

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division Second Department

To be argued by: Brett Wynkoop
Time Requested: 15 Minutes

<p>Brett Wynkoop, Appellant-Plaintiff, -against- Michael T. Yonker Respondent-Defendant</p>	<p>Docket Number: 2020-05126</p>
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APPELLANT'S BRIEF

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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division Second Department

<p>Brett Wynkoop, Appellant-Plaintiff, -against- Michael T. Yonker Respondent-Defendant</p>	<p>Docket Number: 2020-05126 SIGNING REQUIREMENT CERTIFICATION Pursuant to 22 NYCRR § 130-1.1-a</p>
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I hereby certify pursuant to 22 NYCRR § 130-1.1-a that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers listed below or the contentions therein are not frivolous as defined in 22 NYCRR § 130-1.1(c):

1. Appellants Brief
2. Affidavit of Richmond regarding courtroom events
3. Record on Appeal

Dated: 22 December 2020
Brooklyn, NY


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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division Second Department

Brett Wynkoop, Appellant-Plaintiff, -against- Michael T. Yonker Respondent-Defendant	Docket Number: 2020-05126 STATEMENT PURSUANT TO CPLR 5531
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1. The index number in the trial court was 3863/2019
2. The full names of the parties are set forth above. There have been no changes.
3. The action was commenced in Kings County Supreme Court.
4. The summons and complaint were served on 4 March 2020.
5. The object of the action is recovery under Judiciary Law 487.
6. The appeal is from all orders of Supreme Court Kings County dated 19 May 2020 and entered 20 May 2020 by Justice Edgar G. Walker.
7. This appeal is being perfected on the full record method.

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PRELIMINARY STATEMENT

1. Appellant has been denied his right of un-waived procedural due process and substantive due process and his ability to seek redress for damage suffered at the hands of the Defendant below by a judge who violated the law, the Constitution of the United States of America, and the Constitution of the State of New York.

2. In March 2012 Michael T. Yonker Esquire filed an action under index number 6548-2012 in Kings County Supreme Court where it was alleged that Appellant (Wynkoop) had, without authority annexed the cellar of the building to his Unit 1 apartment at 622A President Street. This court ruled that Wynkoop was entitled to and had authority to occupy the cellar of 622A President Street.¹

3. To support the false claims in 6548-2012 Yonker made several oral representations he knew to be false to the court. In addition he filed documents he knew to be false with the court.

4. Wynkoop brought the action below under Judiciary Law 487. Judiciary Law 487, like it's predecessors going back to 1275 AD² is meant not only to recompense those

1 "The plaintiffs established their prima facie entitlement to judgment as a matter of law dismissing the counterclaims alleging breach of contract based on the improper use or occupancy of the cellar within the corporation's building. In support of their motion, the plaintiffs submitted, inter alia, copies of the proprietary lease they signed in 1995 and signed by the defendant Rajeev Subramanyam in 2006 and the defendant Kyle Taylor in 2010. The proprietary lease contained a rider granting to the owners of Unit 1 sole use of the cellar, subject to section 7(a) of the proprietary lease. Those defendants do not specifically dispute that the proprietary lease contains such a provision, and there is no language in the proprietary lease contradicting the terms of the subject rider. "- Decision and order of this court on Dockets 2016-05842 2016-11142

2 Judge Susan Phillips Read, writing for a 6-0 Court, determined that the law that evolved as §487 can be traced back to the first Statute of Westminster, adopted by the Parliament that was called by King Edward I in 1275. - http://www.parentadvocates.org/nicecontent/dsp_printable.cfm?articleID=7539

damaged by the unscrupulous pleader,³ but to also offer punishment to an attorney who attempted to damage the court by misleading the court or any party. At its core Judiciary Law 487 is to protect the integrity of the court. This is what makes a court disposing of such a case by way of a judge violating the Constitutions of the United States of America and the state of New York, as well as multiple state statutes, including Judiciary Law 487, so very repugnant to our system of justice.

