**NEW YORK STATE SUPREME COURT**
**NEW YORK COUNTY: PART 7**

MICHAEL I. KNOPF, NORMA KNOPF,
and DELPHI CAPITAL MANAGEMENT LLC,

Plaintiffs,

-against-

MICHAEL HAYDEN SANFORD, PURSUIT HOLDINGS LLC, SANFORD PARTNERS LP, MH SANFORD & CO. LLC, and WYNDCLYFFE LLC,

Defendants.

Index No.: 113227/09
**DECISION/ORDER**
Motion Seq. No. 023 and 027



Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' motion to confirm JHO Gammerman's report (motion sequence no. 023) and plaintiffs' motion to strike and for contempt (motion sequence no. 027).

| **Papers (mot. seq. no. 023)** | **Numbered** |
|---|---|
| Plaintiffs' Notice of Motion to Confirm | 1 |
| Plaintiffs' Volume II of Exhibits | 2 |
| Plaintiffs' Memorandum of Law in Support | 3 |
| Affirmation of James M. McGuire in Opposition | 4 |
| Affidavit of Michael Hayden Sanford in Opposition | 5 |
| Defendants' Memorandum of Law in Opposition | 6 |
| Reply Affirmation of Eric W. Berry in Support | 7 |
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| **Papers (mot. seq. no. 027)** | **Numbered** |
|---|---|
| Plaintiffs' Notice of Motion to Strike | 1 |

*Berry Law PLLC*, New York, NY (Eric W. Berry of counsel), for plaintiffs Michael Knopf and Delphi Capital Management.
*Gary Greenberg, Esq.*, New York, NY, for plaintiff Norma Knopf.
Defendants are pro se.[1]

Gerald Lebovits, J.

This decision and order consolidates plaintiffs' two motions: (1) a motion for an order pursuant to CPLR 4403 and rule 202.44 of the Uniform Rules of the Trial Court to confirm the report of the Honorable Ira Gammerman, J.H.O., filed on March 17, 2016, and directing the

[1] Dechert LLC, New York, NY (James McGuire of counsel) represented the defendants in filing the Motion to Confirm the Report Issued by JHO Gammerman, motion sequence no. 023.

Clerk to enter judgment in accordance with the findings in the report (motion sequence no. 023) and (2) a motion to strike the answers of each defendant as well as the counterclaim of defendant Michael Hayden Sanford and to enter judgment in accordance with the findings of J.H.O. Gammerman, together with the additional statutory interest that has accrued since the date of that report and to find Sanford in contempt of a decision and order of the Appellate Division, First Department, dated March 24, 2016, and a temporary restraining order issued by the Honorable Richard F. Braun, fine Sanford $650,000, and order him arrested and imprisoned until his contempt is cured (motion sequence no. 027).

The court will consider motion sequence no. 027 first, because a decision on the motion to strike will determine what papers are to be considered on motion sequence no. 023. Defendants submitted a letter requesting an adjournment of the return date on motion sequence no. 027, but did not submit formal opposition. The court considers motion sequence no. 027 unopposed. Defendants submitted opposition papers on motion sequence no. 023.

Background

Plaintiffs Michael and Norma Knopf are a married couple, and plaintiff Delphi Capital Management LLC is a limited liability corporation wholly owned by the Knopfs. (Vol. II of Exhibits to Plaintiffs' Motion to Confirm ("Vol. II of Exhibits"), Exh. 4, ¶ 3.) Defendant Sanford is the sole member of defendants Pursuit Holdings, LLC; Sanford Partners, LLC; MH Sanford & Co., LLC; and Wyndclyffe, LLC. (*Id.* ¶¶ 4-8.) These individuals and entities entered into a number of different loan and investment agreements that are at the center of this controversy.

In 2000, the Knopfs invested $11,607,810 in Sanford's hedge fund, Sanford Partners, through Delphi Capital Management. (Plaintiffs' Memorandum of Law in Support of their Motion JHO Gammerman's [sic] Report ("Memorandum in Support") at 3.)

