

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CENTER FOR JUDICIAL ACCOUNTABILITY, INC.
and ELENA RUTH SASSOWER, individually and as
Director of the Center for Judicial Accountability, Inc.,
acting on their own behalf and on behalf of the People
of the State of New York & the Public Interest,

Albany County Clerk
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Plaintiffs,

October 9, 2014

DECISION AND ORDER

Index No.: 1788-14

RJI No.: 01-14-113240

-against-

ANDREW M. CUOMO, in his official capacity as
Governor of the State of New York, DEAN SKELOS
in his official capacity as Temporary Senate President,
THE NEW YORK STATE SENATE, SHELDON
SILVER, in his official capacity as Assembly Speaker,
THE NEW YORK STATE ASSEMBLY, ERIC T.
SCHNEIDERMAN, in his official capacity as Attorney
General of the State of New York, and THOMAS
DiNAPOLI, in his official capacity as Comptroller of
the State of New York

Defendants.

(Supreme Court, Albany County All Purpose Term)

Appearances:

Elena Ruth Sassower
Self-Represented Plaintiff
Post Office Box 8101
White Plains, NY 10602

Eric T. Schneiderman
Attorney General
State of New York
Attorney for Respondent
The Capitol
Albany, NY 12224
(Adrienne J. Kerwin, Esq., Assistant
Attorney General)

*Ex 11 to September 2, 2016 verified complaint
in 2nd citizen-~~to~~ pay action*

Roger D. McDonough, J.:

This Court (Justice Michael Lynch) executed an Order to Show Cause (“OTSC”) on March 28, 2014 directing defendants to show cause as to why an Order should not be made enjoining defendants from voting on, signing, and disbursing monies for the 2014/2015 Budget Bill. Plaintiffs also requested a Temporary Restraining Order enjoining defendants from voting on, signing and disbursing monies for the Budget Bill. Justice Lynch denied the TRO request and the Budget Bill was passed on March 31, 2014. In response to plaintiffs’ request for a preliminary injunction, defendants have moved to dismiss the underlying complaint pursuant to CPLR § 3211(a)(1), (2) & (7). Plaintiffs responded with a cross-motion seeking: (1) to convert defendants’ motion to dismiss into a motion for summary judgment; (2) the Court to “so-order” plaintiffs’ notice to furnish papers; (3) compelling the Assistant Attorney General (“AAG”) who has appeared in this matter to provide certain material to the Court regarding, *inter alia*, the Attorney General’s representation of defendants in this case; (4) disqualifying the Attorney General from this matter for conflict of interest; (5) imposing costs, sanctions and penal law punishment against the AAG, and all complicit supervisory lawyers in the Attorney General’s and Comptroller’s respective offices; (6) referring the AAG, and all complicit supervisory lawyers in the Attorney General’s and Comptroller’s respective offices to the appropriate disciplinary authorities; and (7) other and further relief including motion costs. Defendants oppose the relief requested in the cross-motion.

During the pendency of the Court’s consideration of said motions, Ms. Sassower brought an OTSC with TRO seeking to prevent the destruction of certain records and directing that said records be furnished to the Court. Defendants provided the Court with, what they represented to be, a copy of the only documents in their possession that may arguably be those described in the OTSC. Defendants also consented to maintaining the original version of said documents until the completion of the underlying action. Plaintiff’s reply papers on the OTSC set forth her conclusions that, *inter alia*, (1) the AAG’s submission on the document destruction issue was a flagrant fraud on the Court; (2) the AAG’s submission revealed that defendants had violated

Legislative Law § 67¹; and (3) the AAG and her collaborating superiors and defendants are in contempt of the TRO set forth in the OTSC.

Discussion

Destruction of Documents

The record reflects that defendants have represented to the Court that they have produced all responsive documents in their possession to the Court and have agreed to maintain the original version of said documents until the completion of the underlying action. Accordingly, the Court will Order that said original documents not be destroyed until the completion of the underlying action. To the extent plaintiffs seek additional relief from the June 16, 2014 OTSC, said requested relief is not properly before this Court and/or is wholly without merit. In particular, the Court notes that: (1) plaintiffs' complaint does not set forth any cause of action asserting that any of the defendants violated Legislative Law § 67; and (2) the plaintiffs have not brought a formal motion for contempt and/or sanctions.

