

To Be Submitted By:  
Jorge Bernal

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**NEW YORK SUPREME COURT**

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**APPELLATE DIVISION-SECOND DEPARTMENT**

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MARIA BERNAL

Petitioner/Respondent

App. Div. No.

-against-

2007-02754

JORGE BERNAL

Respondent/Appellant

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**BRIEF FOR RESPONDENT-APPELLANT**

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On the Brief:

Jorge Bernal

Family Court of the County of Queens, New York, Docket # O-08307-06

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION - SECOND DEPARTMENT

-----X

MARIA BERNAL

Respondent,  
  
-against-

STATEMENT PURSUANT  
TO CPLR 5531.

JORGE BERNAL

Appellant.

-----X

1. The index number of the case in the trial court is O-08707/06.
2. The full names of the original parties are MARIA BERNAL, Petitioner-Respondent, and JORGE BERNAL, Respondent-Appellant. There may be a change in the Respondent 's name due to a change in marital status.
3. The action was commenced in Family Court County of Queens.
4. The action was commenced on or about August 23, 2006, by the filing of a Motion, which was timely served upon the Petitioner-Respondent.
5. The nature and object of the action was to Vacate Final Order due to perjury by the Petitioner-Respondent.
6. This appeal is from a Decision and Order of the Family Court county of

Queens by Honorable Salvatore J. Modica, FCJ, , dated March 6, 2007.

7. This appeal is on the original record.

## **STATEMENT OF QUESTION INVOLVED.**

1. Should a Decision and Order that contains: Lies, judicial impropriety, fabricated statements, inflammatory statements, disregard for a judgement of a higher court; be overturned?
2. Should the Judge who wrote such a Decision and Order, who also held ex-parte communications and criticized the way another Court wrote a decision , be recuse, remove from the bench and disbarred?

## **STATEMENT OF FACTS.**

### **BACKGROUND**

The Respondent/Appellant, Jorge Bernal (hereinafter the “Appellant”), and Petitioner/Respondent, Maria Bernal (hereinafter the “Respondent”) are divorced, as per Supreme Court judgement of the year 2001.

On May 1, 2006, the Respondent filed petition for and was granted a Temporary Order of Protection by the Queens Family Court under docket number O08307/06.

On August 4, 2006, at the end of a fact-finding hearing, the Order became permanent until April 30, 2008.

On August 23, 2006, the Appellant filed Motion to Vacate Final Order, returnable on September 6, 2006. On the return date, Appellant’s petition to adjourn was granted and the matter was adjourned to October 27, 2006.

On October 11, 2006, the Appellant filed Motion to Amend Motion, returnable on October 27, 2006.

On October 27, 2006, the Appellant appeared, represented by Attorney at Law Mr. Edward Friedman, before Honorable Salvatore Modica, FCJ. The matter was adjourned to January 24, 2007. Subsequently, on or about November 2006, Mr. Friedman was dismissed by the Appellant.

On January 2, 2007, the Appellant, following Hon. Modica’s instructions, (Tr.

October 27, 2006, page seven, line 12 thru line 17) filed Motion to Vacate Final Order, returnable on January 24, 2007.

**EX-PARTE COMMUNICATION.**

On January 24, 2007, Honorable Modica partially heard oral arguments on this Appellant's Motion to Vacate Final Order. This Appellant states 'partially heard' because it was evident that Hon. Modica made ex-parte arrangements with Mr. Soto whereby this Appellant's oral arguments time was limited ( Tr. of January 24, 2007, Page 25 at line 21 and ending at page 27 line three).

**JUDICIAL IMPROPRIETY .**

On March 6, 2007, the Court issued the Decision and Order (hereinafter the "D&O"). The March 6, 2007, date is far from Hon. Modica statement of January 24, 2007 hearing that a decision would be issued within six weeks (Tr. of January 24, 2007 page 25 line 13 thru line 16).

In the "D&O" being appealed, single space written in 8 and 1/4 pages, no more than 1/2 of a page is being used for the Motion to Vacate Final Order, which is what was before the Judge at the time. The rest is used by Hon. Modica to defend his decision of the August 4, 2006 hearing on the Order of Protection.