Procedural History

5. The action below was initiated with the filing of a summons and complaint on 2019-11-13.

6. Before service was complete Respondent's attorney filed an RJI, indicating there was a related case and made a motion to dismiss. There was no related case. This was a blatant attempt at Judge Shopping.

7. Along with the RJI Yonker, by his counsel, served and filed, a motion to dismiss which was rejected by Wynkoop as being defective for lack of verification (record p14-16 & p358)

8. Because of the related case indication, the clerk assigned the case to Justice Francois Rivera. Justice Rivera could not hear the case due to the bias he previously expressed on the record against Wynkoop. Additionally, he is a fact witness that might be called in the case below, KSC-3863-2019.

³ This is the English term of art circa 1275 for what we today in this country call an attorney.

9. This forced Wynkoop to file a motion to recuse, which Justice Rivera quickly granted at oral argument prior to hearing the motion to dismiss and motion to strike which he sent to be recalendered with another judge.

10. While the rejection and filing the rejection with the court should have been enough to quash the unverified motion to dismiss, to preserve his rights, Wynkoop filed a motion to strike part or all of the motion to dismiss by order to show cause. The motion contained unrelated scandalous & prejudicial material. Thereby, Wynkoop invoked a statutory stay of his time to respond to the motion to dismiss, which of course is a pleading⁴ in response to the complaint.

CPLR 3024(c) Time limits; pleading after disposition. A notice of motion under this rule shall be served within twenty days after service of the challenged pleading. If the motion is denied, the responsive pleading shall be served within ten days after service of notice of entry of the order and, if it is granted, an amended pleading complying with the order shall be served within that time.

11. In the case below Wynkoop served his motion to strike timely according to statute.

12. The court recalendered both the motion to strike and motion to dismiss for the same day. Since a stay by statute was in effect under CPLR 3024(c), they never should have been calendared for the same day.

⁴ Pleading *n.* 1. A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses – Blacks Law Dictionary 7th edition p 1173

13. Under CPLR 3024(c), the party filing the motion to strike has, 10 days after being served with notice of entry of a denied motion to strike before he has to serve papers responsive to motion he was trying to strike. Thus, no court could logically dismiss a case with a pending motion to strike part of the motion to dismiss. To do so would put the motion to dismiss cart before the controlling motion to strike horse.

14. Despite the clear logic of the inability of the court to do so, oral arguments on both the motion to strike and the motion to dismiss were scheduled by the court for 2020-01-24. A week prior to oral argument Wynkoop called and spoke to Judge Walker's clerk and requested a court reporter for that date. The clerk told Wynkoop to make the request in person.

15. Several days prior to the court date Wynkoop hand delivered courtesy copies of his papers to Judge Walker's court room. A black man with grey in his hair and of average build who identified himself as Judge Walker's court clerk answered his knock at the locked door and accepted my papers. Wynkoop requested a court reporter on 2020-01-24 and was told he would have to make that request on that date at calendar call. The request for a court reporter was also conspicuous on in the papers. (record p1-14, p 441-456)

16. On the court date when Wynkoop checked in he informed the clerk that he wanted a court reporter when the case was called. The clerk told him to make the request to the judge when the case was called.

17. When the case was called Wynkoop informed Judge Walker that before beginning oral arguments he wanted a court reporter and a court that adhered to Article 6 Section 1 of the New York State Constitution. Judge Walker ignored the request and began to go through the motions he believed were before him, including the motion asking Judge Rivera to recuse, a motion which Judge Francois Rivera already granted! Both opposing counsel and Wynkoop informed Judge Walker the motion to recuse was not before him and that it had already been granted. Wynkoop again informed Judge Walker that he wanted a court reporter as was his right under the New York State Constitution. After he made several requests for a court reporter before proceeding, invoking the New York State Constitution each time, Judge Walker said if Wynkoop insisted on having a record he would take the papers on submission. (Richmond Affidavit)

18. Kings County Supreme Court Rules at that time mandated that all motions had to have oral argument. Judge Walker broke the court's own rule & gave no prior notice.

