To Be Argued By:
Brian J. Isaac
Time Requested: 15 Minutes

New York County Clerk's Index No. 452564/2022

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case Nos.
2023-04925
2024-01134
2024-01135

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, SEVEN SPRINGS LLC,

Defendants-Appellants.

ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, and MICHAEL MADAIO,

Non-Party Appellants.

BRIEF FOR NON-PARTY APPELLANTS ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, AND MICHAEL MADAIO

(Counsel on the Reverse)

Brian J. Isaac
POLLACK, POLLACK, ISAAC
& DECICCO, LLP
250 Broadway, Suite 600
New York, New York 10007
212-233-8100
bji@ppid.com

and

Michael S. Ross
LAW OFFICES OF MICHAEL S. ROSS
One Grand Central Place
60 East 42nd Street, 47th Floor
New York, New York 10165
212-505-4060
michaelross@rosslaw.org

Attorneys for Non-Party Appellants
Robert & Robert, PLLC,
Clifford S. Robert, Michael Farina,
Continental PLLC, Christopher M. Kise,
Armen Morian, Morian Law PLLC,
Habba Madaio & Associates, LLP,
and Michael Madaio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Codes

Rules and Regulations

Other Authorities

Non-Party Appellants Clifford S. Robert, Esq. (Robert & Robert, PLLC), Michael Farina, Esq. (Robert & Robert, PLLC), Christopher M. Kise, Esq. (Continental PLLC), Michael Madaio, Esq. (Habba Madaio & Associates, LLP), and Armen Morian, Esq. (Morian Law PLLC) (collectively, "Counsel") submit this brief in support of their appeal from that portion of the decision and order of the Honorable Arthur F. Engoron, J.S.C., dated September 26, 2023, and duly entered by the Clerk of the Supreme Court of the State of New York, County of New York, on September 27, 2023, which granted Plaintiff-Respondent People of the State of New York by Letitia James, Attorney General of the State of New York's ("NYAG") motion for sanctions against Counsel (the "Sanctions Decision").

QUESTIONS PRESENTED

1. Did Supreme Court abuse its discretion under 22 N.Y.C.R.R. § 130-1.1 in sanctioning Counsel for raising legal arguments Supreme Court found unpersuasive?

   Answer: Yes.

2. Did Supreme Court abuse its discretion under 22 N.Y.C.R.R. § 130-1.1 in determining that raising the same argument under differing standards of review constituted "frivolous" conduct within the meaning of the rule?

   Answer: Yes.

3. Did Supreme Court abuse its discretion under 22 N.Y.C.R.R. § 130-1.1 in considering past sanctions awarded against certain Counsel and Defendants-Appellants in separate and distinct proceedings as a basis for sanctioning Counsel?

Answer: Yes.

PRELIMINARY STATEMENT

Counsel bring this appeal to redress Supreme Court's grave abuse of discretion in granting sanctions against Counsel pursuant to 22 N.Y.C.R.R. § 130-1.1. The Sanctions Decision punishes Counsel for making good-faith legal arguments in support of their clients' motion for summary judgment in a case of national import raising issues of first impression as to the scope of NYAG's executive authority. It is beyond cavil that such conduct is not "frivolous" within the narrow definition provided by 22 N.Y.C.R.R. § 130-1.1(c). Counsel cannot be precluded from vigorously advocating for their clients and preserving their clients' appellate rights merely because Supreme Court finds certain arguments raised by Defendants[1] at different procedural stages of the underlying action to be unpersuasive.

[1] "Defendants" as used herein shall include Defendants-Appellants President Donald J. Trump ("President Trump"), Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC.

Caselaw in this Department demonstrates 22 N.Y.C.R.R. § 130-1.1 may not be used as a vehicle to restrict ultimately unpersuasive, yet good-faith, arguments requiring Supreme Court to review existing law. Likewise, this Court has cautioned that Supreme Court should not impose sanctions where the subject conduct consists of making arguments of colorable merit, not in bad faith or with intention to harass or injure. Here, Counsel have repeatedly made clear that their professional obligations required them to interpose and preserve complex arguments of law and fact regarding NYAG's standing and capacity to bring this suit, the impact of disclaimers on NYAG's evidentiary burden, and the availability of disgorgement. All of these arguments are based on Counsel's good-faith interpretation of applicable law and the factual record. Indeed, these arguments are now before this Court in the appeal from the summary and final judgments. See generally Appeal Nos. 2023-04925, 2024-01134, 2024-01135.

Moreover, Supreme Court was presented with (and ignored) an affirmation from the Honorable Leonard B. Austin, a retired Associate Justice of the Appellate Division, Second Department, opining on Counsel's conduct, which he stated was well within both the standards of civil procedure and civil practice in New York State courts and the applicable standards governing the professional conduct of attorneys appearing before New York State courts. There is no evidence in the record that Counsel were motivated by anything other than their considered

professional obligations. In a case presenting difficult questions that will have far-reaching effects on Defendants and others doing business in this State, Counsel have surely acted appropriately.

The respective standards of review under a preliminary injunction application, pre-answer motion to dismiss, and motion for summary judgment differ fundamentally. At the preliminary injunction stage, Supreme Court was required to assess only whether NYAG was likely to succeed on the merits of her underlying case. At the dismissal stage, Supreme Court was required to assess only the sufficiency of NYAG's pleading, reviewing only the complaint and the exhibits attached thereto and affording NYAG the benefit of all favorable inferences. The standard applicable at summary judgment was entirely different and, for the first time, required Supreme Court to consider a developed factual record. Defendants' arguments on summary judgment are necessarily separate and distinct from those raised previously given Defendants contended the developed record required judgment in their favor. Indeed, Defendants were quite clear about this distinction and framed the legal arguments based upon the actual facts before Supreme Court. Moreover, one of the arguments Supreme Court found frivolous was raised for the first time on summary judgment.