The Knopfs also made five loans to Sanford and his companies between 2000 and 2006. Four of the five loans were disbursed from the monies the Knopfs invested in Sanford's hedge fund. These loans were a $100,000 Seed Capital Agreement on or about October 12, 2000; a $3,250,000 loan to buy three condominium units ("10 Bedford Street") on May 31, 2006; a revolving line of credit for $350,000 on May 30, 2006; and a trading loan of $1,627,842 in 2007. The fifth loan was for $1,690,860 to purchase a penthouse ("PHC") and came from plaintiff Norma Knopf directly on January 31, 2006. There is no dispute that these loans were not repaid, with the exception of $830,000 on the trading loan.

On September 17, 2009, plaintiffs filed a complaint in the Supreme Court, New York County, against defendants, alleging breach of contract, dissipation of assets, and breach of fiduciary duty and requesting the imposition of a constructive trust. Plaintiffs alleged that Sanford was liable for breach of contract on all these loans; that Pursuit was liable on the $3.25 million and the $1.69 million loans; that Wyndclyffe was liable on the $3.25 million loan; and that Sanford Partners and M.H. Sanford & Co. were liable on the line of credit and the trading loan. Defendants raised counterclaims.

Plaintiffs filed a summary-judgment motion that Judge Milton Tingling denied on August 16, 2013. Plaintiffs appealed. On December 11, 2014, the Appellate Division, First Department, granted plaintiffs partial summary judgment on their breach-of-contract claims and dismissed defendants' counterclaims except for Sanford's counterclaim for tortious interference. (*Knopf v*

*Sanford*, 123 AD3d 521, 521-522 [1st Dept 2014].) The decision did not provide for entry of judgment.

In February 2015, plaintiffs filed a motion in the Supreme Court to sever the claims upon which they had prevailed against Pursuit in the December 11, 2014, decision and to enter judgment or, alternatively, to issue a pre-judgment attachment against Pursuit. (Affirmation of James M. McGuire ("McGuire Aff."), Exh. S.) On July 23, 2015, Judge Braun held oral argument and granted the motion "to the extent of severing the claims upon which plaintiffs prevailed in the Appellate Division's December 11, 2014 decision" and referred those claims for an inquest. (Vol. II of Exhibits, Exh. 3.) In his opinion on the record on the motion to sever, Judge Braun stated, "Here severance is sought as to plaintiffs' claims in which the Appellate Division has already granted summary judgment, and defendant Pursuit has no counterclaims. The counterclaims are with Sanford, not with Pursuit. The summary judgment granted was against Pursuit, not Mr. Sanford." (*Id.* at 9-10.) Judge Braun denied the request for a pre-judgment attachment against Pursuit. (*Id.* at 12-13.)

Plaintiffs filed a note of issue to calendar a damages hearing in the court's inquest part. JHO Gammerman was assigned to conduct the hearing.

Pending the resolution of the breach-of-contract claims, plaintiffs filed several motions to prevent PHC and 10 Bedford Street, the properties purchased with the $1.69 million and $3.25 million loans, respectively, from being sold or to escrow any proceeds from a sale. In an order dated October 22, 2015, Justice John W. Sweeny, Jr., of the Appellate Division, First Department, ordered that PHC could be sold, but that the proceeds must be escrowed "pending further court order." (Plaintiffs' Notice of Motion to Strike Defendants' Answers and Defendant Michael Sanford's Counterclaim, and to Hold Sanford in Contempt of the Appellate Division's March 24, 2016 Decision and Order and the TRO Entered on March 2, 2016 ("Motion to Strike"), Exh. 5.) On November 12, 2015, a panel of the Appellate Division, First Department, denied plaintiffs' motion "for prejudgment attachment pursuant to CPLR 6201 or, in the alternative, for a preliminary injunction enjoining defendants from transferring, mortgaging, or otherwise impairing the value of the subject properties pending hearing and determination of" the appeal of Judge Braun's decision of July 23, 2015. (Edward S. Feldman, Affirmation in Opposition, Exh. A, included in Motion to Strike, Exh. 9.) On December 29, 2015, a full panel of the Appellate Division denied a cross-motion to vacate the interim order of October 22, 2015. (Motion to Strike, Exh. 6.)