Plaintiffs' Cross-Motion

Based upon the Court's review of plaintiffs' complaint and the submissions in this matter, the Court finds that conversion of the motion to dismiss is inappropriate (*see generally, Bailey v Fish & Neave*, 30 AD3d 48, 55-56 [1st Dept. 2006]). The Court also finds that CPLR § 2214(c)

¹ Legislative Law § 67 provides that:

All books, papers, transcripts of records, pamphlets, statements, reports, documents, data, memoranda and written or printed matter used by or submitted to the finance committee of the senate and ways and means committee of the assembly during any session of the legislature shall be preserved until the adjournment of the next ensuing annual session of the legislature, in the senate finance committee room. All such matters and things in the committee room of the ways and means committee of the assembly at the close of an annual session of the legislature shall be transferred to the committee room of the senate finance committee. The duty of caring for such matters and things, and keeping them intact, between sessions of the legislature shall devolve on the superintendent of public buildings.

does not warrant the apparent type of discovery relief requested by plaintiffs herein. CPLR § 2214(c) requires the moving party, in this case the plaintiffs, to furnish all papers not already in possession of the Court necessary to the consideration of the questions involved. The Court notes that plaintiffs' Notice specifically refers to documents to be produced regarding plaintiffs' OTSC for a TRO and preliminary injunction. As such, the Court will not "so order" plaintiffs' Notice to Furnish Papers.

Also, the Court has searched the records and found absolutely no basis to award sanctions² in this matter or to take any type of disciplinary action against the AAG or any other lawyers affiliated with defendants. Additionally, the Court has not been persuaded that any legal basis exists to compel the AAG to provide the requested information concerning representation of the defendants. Further, the Court finds insufficient basis to disqualify the Attorney General's office or the Attorney General from representing all defendant in this matter. Finally, in light of the Court's findings, the Court declines to award plaintiffs any motion costs on the cross-motion.

Defendants' Motion to Dismiss

Plaintiffs' complaint sets forth four causes of action. The first three involve purported violations of Article VII, § 1 of New York's Constitution. Said section reads as follows:

For the preparation of the budget, the head of each department of state government, except the legislature and judiciary, shall furnish the governor such estimates and information in such form and at such times as the governor may require, copies of which shall forthwith be furnished to the appropriate committees of the legislature. The governor shall hold hearings thereon at which the governor may require the attendance of heads of departments and their subordinates. Designated representatives of such committees shall be entitled to attend the hearings thereon and to make inquiry concerning any part thereof.

² As to the AAG's suggestion that sanctions against plaintiffs are warranted, the Court declines to entertain such argument absent a formal motion. Plaintiffs are respectfully reminded that frivolous conduct includes the making of a frivolous motion for costs or sanctions (N.Y. Ct. Rules, § 130-1.1).

Itemized estimates of the financial needs of the legislature, certified by the presiding officer of each house, and of the judiciary, approved by the court of appeals and certified by the chief judge of the court of appeals, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget without revision but with such commendations as the governor may deem proper. Copies of the itemized estimates of the financial needs of the judiciary also shall forthwith be transmitted to the appropriate committees of the legislature.

Plaintiffs' fourth cause of action alleges that the legislative processes at issue violated legislative statutory and rule safeguards.

First Cause of Action

Plaintiffs' first cause of action alleges that the Budget is unconstitutional because it was not adequately certified and does not contain itemized estimates of the financial needs of the legislature. The itemization challenge clearly must be dismissed as it is nonjusticiable (*see, Urban Justice Ctr v Pataki*, 38 AD3d 20, 30 [1st Dept. 2006]). As to the certification issue, the Court finds that the documentary evidence submitted by defendants conclusively demonstrates that defendants have complied with the letter and spirit of the constitutional requirement for certification (*see generally, Matter of Schneider v Rockefeller*, 31 NY2d 420, 434 [1972]). Accordingly, the first cause of action must be dismissed.

Second Cause of Action

Plaintiffs' second cause of action principally alleges that the Senate and the Assembly are unable to comprehend the Judiciary's proposed budget for 2014-2015 because the cumulative dollar amount and percentage increase over the prior year's budget is not capable of being discerned. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this cause of action. Said information is readily discernible throughout the Judiciary's proposed budget. Accordingly, the second cause of action must be dismissed. Additionally, this cause of action would also appear to fall under the type of itemization argument already found to be nonjusticiable.

Third Cause of Action

Plaintiffs' third cause of action alleges that the Legislative Budget transmitted to the Governor by Senator Skelos and Speaker Silver contained no reappropriations. They further contend that the Governor's budget contains nineteen pages of reappropriations. Accordingly, they contend that the reappropriations constitute revisions in violation of New York's Constitution. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this cause of action. Said submissions clearly establish that the "reappropriations" at issue do not constitute executive revisions to the proposed Budget. Accordingly, the third cause of action must be dismissed.

Fourth Cause of Action

Plaintiffs' complaint adequately sets forth a viable cause of action alleging, *inter alia*, that defendants violated Legislative Law § 32-a regarding public hearings for New York's Budget. Defendants argue that the cause of action should be dismissed because plaintiffs lack standing to challenge internal legislative rules. The Court has not been persuaded that Legislative Law § 32-a constitutes an internal legislative rule. Additionally defendants' submissions did not include any documentary evidence establishing a defense to said cause of action. Accordingly, defendants' motion to dismiss must be denied as to plaintiffs' fourth cause of action.

