Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

EMILY PINES, DAVID DEMAREST, JEFFREY D. LEBOWITZ, STEPHEN FERRADINO, RALPH A BONIELLO, III, and JOSEPH C. CALABRESE,

Plaintiff(s),

-against-

STATE OF NEW YORK,

Defendant(s).

Index No. 13518/10

Motion Submitted: 2/4/11
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....
Reply.....X
Briefs: Plaintiff's/Petitioner's.....XX
Defendant's/Respondent's.....X

Defendant moves this Court for an Order dismissing the complaint for failure to state a cause of action, pursuant to CPLR §3211(a)(7). Plaintiffs cross-move pursuant to CPLR §3212 for summary judgment. By written decision dated January 14, 2011, on notice to the parties, the Court converted defendant's motion to one for summary judgment pursuant to CPLR §3211(c). Neither party proffered any additional evidence subsequent to that notification.

The compensation of judges and justices of the Unified Court System of the State of New York is at issue in this action. Plaintiffs seek a declaratory judgment that the salary of the judges and justices has been increased under Laws of 2009, Chapter 51, §3 ("Chapter

51") as of April 1, 2009, and that defendant is obligated to pay the judges and justices in accordance with Chapter 51and Article VI, § 25(a) of the New York State Constitution. Although defendant does not dispute that the judiciary should be granted a raise in their compensation, defendant opposes the requested relief on the grounds that Chapter 51, as enacted, has not increased judicial salaries, nor has it obligated defendant to pay judicial officers the raises they seek.

Although this Court will be affected by the outcome of this action, that consequence is true for all Supreme Court justices in this State. As no other equivalent judicial body with original jurisdiction exists in this State to hear this action (see Constitution, Article 6, Section 7), under the Rule of Necessity, this Court must hear and determine the legal question presented (***Maron v. Silver***, 14 N.Y.3d 230, 248-249, 925 N.E.2d 899, 899 N.Y.S.2d 97 (2010); ***Maresca v. Cuomo***, 64 N.Y.2d 242, 247, 475 N.E.2d 95, 485 N.Y.S.2d 724 [1984]).

Plaintiffs herein include four Supreme Court Justices, a Court of Claims Judge, and a County Court Judge from Nassau County. Defendant is the State of New York. Defendant has failed to raise the salaries of all judges and justices in this state for more than a dozen years. While the Legislature has passed a judiciary budget containing a judicial salary adjustment every year since 2005, these budgets were not self-executing. In the past, enabling legislation was expressly required to effectuate judicial salary increases, and such enabling legislation was never passed.

The constitutional authorization for judicial compensation in this State is found in its Constitution, Article VI, § 25(a), which requires that such compensation "shall be established by law." The Constitution itself does not provide for any specific amount of judicial compensation.

The amount of compensation for each judicial position in this State has been set forth in the Judiciary Law, last amended in 1998, wherein the annual compensation for Supreme Court Justices and Court of Claims Judges is $136,700 (Judiciary Law § 221-b and 221-c). While the compensation for a County Court Judge varies by County, the compensation for a County Court Judge from Nassau County is $136,700 (Judiciary Law § 221-d).

The original version of the 2009-2010 judiciary budget bill ("A. 151"), introduced on or about January 7, 2009, provided that "notwithstanding any other provision of law, the compensation of state-paid judges and justices of the unified court system and of housing judges of the New York City Civil Court shall be adjusted in accordance with the following and such adjustments shall be funded from available appropriations named in this act." Section 2 (b)(1-6) of A. 151 set forth the specific annual compensation amounts for each of the judicial positions in the Unified Court System. Finally, the original version expressly specified that the annual compensation was to be retroactive to 2005, with increases each

year thereafter, in specified percentages.

The bill (Chapter 51), as enacted on April 7, 2009, reappropriates $51,006,759 as follows:

> For expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system and of housing judges of the New York City civil court, [pursuant to a subsequent chapter of law specifying such salary levels] and for such other services and expenses in section two of this act

(bracketed words deleted; underlined words added by legislature). The provisions related to specific salary amounts, retroactivity, and specified percentage increases found in the original version are not present in Chapter 51 as enacted.

The sole issue presented on the motions in this action is whether Chapter 51, standing alone, is sufficient to require that the compensation of all New York judges and justices be adjusted and paid as of April 1, 2009.

At the outset, defendant makes clear its position that the judiciary should be granted a raise in its compensation, and indeed "whole-heartedly agrees" with the recent statement made in *Maron v. Silver* (14 N.Y.3d at 245) that the judges and justices "have earned and deserve a salary increase." Nevertheless, defendant insists that the goal of granting a well-deserved pay raise to the judiciary was not lawfully accomplished by Chapter 51, for three reasons.

Defendant asserts that Chapter 51 is merely an appropriations provision which contains no specifics, and lumps judicial compensation and unrelated "services and expenses" together, without providing any itemization for expenditures for either.

