SUPREME COURT STATE OF NEW YORK
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,

Plaintiffs,

-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, 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.

Index No 1788-14

May 16, 2014

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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When distilled to those allegations that appear to relate to plaintiffs' present claims, the complaint alleges that, pursuant to Article VII, section 1 of the New York State Constitution, the Judiciary and the Legislature transmitted the estimates of their financial needs for the 2014-15 fiscal year to the Governor on November 23, 2013 and November 27, 2013, respectively. The certification language that accompanied the Judiciary's estimate stated, "Pursuant to Article VII, Section 1 of the Constitution of the State of New York I certify that the attached schedules are the itemized estimates of the financial needs of the Judiciary for General State Charges for the fiscal year beginning April 1, 2014. . ." See Kerwin aff. at Exh. D. The certification language that accompanied the Legislature's estimate stated, "Attached hereto is a copy of the Legislature's Budget for the 2014-15 fiscal year pursuant to Article VII, Section 1 of the New York State Constitution." See Kerwin aff. at Exh. D.

Thereafter, the Governor included those estimates in his Executive Budget on January 21, 2014. See Kerwin aff. at Exh. E. Also included in the Executive Budget were lists documenting previously-appropriated monies of the Judiciary and Legislature that had not yet been spent and, therefore, were available for re-appropriation. See id. Plaintiffs allege that the Senate and Assembly violated their own rules when considering and voting on the State Budget by doing, or failing to do, numerous things such as (1) failing to hold public hearings, (2) ensuring that fiscal notes and introducer's memoranda accompanied budget bills and (3) failing to make daily stenographic records of legislative proceedings available for public inspection. See Kerwin aff. at Exh. A.

ARGUMENT

POINT I

ALL CLAIMS BROUGHT BY PLAINTIFF CENTER FOR JUDICIAL ACCOUNTABILITY, INC. MUST BE DISMISSED

As a non-attorney, plaintiff Sassower cannot represent the interests of the corporate plaintiff in this action. CPLR 321(a) prohibits the appearance of a "corporation or voluntary association" in this judicial proceeding other than by an attorney. See CPLR 321(a). The complaint describes plaintiff CJA as "a national non-partisan, non-profit citizens' organization" whose "patriotic purpose is to safeguard the judicial process by insuring the integrity of its judges." See Kerwin aff. at Exh. A, ¶¶4-5. The complaint alleges that plaintiff CJA appears through its Director, plaintiff Sassower. See Kerwin aff. at Exh. A. Upon information and belief, plaintiff Sassower is not an attorney admitted to practice law in the State of New York. See Kerwin aff. at ¶5. Therefore, pursuant to CPLR 321(a), any claims alleged in the complaint on behalf of plaintiff CJA must be dismissed. Naroor v. Gondal, 5 N.Y.3d 757, 757 (2005); Cinderella Holding Corp. v. Calvert Ins. Co., 265 AD2d 444, 444 (2d Dept 1999).

POINT II

THE COMPLAINT FAILS TO ALLEGE A CAUSE OF ACTION SUBJECT TO JUDICIAL REVIEW

Although voluminous, the complaint in this action challenges only the initial steps taken toward the enactment of the 2014-15 Legislature and Judiciary budgets. Specifically, plaintiffs allege that (1) the Legislature did not provide a certified estimate of its financial needs for the 2014-15 fiscal year as required by Article VII, section 1 of the New York State Constitution; (2) the certified estimates of financial needs submitted by the Legislature and Judiciary were not properly itemized pursuant to Article VII, section 1 of the New York State Constitution; (3) the Governor failed to present the certified estimates of the Legislature and Judiciary in his executive budget "without revision" as required by Article VII, section 1 of the New York State Constitution; and (4) the Legislature failed to follow its own rules and procedures. See Kerwin aff. at Exh. A. For the reasons discussed below, all of these claims should be dismissed.

A. Constitutional Claims

While this action was commenced challenging the proposed 2014-15 State Budget, the budget has now been enacted. Accordingly, plaintiffs' claims are now challenges to the constitutional validity of an enacted statute. Where, as here, a plaintiff asserts that a statute is unconstitutional, courts are mindful that enactments of the Legislature – a coequal branch of government – may not casually be set aside by the Judiciary. The statutes in issue enjoy a strong presumption of constitutionality, grounded in part on "an awareness of the respect due the legislative branch." Dunlea v Anderson, 66 N.Y.2d 265, 267 (1985). On the merits, a plaintiff bears the heavy burden of establishing the statute's unconstitutionality "beyond a reasonable doubt." Matter of E.S. v. P.D., 8 NY3d 150, 158 (2007).

Article VII, section 1 of the New York State Constitution states

> . . . **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 recommendations 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.