In re-writing his opinion of his decision of August 4, 2006, Hon. Modica, made false statements, and distorted the facts while ignoring this Appellant's irrefutable

and unchallenged fact of his Motion to Vacate Final Order.

**JUDICIAL IMPROPRIETY.**

Hon. Modica states (D&O page one, paragraph one, last sentence):

“The Court found that the respondent sustained her burden of proof at the hearing and issued an order of protection in her favor against the respondent, . . .”

Honorable Modica is wrong, because in Family Court, this Appellant is the Respondent.

**LIE.**

Honorable Modica stated (D&O page two, first paragraph, 6<sup>th</sup> sentence) that:

“Mr. Friedman requested and was granted an adjournment for the purposes of securing necessary transcripts in support of his arguments. ...”

The above statement is totally not true. Mr. Friedman did not request an adjournment. Hon. Modica instructed Mr. Friedman (Tr. October 27, 2006, page seven, line four) as follows:

“Counsel, why don’t you do this. Since you represent Mr. Bernal. . . And his papers frankly don’t support what you’re saying at this time, why don’t you file papers?”

**FABRICATION.**

In D&O Hon. Modica stated (D&O page two, paragraph two, in the last

sentence):

“At the request of the respondent, this Court permitted him to represent himself, file additional motion papers, and then make an oral argument. ...”

The ‘request’ is fabrication by Hon. Modica. This Appellant never made that request. Furthermore it is a logistical impossibility to file additional motion papers and then make oral arguments in the same day.

### **INFLAMMATORY AND FABRICATION.**

It is also not totally true (D&O page 2 beginning with the last sentence) that:

“For the past two years, that child, who is almost 16 years old, has been living with his father. Despite that living arrangement, Ms. Bernal filed for child support in the Spring of 2006, a decision that infuriated Mr. Bernal. After being served with the child support petition, which was scheduled to be heard in Queens Family Court on May 5, 2006, Mr. Bernal telephoned the petitioner’s cellular telephone on April 4, 2006, at 7:30 p.m., informing her that he wanted to discuss the May 5<sup>th</sup> court date.”

The record from the Queens Family Court will show that the Respondent did not file a petition for child support, in Queens Family Court. There was a COLA issue in the Kings County Family Court . In Kings Family Court, the record will also show that the Respondent did not file a Petition for child support in early spring of 2006, hence, this Appellant was never served a petition for child support and this Appellant did not, on April 4, 2006, called the Respondent on her cellular phone. Hon. Modica made inflammatory and false statements about this Appellant.

### **INFLAMMATORY AND LIE.**

In addition, it is a lie, an inflammatory and a passionate exaggeration to state (D&O page three, last sentence):

“According to the petitioner, the respondent stood outside her home for several hours...”

The Respondent’s testimony was (Tr. August 6, 2006, page 47, line six):

“He went to my home, he put a sign on, he walked back and forth several times for a half an hour.”

### **JUDICIAL IMPROPRIETY.**

Honorable Modica, in reversing his own ruling of the August 4, 2006, trial regarding caller id evidence, shows interest and passion by writing (D&O, March 6, 2007, second paragraph) that:

“On this record, it is obvious that the respondent telephoned the petitioner several additional times that night. First, the petitioner testified at the hearing that subsequent to the respondent’s 7:30 p.m. telephone call, the petitioner’s cellular telephone rang two more times and her home telephone rang a total of five times, the last one occurring at 12:30 a.m. on April 25<sup>th</sup>. Second, the petitioner telephoned the respondent’s home telephone in the early morning of April 25<sup>th</sup> for the sole purpose of speaking to her son who was staying with Mr. Bernal.”

The record shows (Tr. August 6, 2006, page 44, beginning line 25 and ending on page 45 line 11) that:

“Q. And how do you know that it was Mr. Bernal calling your phone?  
A. Because I have caller Id in the house.  
Judge Modica: Mr. Soto, her testifying as to what the caller identification says is hearsay. “

**LIE .**

In addition, if Honorable Modica's usage of the word 'telephoned' means the parties made voice connection, then Honorable Modica will be again distorting the facts and the evidence because (Tr. August 6, 2006, page 46 line 10):

“Q. That evening did you get to speak to Mr. Bernal at all after the phone call that you had made to your child and after you received the message from the answering machine?