19. Further Wynkoop was prevented from communicating to Judge Walker that he could not take the motion to dismiss on submission because the time to submit opposition had not even started, let alone expired. As soon as Judge Walker said he was taking the motions on submission he refused to allow Wynkoop to speak further and indicated he had to leave his courtroom. Wynkoop's time to respond to the motion to dismiss has not yet begun to run.

Questions For The Court

- **Did the court below have jurisdiction to hear a motion to dismiss filed before the defendant below had been served the summons and complaint?**

20. A wealth of case law that I need not quote for this court teaches us that lack of service means lack of Jurisdiction. Since service had not been perfected on Yonker at the time Respondent filed his motion to dismiss his motion was not ripe and therefore not properly before the court. Since service had not been completed on Yonker the court had not yet obtained jurisdiction. Respondent even says in his papers the court has no jurisdiction. (record p 352) – Wynkoop served Yonker later. (record p 586-587)

- **Do the equal protection & due process clauses of the New York State and United States Constitutions apply in Kings County Supreme court?**

21. Both the Federal and New York Constitutions provide for equal protection under the law. ⁵ If a litigant in one civil case is denied the unwaived right of a court of record yet a litigant in another case is provided with an unwaived Article 6⁶ court of record by way of court reporter, there is a clear violation of the equal protections clauses of both constitutions. Denial of equal protection violates a litigant's right to due process.

- **Is it a denial of due process for the court to premise the exercise of one right on the waiver of another?**

⁵ See the 14th amendment of the United States Constitution and Article 1 Section 11 of the NY State Constitution.

⁶ See Article 6 section 1 of the New York State Constitution which defines the Supreme Court as a court of record. With no transcript of oral arguments the court becomes one of no record and no litigant can show he preserved his rights for appeal by making proper objections in the lower court for there is no record of any such activity.

22. In the action below Wynkoop, according to statute, had at a minimum 10 days beyond the hearing date of the motion to strike to submit his opposition to the motion to dismiss, or in the alternative submit an amended complaint. In reality, Wynkoop would have more time as the 10 days runs from being served with notice of entry of the order.

- **Can a Judge ignore the clear intent of the legislature as seen by a plain reading of the statute? Put in another way, can a Judge just ignore the law?**

23. In the matter below Judge Silber in modifying the language Appellant put in his order to show cause for the motion to strike appears to have violated CPLR 3024. By deciding both the motion to strike and the motion to dismiss at the same time, denying Appellant his right to oppose the motion to dismiss, clearly Judge Walker violated CPLR 3024.

- **Can a Judge change the rules of the game with no prior notice to the litigants?**

24. In the case below Appellant had every reasonable expectation that there would be oral arguments on both the motion to dismiss and the motion to strike. Appellant had the absolute expectation that he would be able to inform the court of the schedule mishap and thereby have the ability to submit opposition to the motion to dismiss if it was not struck in part or in total. He also had the absolute expectation that the court would follow the law.

25. In the case below the court neither followed the law, nor it's own rules and gave Appellant no prior warning. Had Appellant been aware the court would take such actions he would have briefed the court in papers on it's responsibility under the law, but it is presumed that an attorney who sits on the bench with a minimum of 10 years in practice should have an understanding of the principles of Notice and Opportunity to be Heard, the key foundational parts of due process.

26. Litigants expect when they go to court that un-waived rules are followed by everyone, including the other side and the judge.

- **Is Kings County Supreme Court an Article 6 court of record as defined in the Constitution of the State of New York?**
- **Can you have a court of record when no record of oral proceedings is had?**

27. In *People v. Cameron*, 219 A.D.2d 662, 631 N.Y.S.2d 717 (N.Y. App. Div. 1995) the court reporter refused to produce the record of *Voir Dire* and this court ruled a new trial was in order due to the lack of a complete record.

28. *People v. Jacobs*, 286 A.D.2d 404, 729 N.Y.S.2d 189 (N.Y. App. Div. 2001) is also instructive in this regard.

