could not be more different. In fact, the *facts* are so different that Respondent-Appellee erroneously

tells this Court that the federal district court imposed a "leave to file" requirement "after three lawsuits" (Respondent-Appellee memorandum of law, p. 4, top) when in fact the court imposed it after four, as described below.

Such an error is typical of Respondent-Appellee's papers: playing fast and loose, casually and falsely putting "facts" and smears before this Court.

A reading of excerpts also demonstrates unequivocally that the conduct sanctioned by the District Court bears no relevant relationship to Petitioner-Appellant's conduct, and does not serve as precedent. Said the Court:

> "...[T]he Plaintiff...a *pro se* attorney...commenced this action...." (p. 1 of Decision)
> ...
> "In his Complaint, the Plaintiff alleges that while acting in their judicial capacity as Family Court Judges, Judge Freundlich and Judge Wheelan violated his rights. However, such claims are clearly barred by the doctrine of absolute judicial immunity." (p. 5 of Decision)
> ...
> "The Plaintiff's § 1983 claims against the State are barred by the Eleventh Amendment sovereign immunity, for "a state is not a 'person' amenable to suit under § 1983." (p. 10 of Decision)
> ...
> "Prior to bringing this lawsuit, within the span of eleven years, the Plaintiff has commenced at least three other actions in the United States District Court for the Eastern District of New York on behalf of himself and his family....[In 2001] the Court found that the Eleventh Amendment bars all of the plaintiffs' state law claims....The Plaintiff was granted leave to file an amended complaint,...the Court dismissed the Plaintiff's § 1983 claims against the State of New York, because they were barred by Eleventh Amendment immunity. The Court also dismissed the Plaintiff's ADA, Rehabilitation Act, and §§ 1985 and 1986 claims against the State, because the Plaintiff asserted no allegations to support these claims." (pp. 12-13 of Decision)
> ...
> "On November 8, 2002, the Plaintiff commenced a separate lawsuit....[T]he Court...found that the Appellate Division was entitled to absolute judicial immunity for statements made in the course of its duties. It further determined that the Appellate Division was...entitled to Eleventh Amendment immunity from suit in federal court." (p. 13 of Decision)

...
"On November 16, 2007, the Plaintiff commenced a third action ...The Plaintiff named the State and State University of New York at Stony Brook ("SUNY") as defendants and asserted claims under §§ 1983, 1985 and 1988, as well as the ADA and the Rehabilitation Act....The Court ... stated "[a]s was previously explained to these Plaintiffs, which includes counsel, the state and its agencies are immune from Section 1983 claims pursuant to the Eleventh Amendment." The Court also dismissed the claims brought under § 1985, because the complaint failed to state a § 1983 claim and because the complaint was "devoid of any allegations that Defendants conspired to deprive Plaintiffs of their constitutional rights." For similar reasons, the Court dismissed the Rehabilitation Act claim...Finally, the Court dismissed the ADA claims against the State and SUNY, because the claims were "based on access to post-secondary education, which is not a fundamental right....Hence, the Court found these claims to be "barred by the Eleventh Amendment because Congress' purported abrogation of sovereign immunity in such a situation [wa]s not valid." The Court concluded its Order by warning that "frivolous filings will be dismissed with prejudice and may result in sanctions." (pp. 13-14 of Decision)

"...In light of these previous lawsuits, the Court, in its discretion, finds that a "leave to file" filing injunction is appropriate here. [A]s aforesaid, the Plaintiff was previously warned in previous actions that frivolous filings could result in sanctions...." (pp. 14-15 of Decision)

Positano v. State of New York et al., E.D.N.Y 2013 (retrieved 4/14/15 from http://law.justia.com/cases/federal/district-courts/new-york/nyedce/2:2012cv02288/330223/14/, pagination as in original Memorandum of Decision of the Court) (internal quotations and citations omitted)

Again, Respondent-Appellee's implication that the cases cited are applicable as precedent against Petitioner-Appellant fail on inspection.

Firstly, instead of illustrating an appellate court being asked to make a finding which the lower courts have already explicitly rejected -- as in the present matter before this Court -- Positano involves a lower court making a determination based on its own findings, as a trial court, of matters before it and co-equal courts (*See*, Point 1, above).

Secondly, the pattern of conduct giving rise to the Court's finding in Positano is

blatant: (i) the plaintiffs were on notice of, among other things, sovereign immunity issues; (ii) they apparently did not appeal those findings; (iii) they had been clearly warned not to persist; and (iv) they repeatedly filed new cases on the same discredited theories.

In addition, (v) the plaintiff was an attorney.