Supreme Court's assertion that its decisions on an application for a preliminary injunction and motions to dismiss constitute the law of the case on a

motion for summary judgment is simply wrong. Overwhelming and consistent precedent in this Department makes clear that the law of the case doctrine is inapplicable under the circumstances presented. Decisions rendered prior to joinder of issue have no preclusive effect at the summary judgment stage. It cannot be frivolous for Counsel to raise arguments on behalf of Defendants that necessarily depend on the facts available to the parties and Supreme Court at distinct procedural junctures, with different burdens of proof at each stage of litigation. At a minimum, these arguments are worthy of consideration by the trier of fact, notwithstanding that Supreme Court rejected or gave them little credence when applying the standards of review applicable to NYAG's motion for a preliminary injunction and Defendants' motions to dismiss. It also cannot be frivolous for Counsel to raise arguments on behalf of Defendants to ensure preservation for appellate review. Further, despite Supreme Court's claim, this Court did not and has not "emphatically rejected these arguments," (A.27)[2], and they are, as noted, now before this Court on plenary appeal.

Finally, Supreme Court erred in considering past awards of sanctions against President Trump and one member of Counsel[3] in separate proceedings in this State and the Southern District of Florida as a basis for determining that Counsel's

[2] Citations denoted "A." refer to the appendix.

[3] Mr. Robert, Mr. Farina, Mr. Kise, and Mr. Morian were not involved in and had no role in any of those separate proceedings.

conduct was "frivolous." Supreme Court's disdain for President Trump and its personal opinions of his unrelated conduct in other proceedings, before other tribunals, and in other contexts, cannot support an award of sanctions against Counsel, especially those not even involved in any way in the cited cases. Moreover, Supreme Court may not penalize Counsel for representing President Trump and arguing vigorously on his behalf, regardless of Supreme Court's personal animus.

Accordingly, Counsel respectfully submit that this Court should reverse the Sanctions Decision as an abuse of Supreme Court's discretion under 22 N.Y.C.R.R. § 130-1.1.

STATEMENT OF RELEVANT FACTS

On September 21, 2022, NYAG commenced the underlying civil enforcement action captioned People v. Trump, et al., Index No. 452564/2022, in Supreme Court, New York County, by filing a summons and complaint (the "Complaint") against Defendants and then-Defendant Ivanka Trump ("Ms. Trump"). See A.441-662. The Complaint followed a three-year investigation into Defendants' business practices and alleged seven causes of action pursuant to Executive Law § 63(12). See A.448, 645-659. The first cause of action is a standalone cause of action under Executive Law § 63(12). See A.645-648. The

remaining causes of action are Executive Law § 63(12) claims predicated upon violations of the New York Penal Law. See A.649-659.

NYAG alleged that Defendants inflated the value of various assets in President Trump's personal statements of financial condition ("SFCs")—prepared by outside accounting firms—which were submitted to banks and insurers in connection with Defendants' procurement of commercial real estate loans and participation in bid selection processes. See A.448-455. The sole consequence of these purportedly fraudulent valuations, as alleged by NYAG, was that Defendants obtained lower interest rates than they otherwise would have. See A.457-458. It is undisputed on the record before Supreme Court and this Court on appeal that: (1) all of the subject loans were completely and timely repaid; (2) Defendants did not default under any loan agreement; and (3) no party or member of the public was aggrieved by Defendants' submissions of the SFCs. See A.65, 23548-23557.

A. Supreme Court Grants NYAG's Motion for a Preliminary Injunction.

On October 13, 2022, NYAG moved by order to show cause for a preliminary injunction seeking, *inter alia*, (1) the appointment of an independent monitor to oversee the submission of certain financial information to third parties; (2) an injunction preventing the transfer or disposition of assets without court approval; and (3) an expedited preliminary conference. See A.26047-26050. On

October 26, 2022, Defendants filed their opposition to NYAG's preliminary injunction motion. See A.26103-26139.

Defendants' opposition alleged, *inter alia*, that (1) NYAG lacked *parens patriae* standing under Executive Law § 63(12) to bring a suit in the name of the People of the State of New York; (2) NYAG lacked capacity to commence the action under the plain language of Executive Law § 63(12), which does not authorize a proceeding of this type; and (3) the documentary evidence, *i.e.*, the disclaimers set forth in the SFCs, precludes NYAG from claiming that any corporate counterparty reasonably relied on the information contained in the SFCs in any material way. See id. On October 31, 2022, NYAG filed her reply in further support of her motion for a preliminary injunction. See A.26141-26165. Oral argument was held on November 3, 2022. See A.26167-26301.

By decision and order dated November 3, 2022 (the "Preliminary Injunction Decision"), Supreme Court granted NYAG's motion for a preliminary injunction and the appointment of an independent monitor and ordered the parties to appear in person for a preliminary conference on November 22, 2022. See A.26303-26313. Considering only the 95 exhibits annexed to the parties' moving papers, and by necessity addressing only the standard applicable on a motion for preliminary relief, Supreme Court held that the injunction was warranted because, *inter alia*, (1) NYAG need not demonstrate the elements of *parens patriae* standing "where,

as here, the New York legislature has specifically empowered [NYAG] to bring such an action in a New York state court"; (2) NYAG nonetheless "satisfie[d] the *parens patrie* [sic] doctrine by sufficiently articulating a quasi-sovereign interest that touches a substantial segment of the population and is distinct from the interests of private parties"; (3) "[D]efendants' contention that [NYAG] does not have capacity to sue because 'Executive Law § 63(12) does not authorize Plaintiff to commence this type of proceeding' (NYSCEF Doc. No. 126, pgs. 19-20) is belied by the plain language of the statute and by prevailing authority"; and (4) "the Mazars disclaimer does not avail" President Trump "at all," as "the disclaimer was issued by Mazars, not by [President] Trump or any of the other named defendants," and because "the Mazars disclaimer makes abundantly clear that [President] Trump was fully responsible for the information contained within the SFCs." Id.

B. Supreme Court Denies Defendants' and Ms. Trump's Pre-Answer Motions to Dismiss.

On November 21, 2022, Defendants and Ms. Trump filed motions to dismiss the Complaint. In addition to arguing that NYAG's claims were time barred, Defendants and Ms. Trump alleged that NYAG lacked standing and capacity and, thus the authority, to bring the underlying action. See A.26315-26510.

Defendants argued, *inter alia*, that, on the face of the Complaint and the exhibits annexed thereto, (1) NYAG failed to establish the elements required for

parens patriae standing and therefore lacked standing to bring the action; (2) NYAG lacked authority to maintain this action pursuant to Executive Law § 63(12); (3) the documentary evidence, consisting of the disclaimers in the SFCs, foreclosed NYAG's claims inasmuch as it precluded an assertion that any financial institution reasonably relied on the SFCs; and (4) NYAG is not entitled to disgorgement where, as here, a contract governs the conduct at issue and there has been no public loss pleaded. See id.