On February 1, 2016, Sanford sold the PHC property for $3 million. (Motion to Strike, Affirmation of Eric Berry ("Berry Aff."), ¶ 7.) The proceeds were transferred to Sanford; several of Sanford and Pursuit's other creditors; Royal Abstract, which received $650,000 to secure a claim by Meister Seelig & Fein for outstanding attorney fees; and Dechert, L.P., which received a $500,000 initial retainer. (*Id.*)

The Knopfs later learned of the sale and that the proceeds had not been paid into escrow. On February 25, 2016, the Knopfs obtained a new order from the Appellate Division, Justice Karla Moskowitz, directing that any remaining proceeds from the sale be put into escrow. (Motion to Strike, Exh. 11.)

JHO Gammerman held hearings in January and February 2016 and issued his report on February 8, 2016. (Notice of Motion to Confirm the Report Issued by JHO Gammerman

("Motion to Confirm"), Exh. 1-A at 12.) JHO Gammerman found that Sanford was liable for $10,937,850 and that Pursuit was jointly liable with Sanford for $8,336,488.

On March 2, 2016, Judge Braun issued an order to show cause and a temporary restraining order providing that

> "Pursuit, Sanford and all other persons or garnishees under them, be and hereby are RESTRAINED and PROHIBITED pursuant to CPLR 6210 from (A) transferring or paying any assets of Pursuit, or any other personal property in which Pursuit has an interest, or any debt owed to Pursuit, to the extent of $8,336,488.97 and (B) transferring or paying any assets of Sanford, or any personal property in which Sanford has an interest, or any debt owed to Sanford, to the extent of $10,937,850." (Motion to Strike, Exh. 12.)

On March 24, 2016, a full panel of the First Department issued an order modifying Judge Braun's earlier July 23, 2015, decision. The order remanded "the matter to the motion court for a hearing on whether to grant a prejudgment attachment," and directed

> "that, pending the determination after a hearing, defendant Pursuit Holdings, LLC is prohibited from transferring, or further diminishing, impairing or encumbering the properties it acquired with real estate loans from plaintiffs, including but not limited to the property located at 10 Bedford St., New York, New York, as well as any proceeds derived from the sale of such properties prior to the date of this order." (*Knopf v Sanford*, 137 AD3d 662, 663 [1st Dept 2016].)

On April 8, 2016, plaintiffs filed a motion to confirm JHO Gammerman's report and to direct the clerk to enter judgment in accordance with the report. Defendants opposed the motion on the grounds that service of the notice of motion was improper, that Pursuit was wrongly deemed liable for two of the loans, that the JHO had no authority to make determinations regarding Sanford, and that the JHO calculated interest incorrectly. (Memorandum of Law in Opposition to Plaintiff's Motion to Confirm JHO Gammerman's Report and Recommendations ("Memorandum in Opposition") at 1-4, 15.)

Judge Braun denied plaintiffs' motion to confirm on or about November 3, 2016, on the grounds of improper service. The Appellate Division reversed and remanded the case "to the court to confirm, reject, or modify JHO Gammerman's report on the merits." (*Knopf v Sanford*, 150 AD3d 608, 610 [1st Dept 2017].)

Judge Braun recused himself from the case on June 26, 2017, and this action was transferred to this court.

Motion Sequence No. 027

Plaintiffs' motion to strike defendants' answers and counterclaim is denied.

A motion to strike is under CPLR 3126, which provides that

> "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
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> * * *
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> "3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

An order to strike an answer or a counterclaim is a "drastic remedy" appropriate only when the non-moving party's actions in failing to disclose information were "willful, contumacious or in bad faith." (*McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995].) "Apart from CPLR 3126, a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice." (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014].) In the case of *CDR Creances S.A.S.*, the court upheld striking defendants' answer when defendants had suborned perjury, lied in depositions, forged affidavits, and "intentionally and pervasively ignored court-ordered discovery allegations." (*Id.* at 315.)