Respondent-Appellee shamelessly claims to this Court there is an equivalency between the conduct in Positano and that in the present case: "Courts presented with similar patterns of frivolous litigation tactics have not hesitated....See, e.g. Positano...." Respondent-Appellee memorandum of law, p. 3). But there is clearly no such equivalency.

By contrast, in the present matter Petitioner-Appellant, a *pro se* non-lawyer, misapprehended the import on future cases of *one* lower court's questionable ruling on standing -- though not the principle and law of standing itself -- in EH-II-ARB/ZBA. Petitioner-appellant made the error innocently *and* based upon erroneous legal counsel, an assertion he has sworn to several times.

In the following case, EH-III-90-Fir Drive, brought by Petitioner-Appellant on substantially new and different grounds, for substantially different issues, and for a completely separate set of proceedings of the subject board, collateral estoppel was asserted and sustained on the issue of standing to Petitioner-Appellant's shock and surprise.

Petitioner-Appellant then challenged the issue, then appealed, which appeal is now before this Court, and furthermore has not brought any cases since then against the board at issue, asserting any type of standing whatsoever.

Far from an abuse of the system, Petitioner-Appellant's conduct was been a logical and standard exercise of his rights, following civil procedure.

In contrast to Positano, Petitioner-Appellant did not persist in re-filing cases knowing that he did not have standing; Petitioner-Appellant erroneously believed, based on legal counsel, that the ruling in EH-II-ARB/ZBA did not have continuing effect in succeeding cases, because his lawyer told him so.

Once he learned otherwise he followed the rules as they exist. Once Petitioner-Appellant realized collateral estoppel was being asserted, Petitioner-Appellant made a reasoned argument to the Court in his Reply -- in the present case-- that exceptions should apply. When that Court ruled to against him, Petitioner-Appellant submitted a detailed, thoroughly argued and documented appeal, now before this Court.

When the appeal was dismissed based on an issue with which Petitioner-Appellant disagreed, Petitioner-Appellant respectfully asked the Court to re-consider and filed a motion to re-argue.

Despite this guileless and direct progression, Respondent-Appellee asks the Court to see a malicious, abusive pattern in Petitioner-Appellant's conduct where it simply does not exist. Respondent-Appellee's innuendo, reference to settled prior cases, calumny, and citation of inapposite precedent do not change the facts, though they create considerable smoke that can obscure the issues, both legal and factual.

Respondent-Appellee seems to be either obsessed with judicial combat, or laboring under the delusion that its conduct really is above reproach, that none of Petitioner-Appellant's legal or factual arguments have a scintilla of validity, and that Petitioner-Appellant's sole purpose is to harass it.

Yet the evidence is far different. All the courts before have agreed that while Petitioner-Appellant may not have prevailed, his efforts have not been in any way culpable with respect to Respondent-Appellee. Respondent-Appellee simply spins a self-serving fantasy which cannot be supported.

Point 4: Even Where The Appellate Court Rules On An Appeal -- e.g. Mechta -- The Cases Are Clearly Distinguishable And Inapplicable

The only case cited by Respondent-Appellee that bears some resemblance on its surface to the present matter is Mechta v. Mack, 156 AD 2d 747 (Second Dep't, 1989) (hereinafter also "Mechta II"), because the appellate court is ruling on the frivolousness of an appeal alone.

In that case a *pro se* attorney is apparently found to be so off-base in his original action that the appeal itself is found to be frivolous:

> "[Mechta, an attorney] failed to discern what even a cursory review of law in the area of defamation would have revealed, to wit, that his action was totally devoid of legal merit. Moreover, even after a decision was issued in the action with relevant case citations, Mr. Mechta persisted in pursuing this action by taking an appeal. Although he was afforded an opportunity to do so, Mr. Mechta failed to offer any good-faith arguments to demonstrate that his defamation action had a legitimate basis..."
>
> Mechta II, ibid., at 748 (where an attorney acting *pro se* was found to be acting in a frivolous manner by challenging the dismissal of a defamation suit)

The case is distinguishable because Mechta was an attorney held to a higher standard, and in the course of a live hearing apparently gave answers to the Court that appeared insolent:

> "Mr. Mechta claimed at oral argument to have researched the issues relevant to the subject appeal and to have expended a total of 2½ days in

> preparing the appellate brief. The remainder of Mr. Mechta's argument concerned an issue of dubious legal significance to the sanctions hearing, i.e., whether the defendant McCabe & Mack constituted a firm entitled to engage in the practice of law."
>
> Mechta II, ibid., at 748

The case itself appears not to have been followed extensively by either the lower courts or the appellate courts.

Given the unusual harshness of the decision considering the facts presented -- compared with other cases analyzed here -- it suggests there may be elements not clear in the record itself.