Defendant also asserts that Chapter 51 is inadequate to support a raise in judicial compensation because there is no companion statute that satisfies the requirement of Article VI, Section 25(a) of our State Constitution that the amount of judicial compensation be "established by law."

Thirdly, defendant maintains that, without additional legislative action in the form of repeal or amendment of Judiciary Law, Article 7-B, of which there has been none, the appropriation cannot be made effective.

Plaintiffs, on the other hand, assert that the appropriation made in Chapter 51 was complete upon its passage, and is unconditional, warranting a summary declaratory judgment

from this Court that the compensation increases are immediately due and payable to the judges and justices.

While the Constitution requires itemization of the State budget and appropriation bills to implement the budget (***Saxton v. Carey***, 44 N.Y.2d 545, 548, 378 N.E.2d 95, 406 N.Y.S.2d 732 (1978) citing ***People v. Tremaine***, 281 N.Y. 1, 5, 21 N.E.2d 891 [1939]), there is no constitutional definition of itemization (***Saxton***, 44 N.Y.2d at 550, quoting and essentially adopting Judge Breitel's dissent in ***Hidley v. Rockefeller***, 28 N.Y.2d 439, 444, 271 N.E.2d 530, 322 N.Y.S.2d 687 [1971]). Consequently, it has been held that,

> . . . the degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget . . . . Should the Legislature determine that a particular budget is so lacking in specificity as to preclude meaningful review, then it will be the duty of that Legislature to refuse to approve such a budget. If, however, as here, the Legislature is satisfied with the budget as submitted by the Governor, then it is not for the courts to intervene and declare such a budget invalid because of a failure to measure up to some mythical budget specifically delineating the exact fate of every penny of public funds

(***Saxton***, 44 N.Y.2d at 550). In short, the remedy for lack of itemization lies with the legislature itself, not with this Court. It is not the courts' function to police the degree of itemization necessary in the state budget (***Id.*** at 549). If the legislature determines that a budget is not sufficiently itemized, then it should decline to adopt it; however, once adopted, the logical inference can be drawn that the legislature found the budget to be sufficiently itemized and capable of implementation.

In support of its cross-motion for summary judgment, plaintiffs have submitted, *inter alia*, the Executive Summary to the Judiciary 2009-2010 Budget Request ("Executive Summary"). The Executive Summary (plaintiffs' Exhibit C) sets forth the specific annual salaries to be paid to judges and justices, including retroactivity provisions and specified percentage increases. While it is true that the express provisions for adjustments to judicial compensation on a retroactive basis were removed from Chapter 51 before it was passed, this omission can be cured by reliance upon the Executive Summary. Simply put, the judiciary, via the Executive Summary, "did its homework" in providing the legislature with a detailed plan of action to implement the judicial pay raises.

Furthermore, the language in Chapter 51, as enacted, specifically eliminated the language, "pursuant to a subsequent chapter of law specifying such salary levels." Thus, Chapter 51 is not a "'dry appropriation'" (***Maron***, 14 N.Y.3d at 245) requiring further legislation before the salaries can be paid.

The language of *Maron* is instructive in determining the question presented here. With reference to the 2006 budget item related to the adjustment in compensation for judges and justices, which item contained conditional language, the Court of Appeals stated:

> The $69.5 million referenced in the judicial budget was explicitly made contingent upon the adoption of additional legislation, i.e. a chapter of the Laws of 2006. Had the Legislature intended that the judicial compensation appropriation be self-executing, as petitioners claim, there would have been no need for the qualifying language. Moreover, a mere provision calling for a lump-sum payment of $69.5 million without repeal or revision of the Judiciary Law Article 7-B judicial salary schedules is further evidence that additional legislation was required before the funds could be disbursed

(*Maron*, 14 N.Y.3d at 249-50). In that case, where the judicial budgetary item required specific additional legislation, the Court's reference to the failure to repeal or revise the Judiciary Law related to salaries did, under those circumstances, constitute "further evidence" that additional legislation was required.

In this case, however, the fact that the language requiring additional enabling legislation was removed from Chapter 51 constitutes overwhelming and irrefutable evidence that such additional legislation is not required to effect the salary increases. Thus, the absence of such a mandate obviates the need to look to "further evidence." The fact that the Legislature has not amended the Judiciary Law Article 7-B salary schedules does not have the same significance here, as it did for the legislation considered in *Maron*.

Moreover, the historical practice of establishing judicial salary schedules by legislation is also not determinative. As the Court of Appeals has stated:

> Nothing in the Constitution says or implies that, once it becomes customary to deal with a particular subject either in appropriation bills or in other legislation, the custom must be immutable. On the contrary, it was an important part of the purpose of executive budgeting to enable budgets to be adjusted to the changing needs of an increasingly complex society

(*Pataki v. New York State Assembly*, 4 N.Y.3d 75, 98, 824 N.E.2d 898, 791 N.Y.S.2d 458 [2004]). In *Pataki*, the Legislature altered the Governor's appropriation bills in ways not permitted by the Constitution. While *Pataki* dealt with executive budgeting, rather than the judiciary budget, its refusal to adopt a "narrow historical test" of what is a proper appropriation bill is relevant to the present dispute.