By email dated January 4, 2023, Supreme Court advised Counsel that it was "considering imposing sanctions for frivolous litigation," because Defendants' motions to dismiss repeated "the same legal arguments that [Supreme] Court previously rejected (i.e., standing to sue, capacity to sue, the Mazars' disclaimers, and the 'witch-hunt' argument)" in the Preliminary Injunction Decision. A.26707.

Counsel responded to Supreme Court's email by letter, filed on NYSCEF, explaining that "(1) [Supreme] Court's Decision and Order dated November 3, 2022 . . . has ***no preclusive effect*** because it is a *preliminary* finding, not a finding on the merits and as such res judicata (claim preclusion), collateral estoppel (issue preclusion), and the law of the case doctrines do not apply; (2) given same, the Defendants were ***obligated*** to re-raise these legal arguments for both adjudication on the merits and preservation of such arguments for appellate review; and (3) Defendants and counsel were ethically obligated to acknowledge established

precedent for merits adjudication and record preservation purposes." A.26699-26700 (emphasis in original).

On January 6, 2023, Supreme Court denied Defendants' and Ms. Trump's motions to dismiss in their entirety (the "MTD Decision"). See A.26713-26721. Supreme Court held that "Executive Law § 63(12) broadly empowers [NYAG] to seek to remedy the deleterious effects, in both the public's perception and in reality, on truth and fairness in commercial marketplaces and the business community, of material fraudulent misstatements issued to obtain financial benefits." A.26732. Supreme Court also rejected Defendants' argument that disgorgement is not a proper remedy in the absence of harm, holding that "there is no requirement of law that the measure of damages alleged to have been sustained shall be stated in the complaint." A.26733-26734 (internal citation and quotation omitted). Finally, Supreme Court ruled that issues of standing and capacity are purely issues of law. See A.26731. Supreme Court did not impose sanctions on Counsel, concluding that they were unnecessary. See A.26732.

C. Defendants and Ms. Trump Appeal from Supreme Court's Denial of their Motions to Dismiss.

Defendants and Ms. Trump appealed from the MTD Decision. Defendants perfected their appeal on March 20, 2023. See A.26723-26807. On appeal, Defendants argued that (1) NYAG lacked standing and capacity to sue; (2) NYAG's claims were barred by the statute of limitations; and (3) NYAG was not

entitled to disgorgement, as the Complaint failed to allege damages. See A.26744-26807.

On June 27, 2023, this Court unanimously modified Supreme Court's MTD Decision to the extent that it directed Supreme Court to dismiss time-barred claims based upon the applicable statute of limitations. See A.26924-26928. While this Court held that "the failure to allege losses does not require dismissal of a claim for disgorgement under Executive Law § 63(12)," it did not reject Defendants' arguments on the ground that they were "frivolous" or were previously argued at the preliminary injunction stage. Id.

D. The Parties Move for Summary Judgment.

On August 30, 2023, NYAG and Defendants filed their respective summary judgment motions before Supreme Court. See A.1811-12726; 23512-23997. In their summary judgment motion and in opposition to NYAG's motion, Defendants argued, *inter alia*, that Supreme Court was required to dismiss certain of NYAG's claims as time barred pursuant to this Court's prior order and that there was insufficient evidence to establish the elements of each of NYAG's causes of action. See A.12727-12813; 23516-23593.

Defendants further argued on the developed factual record that the ***actual evidence*** now conclusively established that there was no legal or factual basis to maintain an Executive Law § 63(12) claim because the counterparties to the

transactions at issue had never complained and never viewed Defendants' submissions as being fraudulent, and the record was devoid of any evidence of harm. See, e.g., A.23548-23557. Defendants acknowledged that they made a similar authority argument "at the dismissal stage," where NYAG was afforded the presumption of every favorable inference, but made quite clear that "the developed record" upon which their summary judgment motion was based fully undermined NYAG's claims. A.23530, 23553.

Defendants also argued that the first cause of action, NYAG's standalone Executive Law § 63(12) claim, failed because the record evidence did not support the findings of the elements of the claim. See A.23557-23570. More specifically, Defendants averred that the record, including the disclaimers set forth in the SFCs and expert and fact witness testimony, established that the SFCs had no capacity or tendency to deceive. See A.23560-23570, 23582-23583.

Defendants further argued that Supreme Court was compelled to dismiss NYAG's claim for disgorgement because it is not an available remedy under the governing statutory framework. See A.23585-23589. This was the *first time* Defendants made this argument. Previously, Defendants' arguments for dismissal of NYAG's disgorgement demand focused on NYAG's failure to allege any harm or loss, not whether the statutory framework supported the claim. See, e.g., A.26315-26510.

On September 8, 2023, the parties filed opposition to the respective summary judgment motions. See A.12727-23143; 23998-25930. In her opposition, NYAG alleged that Defendants' standing, capacity, disclaimer, and disgorgement arguments were frivolous insofar as they had previously been rejected by Supreme Court at different procedural postures. See A.24048-24053.

E. NYAG Moves for Sanctions against Counsel.

On September 5, 2023, NYAG filed a separate motion for sanctions against Counsel "based on frivolous conduct by Defendants and their counsel in asserting legal arguments in connection with the parties' pending dispositive motions that were previously rejected by [Supreme] Court and the First Department in this action." A.25982.

On September 15, 2023, Defendants opposed that motion, arguing that the standards of review and the evidence available to Defendants at the time they opposed NYAG's preliminary injunction motion and filed their pre-answer motions to dismiss, respectively, materially differed from the standard of review applicable to the motions for summary judgment and the developed factual record now available in connection with those motions. See A.25996-26014. Defendants explained that the record evidence, made available through discovery, proved that NYAG could not establish any fraud, entitlement to relief, or a legitimate statutory interest under the Executive Law. See id.