29. While the above cited cases are criminal in nature the civil litigant has the same right to be provided with a court of record so there is a clear and complete record preserving the litigant's rights for appeal.

30. Clearly a lack of record prejudicing litigant's ability to appeal is the result if a Judge refuses to allow a court reporter in oral argument hearings.

- **Is a litigant required to trade away his constitutional rights to be heard in court?**

31. In the action below Judge Walker repeatedly threatened Appellant that he would have no oral argument on the motions at bar if Wynkoop insisted on enforcing his rights under the constitutions of the State of New York and the United States of America.⁷ In the end Judge Walker made good on his threat, then took further prejudicial action by violating state law.⁸

32. *STEVENSON v. CITY OF ROME* 4th Dept -1997 clearly teaches us that a court reporter may be waived. Appellant never waived his right and in fact attempted to enforce his right. (Richmond affidavit)

33. "Thus, no stenographic notes of the argument on the motion were required in the absence of a specific request by counsel." *Stevenson v. City of Rome*, 237 A.D.2d 946, (N.Y. App. Div. 1997)

34. The court is referred to the affidavit of Eric Richmond testifying to Wynkoop's request for a court reporter and a court of record.

⁷ There is of course no official record of this because Walker would not permit a court reporter in the hearing.

⁸ Walker ignored the provisions of CPLR 3024 that provided Wynkoop with time to oppose Yonker's premature motion to dismiss.

- **Can a Judge deny as moot a motion that was already granted by the predecessor judge in the case?**

35. In the matter below Judge Walker denied Wynkoop's motion to recuse directed at Judge Francois Rivera on the grounds it was moot. This was in spite of both Wynkoop and consul for Yonker informing Judge Walker that the motion was not before him, had already been decided and could not be decided again under the theory of *res judicata*. Both parties showed Walker the order of recusal signed by Rivera.

- **Given the above very real problems with the handling of the case below is Judge Walker fit to sit on the Supreme Court of Kings County?**

36. The reasonable man⁹ test presents a very clear answer to this question, and that answer is no.

Crimes to Hide Crimes

37. This court must remember that Judiciary Law 487 has both criminal and civil prongs. As a worthy successor to ancient legal punishments, an attorney who is found to have violated this law is liable to both criminal and civil penalties.

38. In his attempt to deflect Wynkoop's accusations against his client Attorney Benjamin M. Oxenburg himself violated Judiciary Law 487 by representing to the court that the statute of limitations had run as his client was no longer counsel for Taylor and Subramanyam at the end of KSC 6548-2012. To bolster his position Oxenburg claimed

⁹ A term used to describe a person who acts with common sense, with a good mental capacity who is stable. - <https://thelawdictionary.org/reasonable-man/>

that a document he submitted as an exhibit was an executed consent to change consul.

Not only did Oxenburg not submit a consent to change consul as an exhibit to the court below, but no consent to change consul can be found in the more than 25000 pages of documents filed in KSC-6548-2012.

39. It is expected that Counsel for Yonker will attempt to make the same argument here to keep this court from remanding to the trial court for further motion practice and trial.

40. The document provided by Oxenburg in the action below is a notification of change of consul filed with the clerk in KSC-6548-2012. It is not a consent to change consul and no consent to change consul or even any notice of a change in consul was ever served on Wynkoop. The court must take notice under CPLR 4511 that KSC-6548-2012 was not e-filed, so Oxenburg's client had to serve papers on Wynkoop's attorney for them to be effective. Since Oxenburg produced no affidavit of service regarding a consent to change consul, or any document masquerading as such, in the action below it must be deemed to have never happened and Yonker has no safe haven in the 6 year statute of limitations.

41. Even had Yonker a safe haven in the 6 year statute of limitations such could not be said to start running until all action was finished in KSC-6548-2012 as only then did Wynkoop know the extent of his monetary damages caused by Yonker's misrepresentations to the court.

42. Any argument supported by the statute of limitations against remanding the matter to the trial court is therefore fallacious.