In this case, plaintiffs allege that Sanford paid Frank Esposito, a Long Island lawyer who is married to a court attorney in the Appellate Division, First Department, between $25,000 and $55,000 for an "advisory opinion" from his wife regarding the October 22, 2015, escrow order and the December 29, 2015 denial of vacatur. (Berry Aff., ¶ 2.) Defendants were seeking to sell the PHC property and the potential buyer's title insurer refused to insure title because of the orders. (*Id.*, ¶ 37.) Sanford and Esposito executed a Retention Agreement on January 11, 2016, stating that Esposito Partners would be retained as General Counsel to MH Sanford & Co. LLC at a flat rate of $55,000 for a six-month term. (Motion to Strike, Exh. 7.) On January 12, 2016, two of Sanford's attorneys, Nathaniel Akerman and Edward Feldman, had an ex parte telephone conference call with Esposito's wife, Melissa Ringel. (Berry Aff., ¶ 5.) During that conversation, Ringel allegedly told Sanford's attorneys that the restrictions on the sale of PHC were no longer in effect and that the December 29, 2015, motion for vacatur of the escrow order was denied "because it was moot." (*Id.*, ¶ 46.) Feldman wrote a memorandum of the conversation with Ringel. (Motion to Strike, Exh. 30.) On January 15, 2016, Feldman notified Phillips' title company that "the appellate division vacated all restraints." (*Id.*, Exh. 29.) Sanford paid Esposito some portion of the retainer on January 19, 2016. (*Id.*, Exh. 8.) On February 1, 2016, Sanford sold the PHC property for $3 million. (Berry Aff., ¶ 7.)

Plaintiffs allege that the foregoing facts prove that defendants paid Esposito to obtain an advisory opinion from Ringel, his wife, to help them circumvent the courts' orders requiring them to put sale proceeds in escrow. They further allege that defendants manufactured evidence. (*Id.*, ¶ 58.) On this basis, plaintiffs argue that this court should strike defendants' answer, dismiss Sanford's counterclaim, and enter judgment in accordance with JHO Gammerman's report.

Plaintiffs' allegations, even if true, do not support striking an answer or counterclaim. Striking an answer or a counterclaim is an extreme remedy for failure to cooperate with discovery requests or other types of intentional interference with the court's ability to obtain truthful testimony and evidence. Plaintiffs have not alleged that defendants have failed to cooperate with any discovery orders, nor have plaintiffs alleged that defendants suborned or committed perjury. They allege that defendants manufactured an ex parte advisory opinion by Ringel and that this constituted "manufacturing evidence." (*Id.*, ¶ 58.) As proof of that claim, plaintiff submits a copy of the file memorandum Feldman wrote after the phone call with Ringel. (Motion to Strike, Exh. 30.) The memorandum appears to be a summary of the telephone conference with Ringel and provides her interpretation of the various court orders. It does not look or appear to be an "advisory opinion," an official court document, or anything other than a memorandum of a conversation. This memorandum does not constitute fabricated evidence. Moreover, this memorandum was not submitted in relation to the motion to confirm JHO Gammerman's report. Plaintiffs received it through discovery in a different, related action. (Berry Aff., ¶ 49.)

The allegations against defendants are serious, but a motion to strike is not the proper remedy for such allegations. The motion to strike defendants' answer and Sanford's counterclaim is denied.

The motion to hold Sanford in contempt of two court orders is also denied, without prejudice.

Judiciary Law §§ 750 and 753 provide for penalties for criminal and civil contempt. Criminal contempt is a public violation against the dignity and authority of the court, whereas civil contempt is a private remedy to redress an injury against a party in litigation. Section 750 (A) (3) provides that a court may find criminal contempt in the case of "willful disobedience to its lawful mandate." A court may find a party in civil contempt under § 753 for "disobedience to a lawful mandate of the court."