The *Pataki* Court noted that appropriation bills are limited to two years (Constitution, Article VII, Section 7), and held that it is not forbidden for an appropriation bill to supersede existing law for that time (***Pataki***, 4 N.Y.3d at 98). Therefore, and at the very least, Chapter 51 may properly be determined to supersede the 1998 adjustments to the Judiciary Law for that time period from April 2009 to April 2011.

While this Court is not persuaded that the Judiciary Law must be amended to effectuate a salary adjustment, assuming *arguendo* that this Court found Chapter 51 to be in conflict with Judiciary Law Article 7-B, statutory construction mandates that the later enactment, to wit: Chapter 51 must prevail, as it is the more recent expression of the legislature's will (*see*, McKinney's Statutes § 398; *Matter of Harmon*, 181 Misc.2d 924, 696 N.Y.S.2d 390 (Surr. Ct., New York Co., 8/23/99); *see also*, ***Abate v. Mundt***, 25 N.Y.2d 309, 253 N.E.2d 189, 305 N.Y.S.2d 465 [1969]). Furthermore, "it is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the legislature", (*citations omitted*, ***State of New York v. Patricia II***, 6 N.Y. 3d 160, 289, 844 N.E.2d 743, 811 N.Y.S.2d 289 [2006]).

Defendant suggests that the legislative intent is demonstrated by the debate on the chamber floor. The Court finds unavailing defendant's submission of Assembly and Senate floor debate transcripts for the very reason that those transcripts represent just that, which is debate about the issue. While illustrative of the animus and disdain of less than a handful of legislators for the judiciary, a co-equal branch of government, the colloquy is unpersuasive. Ultimately, the Legislature saw fit to pass the appropriation for judicial salary increases, and it was keenly aware of the earlier ***Maron*** decision emanating from the Appellate Division (***Maron v. Silver***, 58 A.D.3d 102, 871 N.Y.S.2d 404 [3d Dept. 2008]), which stressed the importance of the budgetary language requiring that judicial salary increases be paid "'pursuant to a chapter of the laws of 2006'" (***Id.*** at 420). In that decision, the Appellate Division determined that the phrase, "pursuant to a chapter of the laws of 2006" clearly meant that the judicial budget was not self-executing (***Id.*** at 421). Thus, to ignore the Legislature's present and intentional deletion of such limiting language in Chapter 51 would be to ignore the plain meaning of that Chapter, which is that the judicial budget is self-executing.

Surely, defendant is not suggesting that this Court give credence to the argument that Chapter 51 is merely the Legislature's transparent attempt to, once again, mollify the judiciary by acknowledging the obvious need for salary increases, while, with the other hand, attempting to withhold those earned and deserved increases. While "all the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with and fulfillment of their oaths of office" (***Cohen v. State of New York***, 94 N.Y.2d 1, 13, 720 N.E.2d 850, 698 N.Y.S.2d 574 [1999]), the history of the Legislature's assault on the judiciary, as outlined in ***Maron*** (14 N.Y.3d at 245), lends credence to the inference that the

Legislature may, at times, be engaging in "gamesmanship" with regard to judicial compensation. Despite the repeated appropriations of money for judicial pay raises since 2006, the Legislature, and most notably the Assembly, has found varied ways to thwart delivery of the salary adjustments to the judges and justices of New York State's Unified Court System.

Rather than declaring that the Legislature has engaged in subterfuge, this Court finds that Chapter 51 was properly enacted by the Legislature, and the Court will draw the only appropriate conclusion as to the words chosen by the Legislature in effectuating its constitutional duty. Clearly, the constitutional requirement that judicial compensation be "established by law" is met by Chapter 51, as enacted. Lack of itemization in, and the absence of additional enabling legislation for Chapter 51, are not fatal, nor is the absence of revisions to the judicial salary schedules set forth in the Judiciary Law. The State Constitution does not mandate a specific format for judicial salaries, and consequently, Chapter 51 is enforceable as it stands. To hold otherwise would render Chapter 51 meaningless, under circumstances where all parties agree that an increase in judicial compensation is both warranted and deserved.

Plaintiffs' motion for summary judgment is granted, and this Court declares that the compensation of the judges and justices of the Unified Court System has been duly increased pursuant to the Laws of 2009, Chapter 51, §3 ("Chapter 51"), and that defendant State of New York is obligated to pay the judges and justices of the Unified Court System of the State of New York in accordance therewith, retroactive to April 1, 2009, together with costs and disbursements as taxed by the clerk.

The foregoing constitutes the Order of this Court. Settle judgment on notice.

Dated: February 9, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.