Defendants also submitted the expert affirmation of the Honorable Leonard B. Austin, a retired Associate Justice of the Appellate Division, Second Department, in opposition to NYAG's motion. See A.26015-26039. Justice Austin gave his opinion, to a reasonable degree of legal certainty and based upon over 45 years of experience as a trial and appellate judge, a practitioner, and an adjunct professor of law in the field of civil practice, that Counsel's conduct was well within both the standards of civil procedure and civil practice in New York State courts and the applicable standards governing the professional conduct of attorneys appearing before New York State courts. See id. Justice Austin further opined that Counsel's conduct was not "frivolous" within the meaning of 22 N.Y.C.R.R. § 130-1.1:

> That [NYAG] disagrees with certain arguments raised by Defendants at different procedural stages of this action does not mean that those arguments are frivolous. Indeed, they appear to be meritorious and, at the very least, worthy of consideration by the trier of fact, notwithstanding [Supreme] Court's having rejected or given little credence to them when considering [NYAG]'s motion for a preliminary injunction (likelihood of success on the merits) or Defendants' respective motions to dismiss (all allegations of the plaintiff as the non-moving party are deemed to be true and afforded the benefit of every possible favorable inference, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)).

A.26016 (footnote omitted).

NYAG filed reply in further support of her application for sanctions on September 21, 2023. See A.26939-26947.

F. Supreme Court Imposes Sanctions Against Counsel.

On September 27, 2023, Supreme Court entered a consolidated decision and order on the parties' summary judgment motions and NYAG's sanctions motion (the "MSJ Decision"). See A.23-58. Supreme Court (1) granted NYAG's motion for sanctions against "Michael Madaio, Esq. (Habba Madaio & Associates, LLP), Clifford S. Robert, Esq. (Robert & Robert PLLC), Michael Farina Esq. (Robert & Robert PLLC), Christopher M. Kise, Esq., (admitted *pro hac vice*) (Continental PLLC), and Armen Morian (Morian Law PLLC) in the amount of $7,500 each";[4] (2) granted NYAG partial summary judgment on her first cause of action; (3) cancelled the GBL § 130 business certificates of entities (including, apparently, non-parties to the action) controlled or beneficially owned by President Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney; and (4) denied Defendants' motion for summary judgment. See id. Defendants appealed from the MSJ Decision on October 4, 2023. See A.3-4. On October 23,

[4] Supreme Court's order is unclear as to whether the sanctions apply to the individual attorneys, the law firms themselves, or both. See A.58. Supreme Court has never clarified this issue.

24, and 25, 2023, Counsel separately appealed from the Sanctions Decision.[5] See A.5-22.

LEGAL STANDARD

This Court is authorized to consider an appeal taken as of right from "any final or interlocutory judgment" entered in Supreme Court, (CPLR § 5701[a][1]), or from any other order "where the motion it decided was made upon notice" and the order "affects a substantial right," (CPLR § 5701[a][2][v]). This Court affords trial judges "wide latitude to determine the appropriate sanctions for dilatory and improper attorney conduct" and will "defer to a trial court regarding sanctions determinations unless there is a clear abuse of discretion." Pickens v. Castro, 55 A.D.3d 443, 444 (1st Dep't 2008) (internal citations omitted); see also Arts4All, Ltd. v. Hancock, 54 A.D.3d 286, 286 (1st Dep't 2008), aff'd, 12 N.Y.3d 846 (2009) (a penalty imposed pursuant to CPLR § 3126 "should not readily be disturbed" "absent clear abuse") (internal citations omitted).

[5] In light of Counsel's uncertainty regarding the scope of the Sanctions Decision, Counsel filed notice of appeal both individually and on behalf of their firms. See A.5-22.

ARGUMENT

POINT I

SUPREME COURT ERRED IN IMPOSING SANCTIONS AGAINST COUNSEL FOR INTERPOSING GOOD-FAITH LEGAL ARGUMENTS

A. "Frivolous" Conduct is Narrowly Defined.

22 N.Y.C.R.R. § 130-1.1 permits a court to exercise discretion to impose costs and sanctions on an errant party where he or she engages in "frivolous" conduct. Pursuant to the rule, conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

22 N.Y.C.R.R. § 130-1.1(c); see, e.g., DeRosa v. Chase Manhattan Mtge. Corp., 15 A.D.3d 249, 249-250 (1st Dep't 2005). In determining whether conduct undertaken was frivolous, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." 22 N.Y.C.R.R. § 130-1.1(c). Where the conduct reflected in the record does not fit

within the narrow definition of "frivolous" set forth in 22 N.Y.C.R.R. § 130-1.1(c)(1)-(3), an award of sanctions by the court is an abuse of discretion. See Matter of Kings County Hosp. v. M.R., 226 A.D.3d 513, 513 (1st Dep't 2024); Talos Capital Designated Activity Co. v. 257 Church Holdings LLC, 226 A.D.3d 414, 416 (1st Dep't 2024).

Under this Court's precedent, sanctions ought not to be imposed in such a manner as to restrict ultimately unpersuasive, yet good-faith, arguments. See W.J. Nolan & Co. v. Daly, 170 A.D.2d 320, 321 (1st Dep't 1991). Rather, "the court must weigh the potential effect on inhibiting good-faith arguments to modify existing law," which is the traditional common-law "means whereby courts can reexamine existing precedent in the light of changing circumstances." Id. (internal quotation marks and citation omitted).

Likewise, the court must be careful to avoid the imposition of sanctions where arguments are "of colorable merit" and "not made in bad faith" or with intention to harass or injure. Gordon Group Invs., LLC v. Kugler, 127 A.D.3d 592, 594-595 (1st Dep't 2015), citing Yenom Corp. v. 155 Wooster St. Inc., 33 A.D.3d 67, 70 (1st Dep't 2006) ("[Courts] must be careful to avoid the imposition of sanctions in cases where the [party] asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure."). It is immaterial whether the court finds a party's arguments unpersuasive. In order to

award sanctions, the arguments must be "so completely without merit as to be frivolous within the definition contained in 22 NYCRR 130-1.1(c)." W.J. Nolan & Co., 170 A.D.2d at 321, citing Lewis v. Stiles, 158 A.D.2d 589, 590 (2d Dep't 1990); see also Talos Capital Designated Activity Co., 226 A.D.3d at 417 ("The fact that the court took a different view of the evidence is not grounds for sanctions.").