Plaintiffs' sole allegations rest on the transfer on August 8, 2017, of $650,000 from Royal Abstract to Meister Seelig & Fein. Plaintiffs claim that this transfer violated the March 2 TRO and the March 24 decision and order because these funds were proceeds from the sale of a property acquired with real-estate loans from plaintiffs. According to plaintiffs' pleadings, defendants transferred the $650,000 to Royal Abstract shortly after the sale of PHC, in January or February of 2016, prior to the March 2 and March 24 orders. (Berry Aff., ¶¶ 7-8.) In a March 1, 2016, email from James McGuire, another of defendants' former counsel, to Berry, McGuire states that the money deposited with Royal Abstract was in an escrow account pursuant to an Escrow and Deposit Agreement "as indemnity and security for the Meister Seelig & Fein mortgage." (Motion to Strike, Exh. 32.) According to McGuire's email, once the funds were placed into the Royal Escrow, they were "beyond the possession, custody or control of Pursuit and Mr. Sanford." (*Id.*) The email contained an attachment entitled "Royal Abstract of New

York LLC Escrow and Deposit Agreement," but plaintiffs did not include a copy of this attachment in their exhibits.

Plaintiffs assert that defendant Sanford caused the funds to be released by Royal Abstract to Meister Seelig & Fein. To demonstrate that Sanford caused the release of the funds, the court would require additional information, including the terms of the escrow agreement and the circumstances of the release of the funds from Royal Abstract to Meister Seelig & Fein. Without that crucial information, the court cannot determine whether the transfer of the money from Royal Abstract constituted contempt of a court order or a transfer by the escrow agent upon satisfaction of a condition precedent in the escrow agreement. The motion to hold Sanford in contempt is denied, without prejudice.

Motion Sequence No. 023

Plaintiffs' motion to confirm JHO Gammerman's report is granted insofar as it applies to Pursuit and denied insofar as it applies to Sanford.

Under CPLR 4403, the court "may confirm or reject, in whole or in part, the verdict of . . . the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing." The rules for referees apply to judicial hearing officers (JHOs). (*See* CPLR 4301.) The court may properly defer to the JHO's findings of fact because the JHO "was in the best position to weigh the evidence and make credibility determinations." (*Andersen ex rel. Andersen, Weinroth & Co., L.P. v Weinroth*, 48 AD3d 121, 133 [1st Dept 2007].)

In their opposition to the motion, defendants set forth a number of arguments about why the court should reject JHO Gammerman's report. Judge Braun rejected the report based on defendants' claim that the note of issue was not properly served. On appeal, the Appellate Division rejected that argument as well as defendants' argument that defendants were denied their right to a jury trial on damages. (*Knopf v Sanford*, 150 AD3d at 608.) The Appellate Division remanded the motion to Supreme Court to consider defendants' remaining arguments against confirming JHO Gammerman's report.

Defendants argue that the report erroneously finds Pursuit liable on the $1,690,860 loan and the $3,250,000 loan. This issue was settled by the Appellate Division, which granted plaintiffs partial summary judgment on all their breach-of-contract claims. (*Knopf v Sanford*, 123 AD3d at 521.) The breach-of-contract claims in the complaint allege that Sanford and Pursuit are liable on both the $1,690,000 loan and the $3,250,000 loan. (Vol. II of Exhibits, Exh. 4, Complaint, ¶¶ 13, 17.)

Defendants argue that JHO Gammerman acted in excess of his authority by making determinations against Sanford.

JHOs who determine issues not part of the order of reference act in excess of their authority. The court may not confirm that part of a JHO's report that exceeds the scope of or deviates from the order of reference. (*LA Gear, Inc. v Kidfusion, LLC*, 52 AD 3d 202, 202 [1st Dept 2008]; *Westland Garden State Plaza, L.P. v EZAT, Inc.*, 39 AD3d 291, 292 [1st Dept 2007].) The court is not, as defendants suggest, required to reject the entire report. (*See e.g.*

*Westland Garden State Plaza, L.P.*, 39 AD3d at 291-292.) It may modify the report to confirm only those parts that conform with the order of reference. (CPLR 4403.)

Plaintiffs' motion for severance named only Pursuit. Judge Braun granted the severance as to Pursuit only, as is stated in his decision on the record, quoted above. Although the order implementing the decision is not specific about which defendants are included in the order of reference, the decision controls in this situation, and the order should be settled accordingly. (*Bricuso v Edison Parking Corp.*, 222 AD2d 328, 328 [1st Dept 1995].)