In light of the Court's findings as to causes of action 1-3, plaintiffs' request for a preliminary injunction is also denied.

Plaintiffs' remaining arguments and requests for relief have been considered and found to be lacking in merit. Defendants' additional arguments in support of dismissal for causes of action 1-3 are unnecessary to reach in light of the Court's findings set forth above. Additionally, the Court finds that the Attorney General and Comptroller are entitled to dismissal of the action in its entirety as plaintiffs' complaint does not adequately state a single cause of action as to either defendant. Finally, based upon the Court's review of the submissions, the Court finds that oral argument is unnecessary in this matter.

Based upon the foregoing, it is hereby

ORDERED that plaintiffs' request for a preliminary injunction is denied based upon the Court's dismissal of the first three causes of action of plaintiffs' underlying complaint; and it is further

ORDERED that plaintiff's cross-motion is hereby denied in its entirety; and it is further

ORDERED that defendants are hereby enjoined from destroying the original versions of the documents attached to AAG Kerwin's July 2, 2014 affirmation until the completion of the underlying action including any and all appeals from the instant Decision and Order; and it is further

ORDERED that any additional relief requested relative to plaintiff's June 16, 2014 OTSC is hereby denied in its entirety; and it is further

ORDERED that defendants' motion to dismiss is hereby granted as to causes of action 1-3 and in its entirety as to the Attorney General and the Comptroller; and it is further

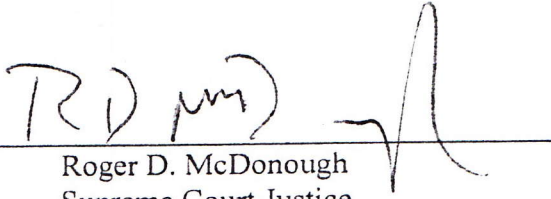
ORDERED that defendants' motion to dismiss is hereby denied as to plaintiffs' fourth cause of action; and it is further

ORDERED that the AAG and Elena Ruth Sassower are directed to confer and thereafter propose to the Court a discovery schedule and/or summary judgment briefing schedule as to the remaining cause of action. said proposal to be submitted to the Court within forty-five (45) days of the date of this Decision and Order. In the event the AAG and Ms. Sassower are unable to agree as to scheduling matters, they should so inform the Court at the expiration of said forty-five (45) day period.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to the counsel for defendants who is directed to enter this Decision and Order without notice and to serve plaintiff with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order and the papers considered to the Albany County Clerk. The signing of the decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

Dated: Albany, New York
October 9, 2014



Roger D. McDonough
Supreme Court Justice

Albany County Clerk
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Papers Considered³:

Order to Show Cause, executed by Justice Lynch on March 28, 2014⁴;
Plaintiffs' Summons, Verified Complaint and annexed exhibits, dated March 28, 2014;
Plaintiffs' Unsigned Notice to Furnish Papers, dated March 26, 2014, with annexed exhibit;
Defendants' Notice of Motion, dated April 16, 2014;
Affirmation of Adrienne J. Kerwin, Esq., AAG., dated April 18, 2014, with annexed exhibits;
Plaintiffs' Notice of Cross-Motion, dated May 16, 2014;
Affidavit of Elena Ruth Sassower, sworn to May 16, 2014, with annexed exhibits;
Affirmation of Adrienne J. Kerwin, Esq., AAG., dated May 30, 2014,
Order to Show Cause, executed on June 16, 2014;
Affidavit of Elena Ruth Sassower, sworn to June 6, 2014, with annexed exhibit;
Affidavit of Elena Ruth Sassower, sworn to June 16, 2014, with annexed exhibits;
Affirmation of Adrienne J. Kerwin, Esq., AAG., dated July 2, 2014, with annexed exhibit;
Affidavit of Elena Ruth Sassower, sworn to July 7, 2014, with annexed exhibits.⁵

³ Both sides also submitted several memoranda of law in support of their respective positions.

⁴ The Order to Show Cause indicates that it is based upon an annexed affidavit and plaintiffs' verified complaint with annexed exhibits. The affidavit attached to the Original Order to Show Cause was unsworn. Additionally, the verified complaint and annexed exhibits were not provided to this Court. The Court retrieved the verified complaint and annexed exhibits from the County Clerk's file. The unsworn affidavit was not considered.

⁵ Plaintiff submitted two "corrected" pages to this affidavit in order to correct typographical errors. The corrections were done on notice to the AAG and were not objected to. The Court has attached the unsworn "corrected" pages to the affidavit.