B. Counsel's Arguments on Summary Judgment Were Merits-Based and Made in Good Faith.

Counsel's arguments on behalf of Defendants in their summary judgment motion and opposition to NYAG's motion for summary judgment plainly fail to satisfy the requirements of 22 N.Y.C.R.R. § 130-1.1(c). As set forth above, Defendants argued, in relevant part, that (1) the developed factual record, devoid of any evidence of reliance, causation, or harm to the public or any other party, demonstrates NYAG lacks authority to maintain an Executive Law § 63(12) action; (2) the developed factual record, including the disclaimers contained in the SFCs and expert and fact witness testimony regarding the SFCs and the disclaimers therein, is fatal to NYAG's standalone Executive Law § 63(12) claim; and (3) disgorgement is not an available remedy under the statutory framework. See A.12727-12813; 23516-23593.

Defendants' arguments cannot be characterized as "completely without merit." 22 N.Y.C.R.R. § 130-1.1(c)(1). As set forth in Defendants' briefs, the

issues raised in this proceeding are predominantly ones of first impression. Principal among these is the scope of NYAG's authority under Executive Law § 63(12) and her ability to inflict punishment in the absence of consumer-facing conduct, reliance, materiality, intent, causation, or any public or private harm. While Counsel are bound to accept Supreme Court's rulings on these issues, it is ludicrous to suggest that Counsel are forbidden from making arguments because Supreme Court and NYAG do not agree with them.

Defendants' arguments were based on Counsel's interpretation of voluminous caselaw and evidence produced during the course of discovery, all of which was cited and discussed in Defendants' briefs. Inasmuch as the arguments are based on the developed factual record, which did not exist and could not have been considered by Supreme Court at any earlier juncture, they were manifestly appropriate to make at the summary judgment stage. To the extent that Defendants raised similar arguments concerning NYAG's standing and capacity, the disclaimers in the SFCs, and disgorgement at the preliminary injunction and pre-answer dismissal stages, it was likewise appropriate for them to do so in light of the distinct standards applicable at each procedural posture of the case. See infra at Point II. As fully discussed infra, it cannot be frivolous for Counsel to raise arguments on behalf of Defendants that necessarily depend on the facts available to

the parties and Supreme Court at different procedural junctures, with different burdens of proof.

C. Counsel Were Ethically Obligated to Make and Preserve Arguments on Behalf of Defendants.

"The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system . . . and to act with loyalty during the period of the representation." New York Rules of Professional Conduct, Preamble at ¶ 2. Counsel are bound to advocate vigorously for their clients at each stage of the underlying proceeding. This mandates that Counsel make all arguments they view as significant and meritorious, regardless of whether Supreme Court agrees. Indeed, even where Counsel's arguments are expected to be unsuccessful at the trial court level, it is critical that they are nonetheless made so that Defendants' appellate rights are preserved.

The properly preserved arguments for which Counsel were sanctioned are now before this Court on Defendants' consolidated appeal from the MSJ Decision and final judgment. Precedent from this Court and the Court of Appeals has underscored the importance of preserving issues raised prior to final judgment. See, e.g., Bonczar v. American Multi-Cinema, Inc., 38 N.Y.3d 1023, 1025-1027 (2022); Siegmund Strauss, Inc. v. East 149th Realty Corp., 81 A.D.3d 260, 265-267 (1st Dep't 2010). Absent preservation and interlocutory appeal, Defendants' first-impression arguments on the scope of NYAG's authority and the availability

of disgorgement in an Executive Law § 63(12) action might have been waived.

Sanctioning attorneys for making merits-based arguments on summary judgment because similar arguments were previously made under a wholly different standard of review at the preliminary injunction and motion to dismiss stages discourages compliance with the attorneys' duty of loyalty to their clients. See infra at Point II. Fundamental principles of advocacy and established law require the presentation and preservation of arguments without fear of punishment for doing so. These concerns are at the very core of the adversarial process. Under the Sanctions Decision, however, Counsel could be sanctioned even for making a motion for directed verdict, a mainstay of trial practice essential to the preservation of appellate arguments in this State, merely because Supreme Court rejected similar arguments on dispositive motions before trial. See, e.g., Miller v. Miller, 68 N.Y.2d 871, 873 (1986) (holding that plaintiff's failure to move for directed verdict conceded the question to the jury). The resulting chilling effect on zealous advocacy runs counter to Counsel's fiduciary obligations.

Here, the record demonstrates that those obligations were the motivating factors behind Counsel's purportedly "frivolous" conduct. In contrast, nothing in the record suggests that Counsel made any argument in bad faith, with disrespect to Supreme Court, or to impede the underlying proceeding. Accordingly, Supreme Court abused its discretion in characterizing Counsel's submission of robust

summary judgment briefing as "frivolous" within the definition of 22 N.Y.C.R.R. § 130-1.1.

POINT II

COUNSEL'S CONDUCT WAS APPROPRIATE TO PROTECT DEFENDANTS' INTERESTS AT DIFFERING PROCEDURAL STAGES

A. Mixed Questions of Law and Fact are Necessarily Subject to Different Standards of Review at Different Stages of Litigation.

The standards of review applicable to a motion for a preliminary injunction, a motion to dismiss, and a motion for summary judgment, respectively, are fundamentally different. Although each application may be made during the course of an action, each application serves a different and distinct purpose and is subject to different standards of review and evidentiary burdens. These differences materially distinguish the arguments Defendants made regarding mixed questions of law and fact at the summary judgment phase from those made at earlier junctures.

1. Preliminary Injunction Applications

CPLR § 6301 provides, in relevant part, that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual" or in "any action where the plaintiff has demanded and

would be entitled to a judgment restraining the defendant from the commission or continuance of an act" that would produce injury to the plaintiff.

In New York, the movant seeking a preliminary injunction must make out a *prima facie* case: (1) that it is likely the movant will ultimately succeed on the merits of the underlying case; (2) that there will be irreparable harm to the movant if the injunctive relief is not granted; and (3) that a balancing of the equities favors the movant who is asking for the relief. See generally, e.g., Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990); Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517 (1981); St. Paul Fire and Mar. Ins. Co. v. York Claims Serv., 308 A.D.2d 347, 348-349 (1st Dep't 2003).

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held . . . . [T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (internal citations omitted); see also Heckler v. Redbud Hosp. Dist., 473 U.S. 1308, 1314 (1985) (holding that a preliminary injunction is not a vehicle for final relief on the merits); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 317 (1985) (holding that "any conclusions reached at the preliminary injunction stage are subject to revision"), citing Camenisch, 451 U.S. at 395.