See N.Y. Const. art. VII, §1 (emphasis added). Plaintiffs allege that the defendants violated this constitutional provision by (1) failing to provided sufficient itemization, (2) failing to provide a sufficient certification and (3) failing to include the estimates in the budget without revision.

1. *Degree of Itemization*

The plaintiff alleges that the estimates of financial needs of the Legislature and Judiciary transmitted to the Governor in advance of the preparation and presentation of the proposed 2014-15 executive budget were not "itemized" as required by Article VII, section 1 of the State Constitution. However, an argument that a budget is not adequately itemized is not justiciable. Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 30 (1st Dept 2006). The degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the reviewer to effectively review it. Saxton v. Carey, 44 N.Y.2d 545, 550-51 (1978). That decision is for the reviewing governmental body to make, and not an issue to be delineated by the courts. Id. Therefore, if the Governor determined that the alleged lack of itemization precluded him from giving the proposed Legislature and Judiciary budgets meaningful review, he could have refused to approve it. Id. If the Governor was satisfied, the courts cannot find differently. Id.

Therefore, since the Governor accepted and acted upon the estimates of the financial

needs of the Legislature and Judiciary, the level of itemization therein is not subject to judicial review. Accordingly, plaintiffs' claims relating to the itemization of the estimated financial needs of the Legislature and Judiciary should be dismissed.

2. *Sufficiency of Certification*

The plaintiff also alleges that the estimate of financial needs of the Legislature transmitted to the Governor was not "certified" as required by Article VII, section 1 of the State Constitution. However, the Legislature's estimate of its financial needs for the 2014-15 fiscal year was transmitted to the Governor with the following certification, signed by defendants Skelos and Silver: "Attached hereto is a copy of the Legislature's Budget for the 2014-15 fiscal year pursuant to Article VII, Section 1 of the New York State Constitution." See Kerwin aff. at Exh. C. Plaintiffs appear dissatisfied with this certification because it is not the same as the one provided from the Judiciary. In its certification, the Judiciary stated, "Pursuant to Article VII, Section 1 of the Constitution of the State of New York I certify that the attached schedules are the itemized estimates of the financial needs of the Judiciary for General State Charges for the fiscal year beginning April 1, 2014. . ."[1] See Kerwin aff. at Exh. D. Both certifications purport to do the same thing – namely, comply with the requirements of Article VII, section 1. The lack of the word "certify" in the language chosen by the Legislature to convey this compliance does not somehow make the certification unconstitutional.

An examination of the sufficiency of certifications in other contexts demonstrates that, if a law requiring a certification does not specify the form or language that must be used, no particular form or language is required, see e.g. Rattley v. New York City Police Dep't, 96

1 Unlike the estimate of financial needs of the Legislature, which only needs to be certified by the leaders of the Senate and Assembly, the estimate of the financial needs of the Judiciary must be approved by the New York State Court of Appeals before it can be certified by the Chief Judge. See N.Y. Const. art. VII, §1.

N.Y.2d 873, 875 (2001) (FOIL statute "does not specify the manner in which an agency must certify that documents cannot be located"); Lazzari v. Town of Eastchester, 20 N.Y.3d 214, 222 (2012) (nothing in Civil Service statute "suggests, much less required, that a medical certification be in writing or take any particular form"); Schum v. Burchard, 211 A.D. 126, 128 (2d Dept 1924) ("It is not necessary that the words of the [real property] statute be contained in the certificate. A substantial compliance with the statute is sufficient"), and it is up to the party receiving the certification to determine if the certification is acceptable. Maybee v. State of New York, 4 N.Y.3d 415, 420 (2005) (if Legislature is dissatisfied with a certification of necessity from the Governor, it can reject it).

Since Article VII, section 1 merely states that the estimates of the financial needs of the Judiciary and Legislature must be "certified," and does not require what form such a certification must take, or what language must be used, no particular form or language is necessary. Therefore, the certification provided by the legislative leaders, declaring that the document is produced pursuant to the constitutional mandate, was constitutionally sufficient. However, as with the degree of itemization discussed above, if the Governor was dissatisfied with the certification provided by the Legislature, he could have rejected it. Since the Governor was satisfied with the certification, and there is no pretext as to what was clearly intended, it is not subject to further judicial review, nor should it be. Therefore, plaintiffs' claims relating to the Legislature's certification should be dismissed.