However, the case may also be distinguished because the error made by the plaintiff in the case was a clear matter of law: the innocuous letter about which he sued (sharing with a colleague the assertion that he missed a deposition) was clearly a matter subject to qualified privilege as discussed in the lower-court decision upon which the decision cited by Respondent-Appellee is based, Mechta v. Mack, 154 AD 2d 440 (Second Dep't, 1989) (hereinafter "Mechta I") states:

> "[W]e agree with the Supreme Court that the statement complained of is not defamatory on its face. Even assuming, arguendo, that the subject statement was defamatory, it was subject to a qualified privilege. A qualified privilege arises, creating a shield from liability, when a person makes a good-faith communication upon any subject matter in which the parties to the communication have a corresponding interest (see, Shapiro v Health Ins. Plan, 7 N.Y.2d 56; Hollander v Cayton, 145 AD2d 605). Here, the allegedly defamatory statement was forwarded to the general counsel of Strout Realty, Inc. and to Mechta concerning a matter of obvious concern to all parties...."
>
> Mechta I, ibid., at 441 (where the Court sets a hearing for sanctions after sustaining the lower court's dismissal of a defamation action)

The issue of qualified immunity for matters communicated in good faith among

related parties is well-established, and the appellate court argues that the plaintiff, an attorney, having been supplied with a decision citing case law , should have known better than to appeal.

In the case now before this Court, the lower Court decided that collateral estoppel applied, but it failed to answer or analyze Petitioner-Appellant's arguments why precedent describing exceptions to the working of collateral estoppel should not apply, as Petitioner-Appellant asserted, e.g. lack of full opportunity to litigate, defective counsel, etc.

Thus the issue was not clear and settled in the law, in contrast to the issues in Mechta I.

Petitioner-Appellant has presented reasonable and compelling arguments to this Court why the lower court was in error to let collateral estoppel lie, why the prior Court was in error in denying Petitioner-Appellant standing, and why Petitioner-Appellant's failure to appeal that decision was excusable.

These facts thus distinguish the case from Mechta I and II.

Furthermore, no sanctions were imposed until Plaintiff Mechta had an opportunity to address the Court on person. Petitioner-Appellant has made such a request in his affidavit:

> "...[T]he parties are directed to appear at this court on November 1, 1989 at 12:00 noon to be heard upon the issue of the imposition of appropriate sanctions or costs pursuant to 22 NYCRR 130-1.1, if any."
>
> Mechta I, ibid., at 441
>
> "On November 1, 1989, both parties appeared before this court and were heard on the record with respect to the question of sanctions."

Mechta II, ibid., at 747-8

Other cases cited by Respondent-Appellee correspond to the pattern Petitioner-Appellant has presented.

At least two other matters involving Mr. Mechta are met with similar harshness for the attorney's apparent obtuseness in the eyes of the Second Department.

Respondent-Appellee Village cites the case Strout Realty v. Mechta, 170 A.D.2d 499 (Second Dep't,1991), Respondent-Appellee memorandum of law, p. 3. The facts of the case are not stated there, but in a preceding decision which set the matter of sanctions for hearing, as follows:

> "In challenging the orders of the Supreme Court that were designed to resolve a discovery dispute, the defendant conspicuously fails to raise any issue of either law or fact. Instead he asserts, without any support in the record, that the plaintiff, with the assistance of the court, has been "harassing" him with its discovery demands. He further reiterates a groundless contention raised in an earlier suit — i.e., that the plaintiff's attorneys are not authorized to practice law ....— despite this court's express finding that this allegation had no merit...[T]he defendant's conduct...must be characterized as frivolous....Accordingly, the parties are directed to appear...."
>
> Strout Realty v. Mechta, 161 A.D.2d 630 (Second Dep't, 1990) at 631

Again Mechta involves pedestrian issues, which the plaintiff seems, in the eyes of the Court, to have no grasp of and no argument for.

Petitioner-Appellant respectfully insists that those words do not accurately characterize his diligent and well-formed legal arguments in any way, and the case is thus inapposite.

Where Mechta reflects bad-faith lawyering as a criteria for frivolousness, the other cases cited by Respondent-Appellee reflect blatant, extreme conduct.

But in neither case to the cases bear a resemblance, let alone suggest precedent, for the conduct of Petitioner-Appellant in this appeal or in the other, already-settled cases in which no fault by Petitioner-Appellant was found to lie.

Conclusions

Respondent-Appellee makes wild accusations against Petitioner-Appellant in its memorandum of law that are without basis and without evidence, and furthermore the accusations deal with matters and cases in which the lower courts have already specifically rejected the assertions with respect to Respondent-Appellee, which was raised them routinely and with increasing stridence.