Consistent with this principle, the Court of Appeals and this Court have made clear that *res judicata*, collateral estoppel, and the law of the case doctrine do not apply when the previous ruling is a ruling on a motion for a preliminary injunction, where the only question before the court is whether and how the status quo should be maintained. See, e.g., Town of Concord v. Duwe, 4 N.Y.3d 870, 875 (2005) ("[M]ere denial of the motion for a preliminary injunction did not constitute the law of the case or an adjudication on the merits."); J.A. Preston Corp. v. Fabrication Enters., 68 N.Y.2d 397, 402 (1986) ("The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for."); Walker Mem. Baptist Church, Inc. v. Saunders, 285 N.Y. 462, 474 (1941) (same); Huguenot LLC v. Megalith Capital Group Fund I, LP, 191 A.D.3d 530, 530 (1st Dep't 2021) (same); London Paint & Wallpaper Co., Inc. v. Kesselman, 158 A.D.3d 423, 423 (1st Dep't 2018) (the "granting of the preliminary injunction does not constitute the law of the case" on a subsequent motion for summary judgment).

The well-settled rule that a granting of a preliminary injunction does not constitute the law of the case is further confirmed by other appellate courts in this State. See, e.g., Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D.3d 595, 596 (2d Dep't 2005); Rural Community Coalition, Inc. v. Village of Bloomingburg,

118 A.D.3d 1092, 1095 (3d Dep't 2014); Meyer v. Stout, 45 A.D.3d 1445, 1447 (4th Dep't 2007). Likewise, the Bench Book for Trial Judges-New York § 11:3 notes that the "[g]rant or denial of a preliminary injunction is not a determination on the merits and, therefore, is not law of the case." Association of Justices of the Supreme Court of the State of New York, Bench Book for Trial Judges-New York § 11:3 (Jan. 2024), citing Huguenot LLC, 191 A.D.3d at 530. Supreme Court ignored the precedent set out above.

2. Motions to Dismiss

CPLR § 3211(a) provides that a "party may move for judgment dismissing one or more causes of action asserted against him" on one or more of several enumerated grounds. A motion to dismiss challenges the sufficiency of the pleading; it does not challenge the allegations within the pleading on their merits. Accordingly, on a motion to dismiss under CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007), quoting Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); see CPLR § 3026. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005). "In ruling on a motion to dismiss, the court is not

authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of [any] legally cognizable cause of action." P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 301 A.D.2d 373, 376 (1st Dep't 2003).

It is blackletter law that because a motion to dismiss concerns only the sufficiency of the pleading and cannot direct itself to an assessment of the sufficiency of the evidence, even in those circumstances where it is available to the movant, it does not impair a party's right to seek summary judgment at a later stage in the proceedings. An earlier holding on a motion to dismiss will not bar a party from subsequently moving for summary judgment, which is subject to a different standard of review. See Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, 128 A.D.2d 467, 469 (1st Dep't 1987). "[T]he law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion." Moses v. Savedoff, 96 A.D.3d 466, 468 (1st Dep't 2012).

New York law, particularly as stated by this Court, is consistent and clear on precisely this point. See, e.g., Friedman v. Connecticut Gen. Life Ins. Co., 30 A.D.3d 349, 349-350 (1st Dep't 2006), aff'd as modified, 9 N.Y.3d 105 (2007) ("The doctrine of law of the case is inapplicable 'where . . . a summary judgment motion follows a motion to dismiss'. . . since the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings,

whereas summary judgment examines the sufficiency of the evidence underlying the pleadings." [alteration in original, citation omitted]); see also RXR WWP Owner LLC v. WWP Sponsor, LLC, 145 A.D.3d 494, 495 (1st Dep't 2016) ("Our earlier holding, on a motion to dismiss, brought pursuant to CPLR 3211 . . . does not constitute law of the case, barring [the party] from moving for summary judgment, which is subject to a different standard of review." [quotations omitted]); 191 Chrystie LLC v. Ledoux, 82 A.D.3d 681, 682 (1st Dep't 2011) ("The law of the case doctrine is inapplicable where, as here, a summary judgment motion follows a motion to dismiss." [quotations omitted]); Sivin-Tobin Assoc., LLC v. Akin Gump Strauss Hauer & Feld LLP, 68 A.D.3d 616, 618 (1st Dep't 2009) ("[N]o law of the case was established by the court's prior order denying defendant's motion to dismiss the complaint.").

Consistent with this principle, the Bench Book for Trial Judges-New York § 11:3 notes that the law of the case doctrine is "inapplicable when a summary judgment motion follows a motion to dismiss since the scope of review on the two motions differ." Association of Justices of the Supreme Court of the State of New York, Bench Book for Trial Judges-New York § 11:3 (Jan. 2024). This is true even when the denial of a motion to dismiss has been affirmed. See Town of E. Hampton v. Cuomo, 179 A.D.2d 337, 344-345 (2d Dep't 1992); Del Castillo v.

Bayley Seton Hosp., 232 A.D.2d 602, 603-604 (2d Dep't 1996). Again, Supreme Court wholly ignored the precedent cited above.

3. Summary Judgment Motions

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); see also CPLR § 3212(b); Ryan v. Trustees of Columbia Univ. in the City of N.Y., Inc., 96 A.D.3d 551, 553 (1st Dep't 2012); Santiago v. Filstein, 35 A.D.3d 184, 185-186 (1st Dep't 2006). The motion must be supported by evidence in admissible form and by the pleadings and other proof such as affidavits, depositions, and written admissions. CPLR § 3212(b). The "facts must be viewed in the light most favorable to the non-moving party." Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012) (internal quotations omitted). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v. Metropolitan Museum of Art, 27 A.D.3d 227, 228 (1st Dep't 2006); see also Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); DeRosa v. City of New York, 30 A.D.3d 323, 325 (1st Dep't 2006).

"The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues [of fact] exist." Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224, 226 (1st Dep't 2002); see also Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) ("issue-finding, rather than issue-determination, is the key to the procedure" for assessing whether to grant summary judgment), quoting Esteve v. Abad, 271 A.D. 725, 727 (1st Dep't 1947). Moreover, a "principal rationale of partial summary judgment is to narrow the number of issues presented to the jury." Rodriguez v. City of New York, 31 N.Y.3d 312, 323-324 (2018).