3. *Inclusion of Re-Appropriations with Certified Submissions of the Legislature and Judiciary*

The plaintiffs further allege that, by including re-appropriation amounts from prior Legislative and Judiciary budgets in his proposed State Budget, the Governor failed to include the certified estimates of financial needs of the Legislature and Judiciary in the State budget "without revision." This claim completely misinterprets the role of the inclusion of re-appropriation amounts in the Executive Budget.[2] Plaintiffs appear to believe that the items and amounts listed in the re-appropriations were "added" to the estimates of financial need submitted by the Judiciary and Legislature. However, all that the re-appropriations reflect are unused funds from appropriations made in prior fiscal years. A comparison of the amounts sought by the Judiciary and Legislature, and the purposes therefore, with the amounts and purposes listed in the Executive Budget shows that they are identical. The Governor did, in fact, include the estimated financial needs of the Judiciary and Legislature "without revision." Identifying the amounts of funds available for re-appropriation in the budget bill did nothing to change, alter or revise the funds sought by the Judiciary and Legislature. Therefore, plaintiffs' claims relating to the inclusion of the re-appropriation amounts in the Governor's Executive Budget should be dismissed.

B. Violation of Senate/Assembly Rules

Finally, the plaintiff alleges that the Senate and Assembly acted in violation of their own rules in considering the 2014-15 budget. The complaint alleges violations of various internal rules of the Legislature. However, it is well-settled that such procedural matters are "wholly

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2 Upon information and belief, the re-appropriation amounts are provided to the Governor by the Senate and the Assembly. The Governor does not unilaterally or personally generate these numbers.

internal" to the Legislature and thus beyond judicial review under the separation of powers. Heimbach v. State, 59 N.Y.2d 891, 893 (1983), app. dismissed 464 U.S. 956 (1983)(determining whether a legislative roll call was incorrectly registered is a legislative matter beyond judicial review); Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 27 (1st Dept 2006), lv. denied 8 N.Y.3d 958 (2007) (not the province of the courts to direct the Legislature on how to do its work, particularly where the internal practices of the Legislature are involved). The independence of the Legislature and Judiciary requiress that each must be "confined to its own functions and can neither encroach upon nor be made subordinate to" each other. Matter of Davies, 168 N.Y. 89, 101 (1901); Urban Justice Ctr., 38 A.D.3d at 27. To this end, each branch must "be free from interference, in the discharge of its own functions and particular duties, by either of the others." Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635 (1971), aff'd 30 N.Y.2d 807 (1972), cert. denied 409 U.S. 1008 (1972); see People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898). Simply put, "it is not the province of the courts to direct the [L]egislature how to do its work." Heimbach, 59 N.Y.2d at 893, quoting N.Y. Public Interest Research Group v. Steingut, 40 N.Y.2d 250, 257 (1976); People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906). Any other result would foist this Court into an "improvident intrusion into the internal workings of a coequal branch of government." Smith v. Espada, Index No. 4912-09 (Sup. Ct., Albany Co., June 16, 2009).

Further, the plaintiffs lack standing to bring any claims relating to the Legislature's alleged violations of its own rules and procedures because they cannot allege an injury "distinct from that suffered by the public at large." Urban Justice Center v. Silver, 66 A.D.3d 567, 567 (1st Dept 2009) (the organizational plaintiff challenged certain rules and practices adopted by the Senate and the Assembly. The court held that the plaintiff lacked standing because it "failed to

allege a personally concrete and demonstrable injury distinct from that suffered by the public at large"). For these reasons, plaintiffs' claims relating to alleged violations of Senate and Assembly rules should be dismissed.

POINT III

ATTORNEY GENERAL SCHNEIDERMAN AND COMPTROLLER DINAPOLI ARE NOT PROPER DEFENDANTS

Although entirely unclear, the complaint appears to name Attorney General Schneiderman as a party because he was directed by the Governor to investigate instances of public corruption. See Kerwin aff. at Exh. A, ¶12. The only allegation contained in the complaint about Comptroller DiNapoli states that "Defendant Thomas DiNapoli. . .is Comptroller of the State of New York." See id. at ¶13. Plaintiffs point to no specific responsibilities imposed upon the Attorney General or the Comptroller in relation to the consideration and enactment of the State Budget. Therefore, they are not proper parties and the verified complaint should be dismissed as against them. Sobel v. Higgins, 151 Misc.2d 876, 878 (Sup. Ct. New York Co. 1991) (citing Federal National Mortgage Association, 383 F.Supp. 1294, 1296 (SDNY 1974)) (finding the Attorney General to be an improper party because he had no specific enforcement responsibilities relating to the statute at issue); Cheevers v. State, 2002 Misc. LEXIS 834, **6-7 (Sup. Ct. Albany Co., July 10, 2002) (finding the Comptroller to be an improper party because the case was not challenging a disbursement by the Comptroller).

CONCLUSION

For the reasons discussed above, the complaint should be dismissed in its entirety with prejudice.

Dated: Albany, New York
April 18, 2014

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