The issues raised by Respondent-Appellee are almost entirely governed by *res judicata,* or by Respondent-Appellee's lack of standing to argue them (Point 2, *supra*). The only issue properly before the Court is the motion to re-argue, over which Respondent-Appellee seems to have "blown a gasket".

As for the law itself, Respondent-Appellee's memorandum of law offers almost no guidance whatsoever as to what the courts have deemed frivolous behavior.

Instead of using its memorandum of law to explore and clarify the law, and demonstrate how it applies in this case, Respondent-Appellee simply uses its memorandum of law to viciously and falsely bash Petitioner-Appellant, and to recite the sanctions imposed in prior cases -- or often their mere affirmation by the appellate court -- with no indication of the facts of those cases or how they have specific relevance to the present case.

An analysis of almost every case cited, as Petitioner-Appellant has done here -- and

as he had to do in his Reply earlier in this case (Appendix, pp. 242-7), and in two other cases -- demonstrated the cases are wholly different from the present circumstances, and are useful only for their inflammatory value of flashing around penalties (Points 1, 3, 4, *supra*).

The legal analysis supposedly built upon the cases Respondent-Appellee cites in its memorandum of law falls away upon analysis.

The cases cited by Respondent-Appellee are inapplicable because of three issues, Petitioner-Appellant's Points 1, 3, and 4: (1) Almost each case relates to findings of sanction-worthy conduct by the trial courts, not the appellate court, while in Petitioner-Appellant's case all the trial courts have exculpated him from the baseless allegations of Respondent-Appellee; (2) the cases indicate imposition of sanctions only where there is such egregious and blatant conduct that there is not and never could be a correspondence between the conduct sanctioned by precedent and Petitioner-Appellant's conduct when accurately depicted; and (3) the appellate cases set out a standard for frivolity that does not apply in the case before this Court.

The cases examined that are appellate in nature involve one attorney named Mechta, who was repeatedly sanctioned by the Second Department based on findings of misconduct committed at the appellate level (see *supra,* Mechta v. Mack and Strout Realty v. Mechta, multiple cases, as cited).

Three things distinguish the several cases of Mechta *supra*, from the circumstances related to Petitioner-Appellant: (i) Mr. Mechta was an attorney whom the Court held to a certain standard of knowledge; (ii) The issues that Mr. Mechta brought to the Court were far more clear-cut or even trivial than the legal issues involving Petitioner-Appellant; (iii)

Mr. Mechta was arguably on notice; and (iv) Mr. Mechta was given a hearing before the Court to allow him to explain himself.

Petitioner-Appellant does not seek any refuge in points (i.) or (iii.), though they should be relevant to the Court's decision.

Instead Petitioner-Appellant is confident that the substantive legal issues Petitioner-Appellant raised regarding collateral estoppel and standing are matters of legitimate question, properly before this Court, and that the issue of standing going forward, to enable Petitioner-Appellant to help fight misconduct in local environmental stewardship, is far from trivial.

The issues before the Court are neither clear-cut nor trivial, nor petty nor vexatious.

Respondent-Appellee's careless and self-serving legal analysis, baseless claims of fact, innuendo and aspersion, should not be sustained by this Court as the basis for a finding of fault as against Respondent-Appellees, where none has been found before.

The request for sanctions each time Respondent-Appellee is challenged should not be permitted to turn each meritorious legal controversy into a jousting match to the death. Respondent-Appellee's cynical, vicious legal tactics should not be validated by this Court.

The request for sanction should be rejected for reasons of fact and evidence, but they unquestionably also fail on clear-cut technical issues of law, as presented above: *res judicata*, standing, venue, and common sense measures of jurisprudential conduct.

Pro se plaintiffs cannot of course be excused willful, or destructive, or boorishly ignorant behavior in the court system.

But their constructive role in cases such as Petitioner-appellant has explored (*see*

Petitioner-appellant's affidavit, "Need For Citizen Litigators") should mean that excusable errors unrelated to the substance of their litigation should not be fatal or lead to their purposeful incapacitation. Particularly when their litigation in the public interest is being attacked for self-serving reasons by one of their subjects.

Unfortunately, that is the very outcome being threatened in this case, and the Court should, respectfully, prevent it.

Finally Respondent-Appellee has not clearly articulated a case that Petitioner-appellant has violated any of the specific provisions of 22 NYCRR 130-1.1. Nor has it presented clear evidence to support any allegation it has made that bears upon such a violation.

Dated: Nassau County, New York
April 16, 2015

_____

Richard A. Brummel
Petitioner-Appellant *pro se*
15 Laurel Lane, East Hills, N.Y. 11577
Tel. (516) 238-1646