Accordingly, a motion for summary judgment under CPLR § 3212 challenges the underlying merits of the case, *i.e.*, the factual support for a claim, not how well it was pleaded. It is typically filed after completing discovery[6] when the filing party believes that there are no genuine issues of material fact and that such party is entitled to judgment as a matter of law on the developed factual record. In other cases, counsel will move for summary judgment to put the non-movant to its proof in order to sharpen the issues for trial, even where there may be a factual dispute. See A.26034. ("A motion for summary judgment can be thought

[6] To be sure, CPLR § 3212(f) expressly permits a court to deny a motion for summary judgment where "facts essential to justify opposition may exist but cannot then be stated."

of as a trial on paper. If summary judgment is partially granted, then a trial will only be held on the remaining causes of action.").

In other words, the plaintiff would file the motion seeking a ruling either that he/she has proven her case, or that the adversary cannot prove his/her case, because there are no material questions of fact to be decided. This is precisely what Counsel did in this case and precisely the conduct for which Supreme Court imposed sanctions.

B. The Law of the Case Doctrine Did Not Preclude Counsel from Interposing Arguments at the Summary Judgment Stage Based on a Developed Record.

Contrary to Supreme Court's holding, Counsel were not precluded from making arguments at the summary judgment stage, based on a developed factual record created over the course of nearly one year through protracted and comprehensive discovery, merely because Defendants did not prevail on similar arguments at the preliminary injunction or pleading stages. The legal standard applicable to a motion for summary judgment is entirely different from those earlier stages.

Defendants first argued in their opposition to NYAG's motion for a preliminary injunction that, *inter alia*, NYAG lacked standing and/or capacity to maintain this action under Executive Law § 63(12) because she (1) "cannot establish an injury in fact" and (2) "cannot meet the elements required to bring a

parens patriae action to sue in the public interest." A.26305 (quotations omitted). Defendants also argued that the disclaimers included in the SFCs defeated any claim by NYAG of reasonable reliance and causation. See A.26122-26123. These arguments presented mixed questions of law and fact, *i.e.*, whether NYAG lacks standing and/or capacity to maintain this action because there is no public interest being vindicated and whether a corporate counterparty reasonably relied on the SFCs in light of the disclaimers, on a set of facts that were required to be presumed true in the initial stages of this proceeding.

In the Preliminary Injunction Decision, Supreme Court necessarily decided whether the movant had a "likelihood of success on the merits" of her claims based on nothing more than the pleadings and the motion papers before it.[7] A.26307. However, Supreme Court's Preliminary Injunction Decision had no preclusive effect under the law of the case doctrine when Defendants made similar arguments on their motion to dismiss. In deciding the latter motion, Supreme Court was obligated to apply the appropriate standard of review and draw all inferences in favor of NYAG. The only question before Supreme Court was whether NYAG stated a cognizable claim, considering only the Complaint and the exhibits annexed

[7] As Defendants stated in their opposition to a preliminary injunction, the record was far from fully developed at this juncture: "[A]lthough Plaintiff states in the Complaint that the NYAG interviewed 'more than 65 witnesses and review[ed] [ ] millions of pages of documents,' only cherry-picked documents and deposition excerpts have been submitted to [Supreme] Court entirely out of context. Yet even this skewed record does not demonstrate a clear right to relief." A.26116.

thereto. See, e.g., 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 151-152 (2002). Supreme Court's assertion in its January 4, 2023, email that "[D]efendants are making the same arguments based on the same facts and the same law, and thus would appear to be subject to issue and/or claim preclusion (law of the case)" is flatly wrong. A.26707; see, e.g., Town of Concord, 4 N.Y.3d at 875; J.A. Preston Corp., 68 N.Y.2d at 402.

Likewise, neither the Preliminary Injunction Decision nor the MTD Decision precluded Defendants' arguments at summary judgment, where NYAG was no longer entitled to the presumption of the truth of her allegations, or the benefit of every favorable inference, and was held to the actual record evidence. Compare Cruz v. New York City Tr. Auth., 136 A.D.2d 196, 199-203 (2d Dep't 1988) (reversing award of judgment as a matter of law to defendant based upon erroneous rulings precluding introduction of evidence and directing new trial), with Cruz v. New York City Tr. Auth., 190 A.D.2d 651, 652 (2d Dep't 1993) (dismissing complaint "with the benefit of the full record of the second trial"). Defendants argued in their summary judgment motion that "the scope of the NYAG's authority depends upon a public interest nexus fully lacking in this case" *based on the evidence*.[8] A.23549. Defendants further argued that the undisputed

[8] NYAG acknowledged the limitations on her Executive Law § 63(12) authority, arguing that such authority "is circumscribed by the express language of the statute: [NYAG] may sue only those persons who have committed repeated or persistent fraud or illegality in the conduct of

existence of disclaimers in the SFCs, read together with the extensive notes in the SFCs identifying and describing numerous departures from Generally Accepted Accounting Principles, and considered with ample expert and fact testimony regarding both the disclaimers and the manner in which the banks used the SFCs, "undercut[] any claim that Defendants intended to defraud anyone," (A.23583), disgorgement was not available as a remedy within the statutory scheme of Executive Law § 63(12), (A.23585-23589), and the record evidence failed to establish any causal link between Defendants' conduct and any ill-gotten gain, (A.23589-23591).

Defendants explained that although similar arguments were made at the dismissal stage, where NYAG was afforded the presumption of every favorable inference, the summary judgment motion was based on the "developed record," which fully undermined NYAG's claims. A.23530. The scope of the evidence Supreme Court could properly consider on summary judgment, consisting of hundreds of exhibits and thousands of pages of evidence and testimony, was orders of magnitude greater than what it could consider on review of NYAG's application for a preliminary injunction or Defendants' motions to dismiss. Further, Defendants argued for the first time on their summary judgment motion that the

business in this State. *And to obtain relief,[NYAG] must prove [her] case*." People v. Trump, et al., Appeal No. 2023-00717, NYSCEF Doc. No. 24 at 29-30 n. 4 (emphasis added).

record evidence conclusively established that disgorgement was not an available remedy under the governing statutory framework. A.23585-23589.

Defendants' arguments at summary judgment were, by definition, separate and distinct from those raised at the preliminary injunction and dismissal stages of this proceeding. Supreme Court defied decades of overwhelming and well-settled law in erroneously applying the law of the case doctrine to a motion to dismiss followed by a summary judgment motion to foreclose Counsel from arguing under the summary judgment standard. See, e.g., Moses, 96 A.D.3d at 468.