Request for Relief


43. Given the violation of Appellant's rights by the trial court and Judge Walker's display of bias or incompetence or both Appellant request this matter be sent back to Kings County Supreme Court for random judge assignment.

44. Appellant Requests that the decisions on Respondent's motion to dismiss and Appellant's motion to strike be reversed and the matter be remanded to the court below for a hearing on Wynkoop's motion to strike and if then needed a later hearing on Respondent's motion to dismiss while comporting with CPLR 3024 giving Appellant the opportunity to oppose the motion to dismiss.

45. Appellant Requests Judge Walker's order on Motion Sequence 2, Motion to Recuse be vacated and deemed improper given that Judge Rivera previously ruled on that motion.

I swear under penalty of perjury that all statements of a factual matter made in this document are true and known by me to be true.

Dated: 22 December 2020
Brooklyn, NY


Brett Wynkoop
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917-642-6925 – wynkoop@wynn.com

Richmond Affidavit

State of NEW YORK)
) ss.
County of KINGS)


**AFFIDAVIT OF
ERIC RICHMOND**

AFFIDAVIT


Eric Richmond, being duly sworn, under penalty of perjury, deposes and swears the statements herein are true to my own knowledge.

1. I was present for the calendar call for case 3863/ 2019, *Wynkoop v. Yonker* on Friday, January 24, 2020 at approximately 10:00AM.
2. Plaintiff Brett Wynkoop demanded a court reporter for oral argument pursuant to *Article VI of the New York State Constitution* and the Court's own rules.
3. The presiding Judge, the Honorable Judge Edgar Walker, informed both Wynkoop, appearing pro-se and the attorney for the defendant, Benjamin M. Oxenberg, that oral argument would not be held if Wynkoop would not agree to the oral argument being off the record.
4. Mr. Wynkoop then informed the court that the court must have a court reporter for oral arguments and that Mr. Wynkoop would never waive his right to a court reporter.
5. Judge Walker then said that there would be no oral argument and that the motions were taken on submission.
6. Mr. Wynkoop then informed the Judge that he would be appearing at the Appellate Division, Second Department at 2:30PM the same day, January 24, 2020 seeking both writs of prohibition and mandamus regarding the holding oral argument hostage to accepting no court reporter at oral argument.
7. Mr. Wynkoop then informed the opposing counsel of the Second Department appearance.
8. At approximately 12:00PM, Mr. Wynkoop then called James B. Cooney - Director of Emergency Litigation / Assistant Attorney General - Office of the New York State Attorney General to inform him of the hearing at 2:30PM at the Second Department.

DATE: January 24, 2020
STATE OF: New York
COUNTY OF: Kings

SIGNATURE: 
NAME: Eric Richmond
ADDRESS: 2107 Regent Place
Brooklyn, NY 11226
(646) 256 - 9613

Sworn to before me this 24th day of January, 2020


PRAKASH B. SONI
Notary Public, State of New York
No. 01SO6038647
Qualified in Kings County
Commission Expires March 20, 2022

Computer generated Brief - Proportionally Spaced Typeface

The foregoing brief was prepared on a computer (on a word processor). 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 citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 3189.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division Second Department

Brett Wynkoop, Appellant-Plaintiff, -against- Michael T. Yonker Respondent-Defendant	Docket Number: 2020-05126 Affirmation of Service
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I, Kathleen Keske, swear the following to be true under penalty of perjury.

1. I am not a party to the above captioned matter.
2. Currently there exists in New York City and State a declared emergency due to the covid-19 pandemic. The emergency declarations by Governor Cuomo have caused many businesses and shops to operate with limited staff, or limited hours, or cease operations all together.
3. I am considered an essential worker by New York State and I work for an essential business.
4. The above factors limit my ability to seek out a notary during business hours.
5. On 23 December 2020 I served a true copy of the Appellate Brief, Record and supporting documents on the Respondent by mailing such to the Attorney for the Respondent:

FURMAN KORNFELD & BRENNAN LLP
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Kathleen Keske Dec 23, 2020
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