This court disagrees with plaintiffs' argument that the parties modified the order of reference to include Sanford by a stipulation in open court under CPLR 2104. Plaintiffs cite statements James Prestiano, counsel for the corporate defendants, made in the inquest that "what has to be determined is which parties allegedly owe that money." (Motion to Confirm, Exh. 1-C at 24.) Mr. Prestiano is not counsel for Sanford in his personal capacity and has no authority to speak on Sanford's behalf. Sanford appeared pro se at the inquest. Sanford did not agree that the JHO was to determine the amounts of his personal liability. Sanford stated at the inquest that Judge Braun ordered "severance against Pursuit. That's all that was supposed to be before you. An issue about Pursuit." (*Id.* at 86.) No stipulation in open court expanded the scope of JHO Gammerman's responsibilities.

The order of reference applied only to Pursuit, not to any other defendant. The JHO exceeded the scope of the order of reference by determining the amounts owed by Sanford individually. The court rejects the report insofar as it pertains to Sanford and confirms the JHO's finding that Pursuit's pre-interest liability is $4,940,860.

Defendants' further contest JHO Gammerman's calculation of interest on the loans against Pursuit.

The JHO calculated interest on the $1,690,860 according to the rate contractually agreed to (9%) from the date the agreement was made (January 31, 2006) until the "contract was merged in a judgment" on February 8, 2016, the date the JHO issued his report. On the $3,250,000 loan, the loan agreement does not specify an interest rate, and the JHO applied the default rate of 9% per annum, beginning to accrue from September 17, 2009, when the complaint was filed (CPLR 5001 [b]) and ending on February 8, 2016, with the JHO's report. The interest amounts on the two loans are $1,525,091.47 and $1,870,537.50, respectively.

Defendants argue that this method of calculating interest is incorrect because, they allege, in an agreement between the parties on May 30, 2006, plaintiffs waived interest. They argue that this contract "called for interest on all of the loans . . . by Plaintiffs to be 'deferred' in exchange for Mr. Sanford, Sanford Partners, and MH Sanford & Co.'s giving Plaintiffs 'a 20% economic interest in all net profits derived from Performance Allocations and Management Fees, minus Management Expenses.'" (Memorandum in Opposition at 16.)

The May 30, 2006 agreement does not indicate that plaintiffs intended to waive interest. The only reference in the May 30 agreement regarding interest on the prior loans reads as follows: "In return for approximately $5.65 million dollars of interest deferred short- and long-term loans. . . ." (Vol. II of Exhibits, Exh. 4-6.) As the Appellate Division noted in its decision on summary judgment, "although later loan agreements refer to earlier agreements, the later

agreements do not alter or reflect an intent to supersede the terms of the earlier agreements." (*Knopf v Sanford*, 123 AD3d at 522.)

The court finds that JHO Gammerman calculated interest on the two loans properly.

Accordingly, it is

ORDERED that plaintiffs' motion sequence no. 027 to strike defendants' answer and counterclaim is denied, and that portion of the motion asking to find Michael Hayden Sanford in contempt of a decision and order of the Appellate Division, First Department dated March 24, 2016 and a temporary restraining order issued by the Honorable Richard F. Braun, J.S.C. dated March 2, 2016 is denied without prejudice; and it is further

ORDERED that plaintiffs' motion to confirm JHO Gammerman's report (mot. seq. no. 023) is denied in part and granted in part. Plaintiffs' motion to confirm JHO Gammerman's report is granted insofar as it applies to Pursuit Holdings LLC and denied insofar as it applies to Michael Hayden Sanford; and it is further

ORDERED that judgment be entered for plaintiffs and against Pursuit Holdings LLC in the amount of $8,336,488, with interest from February 8, 2016 at the statutory rate until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that plaintiffs serve a copy of this decision and order with notice of entry on defendants and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: February 9, 2018

J.S.C.

**HON. GERALD LEBOVITS**
**J.S.C.**