C. This Court Did Not "Affirm" Supreme Court's Finding That Defendants' Arguments in This Proceeding Were Frivolous.

Supreme Court claims that it has "*twice* ruled against these arguments, called them frivolous, and *twice* been affirmed by the First Department." A.31. Supreme Court grossly mischaracterizes this Court's ruling. This Court did not "emphatically reject[] [Defendants'] arguments" or reject them as without any basis in law or fact, as Supreme Court suggests. A.27, 31. In fact, this Court did not address Supreme Court's contention that the arguments made at the preliminary injunction or motion to dismiss stage were frivolous. See A.26744-26807. Instead, this Court issued a unanimous decision favorable to Defendants, severely curtailing NYAG's claims on statute of limitations grounds interposed at the motion to dismiss phase. Id. This Court did not issue a decision on Defendants' appeal from the Preliminary Injunction Decision, as that appeal was

withdrawn. See People v. Trump, Appeal No. 2022-04980, NYSCEF Doc. No. 11.

POINT III

SUPREME COURT ERRED IN CONSIDERING PRIOR SANCTIONS ISSUED AGAINST CERTAIN COUNSEL IN UNRELATED MATTERS

As set forth above, 22 N.Y.C.R.R. § 130-1.1(c) provides a clear list of categories of conduct qualifying as "frivolous" and a directive that courts applying the categories consider, "among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." The rule does not direct courts to consider past conduct by counsel or clients resulting in sanctions in cases other than the proceeding presently before the court.

Nonetheless, in the Sanctions Decision, Supreme Court recited that there is "a larger context to the sanctions issue." A.33. Specifically, Supreme Court stated that "[s]everal defendants are no strangers to sanctions and why courts are sometimes constrained to issue them." Id. Supreme Court then described (1) its own prior issuance of $10,000.00 per day in sanctions against President Trump in the separate investigatory proceeding[9] that preceded this action for his purported

[9] As noted, Mr. Robert, Mr. Farina, Mr. Kise, and Mr. Morian were not involved in any way in this proceeding.

failure to comply with discovery obligations and (2) the decision of a federal court in the Southern District of Florida in the matter captioned Donald J. Trump v. Hillary R. Clinton, 22-14102-CV-DMM[10], denying President Trump's application to vacate sanctions imposed on him and his legal team totaling almost $1 million. Id.

Supreme Court concluded that "sanctions are the only way to impress upon defendants' attorneys the consequences of engaging in repetitive, frivolous motion practice." A.34. However, the prior conduct Supreme Court cited as supposedly justifying sanctions did not consist of motion practice and did not occur within the underlying proceeding at all. Moreover, President Trump was not even represented in the other proceedings by four out of the five individual Counsel Supreme Court sanctioned herein. Supreme Court is without authority or rational basis to punish Counsel for conduct that they did not engage in and that occurred in other proceedings, in other jurisdictions, under different circumstances. Indeed, it is hornbook law that, in civil cases, evidence of the same or similar act on another unrelated occasion is inadmissible to prove that a person did a similar act on a particular occasion. See Matter of Brandon, 55 N.Y.2d 206, 210-211 (1982); see also Kourtalis v. City of New York, 191 A.D.2d 480, 481 (2d Dep't 1993); Feaster

[10] The sanctions in the Southern District of Florida action were imposed only on Mr. Madaio and Ms. Habba, another member of his firm. Id., Doc. No. 343. Mr. Robert, Mr. Farina, Mr. Kise and Mr. Morian were not involved in any way in this proceeding.

v. New York City Tr. Auth., 172 A.D.2d 284, 285 (1st Dep't 1991). Further, "[e]vidence of character is not admissible in a civil case to raise the inference that a party acted in conformity therewith." Fanelli v. diLorenzo, 187 A.D.2d 1004, 1005 (4th Dep't 1992). Nor can Supreme Court punish Counsel for representing President Trump.

To the extent that Supreme Court considered awards of sanctions against President Trump or other members of his legal team in separate cases, for entirely distinct conduct or in matters pending outside of this jurisdiction, as a factor in its determination that Counsel engaged in frivolous conduct or its calculation of an appropriate penalty, Supreme Court clearly abused its discretion.

CONCLUSION

Counsel respectfully request that this Court reverse the portion of Supreme Court's decision and order awarding sanctions against Counsel and grant any other and further relief as it may think proper.

Dated: New York, New York
July 22, 2024

Respectfully submitted,

BRIAN J. ISAAC
POLLACK POLLACK ISAAC & DECICCO LLP
250 Broadway, 6th Floor
New York, New York 10007
Tel.: (212) 233-8100
Fax: (212) 233-9238
Email: bji@ppid.com

-and-

MICHAEL S. ROSS
LAW OFFICES OF MICHAEL S. ROSS
One Grand Central Place
60 East 42nd Street
Forty-Seventh Floor
New York, New York 10165
Tel.: (212) 505-4060
Fax: (212) 505-4054
Email: michaelross@rosslaw.org

Attorneys for Non-Party Appellants

PRINTING SPECIFICATIONS STATEMENT

PURSUANT TO 22 N.Y.C.R.R. § 1250.8(j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 8,879.

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, SEVEN SPRINGS LLC,

Defendants-Appellants.

ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, and MICHAEL MADAIO,

Non-Party Appellants.

---

1. The index number of the case in the Court below is 452564/2022.

2. The full names of the remaining parties are set forth above. Defendant Ivanka Trump was discontinued from the action by Decision and Order of this Court dated June 27, 2023.

3. The action was commenced in the Supreme Court, New York County.

4. This action was commenced on or about September 21, 2022, by the filing of a Summons and Verified Complaint. Issue was joined by service of Verified Answers on or about January 26, 2023, followed by Amended Verified Answers on or about February 21, 2023.

5. The nature and object of the action is Executive Law § 63 (12).

6. These appeals are from the Decision and Order of the Honorable Arthur F. Engoron, dated September 26, 2023, the Decision After Non-Jury Trial of the Honorable Arthur F. Engoron, entered February 16, 2024, and the Judgment of the Supreme Court of the State of New York, County of New York, entered February 23, 2024.

7. These appeals are being perfected with the use of a Joint Appendix.