A. No.”

**LIE.**

The Respondent never called this Plaintiff's home on April 25<sup>th</sup> early in the morning. Honorable Modica distorts the facts as he writes along.

**JUDICIAL IMPROPRIETY.**

In regards to this Appellant's Motion to Vacate Final Order, Honorable Modica wrote, on page eight, first paragraph, second sentence of D&O:

“As noted in this opinion, the Court found the petitioner to be a credible witness when she testified at the August 4<sup>th</sup> hearing. The motion papers filed by Mr. Bernal, as supplemented by his oral argument in court on January 24, 2007, do not cast doubt on those credibility findings.”

Honorable Modica, acting a co-counsel for the Respondent, states that the Appellant's Motion and oral arguments do not cast doubt on those credibility findings. Counsel for the Respondent's arguments, Mr. Soto, which begins on page eight of the January 24, 2007, transcript, concludes in page 10 beginning line

24 with:

“And what he does in his paperwork has been to continually point out in his paperwork that my client has made inaccurate statements and he’s trying to (inaudible) my client’s testimony within the paperwork that he - - that he submitted, but that does not matter as this point, Your Honor. One of the things that I take issue with in the papers that Mr. Bernal has submitted to me is that he gives me an incomplete transcript. What he does is that he takes excerpts and he underlines them and he points them out that this why Hour Honor should not have believed my client.”

Mr. Soto contention of the Appellant’s paperwork (read Motion) is that the true has a time limitation and it should not be submitted in transcript excerpts. Mr. Soto never asked the Appellant for a full copy of the transcripts. Mr. Soto’s position does not negate the credibility of this Appellant’s Motion.

**JUDICIAL IMPROPRIETY.**

Honorable Modica never writes in his D&O the reason(s) the Appellant’s Motion does not cast doubts on the witness’ credibility but he continues on page eight, first paragraph, :

“ To the extent that the respondent moves to vacate under CPLR 5015(2), he has not alleged that there exists “newly discovered evidence, which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404. Nor, other than alleging that the petition lied at the fact-finding hearing, has the respondent alleged any ‘fraud, misrepresentation, or other misconduct’ of the petitioner.”

Again, the Appellant’s allegations that the Respondent lied during the fact-finding hearing were never challenged or argued against by Mr. Soto. Furthermore, this

Appellant could not argue the circumstances of the newly discovered evidence or conclude that the Respondent's lies amounted to 'fraud, misrepresentation, or other misconduct' because this Appellant was cut short of completing his oral arguments, as already established on the second paragraph of page three of this brief.

**JUDICIAL IMPROPRIETY AND LIE.**

In addition, Honorable Modica made several more false statements. Honorable Modica wrote, on page eight of his D&O:

“In any event, the Court has carefully examined the exhibits submitted by the respondent in support of his motion . They do not establish his collateral estoppel claim. For instance, the respondent has provided an order of the Family Court, dated April 22, 1999, which purports to vacate a Final Order of Protection issued on January 7, 1994 under docket O13107/93. No explanation, however, is provided in the order for why the final order of protection was vacated by the Court in 1994.”

This Appellant reiterates that Hon. continuous to lie. First of all, Honorable Modica did not examine the exhibits as carefully as he claims, or he purposely ignored Exhibit M, of this Appellant's Motion.

**IGNORES HIGHER COURT JUDGEMENT.**

Exhibit M, is a judgement by the Supreme Court granting divorce to the litigants on this Appellant's grounds of constructive abandonment and not in the Respondent's grounds of cruel and inhuman treatment. That 2001 judgement resolves once and for all issues of alleged domestic violence prior to 2001. Hon.

Modica conveniently ignored a ruling of a higher court that, after a trial, did not believe the Respondent was a victim of domestic violence.

**LIE.**

Honorable Modica is again making up evidence and lying on the D&O. This Appellant did not, in his motion, sought relief based on collateral estoppel. The Appellant's grounds for his Motion to Vacate Final Order are:

1. The Petitioner outright lied to this court in the fact-finding hearing of August 4, 2006.
2. The Petitioner fabricated the domestic violence issue.
3. The Petitioner fabricated/dramatized the contents of the cell phone call and the voice message in the Petitioner's answering machine.
4. The Respondent strongly believed that the Petitioner was not home when respondent picketed in front of the Petitioner's house.

**CRITICIZED ANOTHER COURT.**

Third, the Order of the Family Court, dated April 22, 1999, which is the Exhibit F of this Appellant's Motion, is signed by a Judge of the Family Court. Honorable Modica does not like the way the Order was written up because no explanation is provided in the order for why the final order of protection was vacated by the Court in 1994. The purpose of Exhibit F, as stated on the record, was to show that the

Respondent had been in Family Court in 1993 and not tied up in the house as the Respondent claimed (Tr page 20 line 11).

“MR. BERNAL: So the Petitioner completed an ESL course at York College in 1990, and it’s attached as Exhibit B. Furthermore, the Petitioner completed another ESL course a (inaudible) in December of 1990, also attached as Exhibit E. The Petitioner went to Family Court in 1993, Your Honor. She filed a Petition which is attached - - not the Petition, but the disposition of that Petition - - which docket number shows that it was entered in 1993. Your Honor. The Petition - - the Petition was back-dated. I mean, she was not tied up in the house that she could not go anywhere, Your Honor. That was a total lie.

**LIE.**

In reference to note four of page eight, Hon. Modica states that:

“the respondent inexplicably did not have the necessary documents with him at the time of the hearing in support of his claim that the petitioner should be estopped from re-litigating prior domestic violence.”

That is also not true. The Appellant believed that the history of the litigants cases, listed on the last page of the petition was enough. To that effect the Appellant argued that (Tr. of August 4, 2006 page 52, line 15):

“MR. BERNAL: All of the petitions were dismissed. If you look at the back of the orders that were issued by Judge - the back of the petition, the last page of the petition.”

**FABRICATION.**

In writing about the May 19, 1999 proceeding before a Judge of the Family Court in Kings County, Hon. Modica states that (O&D, beginning next to last sentence

on page eight):

“Likewise, the stenographic transcript of the May 19, 1999 proceeding before a Judge of the Family Court in Kings County also fails to establish the present claim advanced by the respondent. In that case, the petition contained allegations that the respondent made false statements about the petitioner to the Bureau of Child Welfare. That petition was dismissed for failure to state a prima facie case.”

The last page of Exhibit L, in Appellant’s Motion to Vacate Final Order the transcript of those proceedings read:

“Petition further goes on to read that respondent has hit her on many occasions in the past and that she is very scared. The petitioner indicates that the last time that happened was 1994, five years ago, and that subsequently she has been to Family Court and received at least Temporary Orders of Protection regarding those incidents. I will not retry those incidents. She has had Orders of Protection in the past, whether temporary or final, it doesn’t matter. They’ve been litigated already. I’m not re-litigating them now. The order of Protection is vacated and your petition is dismissed. “

Absolutely nothing in above transcripts says that the petition was dismissed for failure to state a prima facie case, as Honorable Modica wrote.

## **CONCLUSION.**

Honorable Modica littered a legal and judicial document with outright lies, distortion of the facts, fabricated statements and judicial improprieties. This Appellant was cut short of his oral arguments by ex-parte arrangements that limited this Appellant's time to make his case. Judicially and fundamentally, this Appellant was denied his rights to be heard by an impartial judge.

The Appellant Motion's purpose was to challenge the witnesses' credibility.

Honorable Modica erred in his decision to appoint himself as co-counsel for the Respondent by appealing his own trial decision, rather than solely ruled on the Appellant's Motion. In addition, Honorable Modica's obsession with collateral estoppel was redundantly non judicial.

Accordingly the Decision and Order of Honorable Modica should be overturned.

The Motion to Vacate the Final Order should be re heard by a different Family Court Judge and Honorable Modica should be removed from the bench.

Alternatively, this Appellant's Motion to Vacate the Final Order should be granted by default because counsel for the Respondent did not challenge or argue the Motion's merits and/or its exhibits' merits or the lack of them thereof.

## **CERTIFICATE OF COMPLIANCE.**

I hereby certify that pursuant fo 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman.

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Dated: June 4, 2007.

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