

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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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, JOHN J. FLANAGAN in his  
official capacity as Temporary Senate President, THE NEW  
YORK STATE SENATE, CARL E. HASTIE, 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,  
THOMAS DiNAPOLI, in his official capacity as Comptroller  
of the State of New York, and JANET M. DiFIORE, in her  
official capacity as Chief Judge of the State of New York and  
chief judicial officer of the Unified Court System,

*Defendants.*

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**AFFIRMATION**

Index No. 5122-16

RJI No.: 01-16-122174

Adrienne J. Kerwin, an attorney licensed to practice in the State of New York, affirms the following under penalty of perjury pursuant to CPLR 2106:

1. I am an Assistant Attorney General of counsel in this matter to Eric T. Schneiderman, Attorney General of the State of New York, attorney for defendants Governor Andrew M. Cuomo, the New York State Senate, the New York State Assembly, John J. Flanagan, Carl E. Hastie, Eric T. Schneiderman, Thomas DiNapoli and Janet M. DiFiore in the above-captioned action.

2. I submit this affirmation in opposition to plaintiffs' application seeking an order (i) disqualifying the Honorable Denise A. Hartman, Acting Supreme Court Justice; (ii) granting re-argument and renewal of Defendants' motion to dismiss, pursuant to Rule 2221 of the New York Civil Practice Law and Rules; (iii) vacating the Court's Decision and Order dated December 21, 2016 on Defendants' motion to dismiss, for "fraud" and lack of jurisdiction; and (iv) litigation costs.

3. In a Complaint filed September 2, 2016, Plaintiffs Elena Ruth Sassower and the Center for Judicial Accountability ("CJA") asserted ten causes of action, as citizen-taxpayers, challenging the Governor's Legislative/Judiciary Bill S.6401/A.9001, and the amended bill S.6401-a/A.9001-a. A copy of the Complaint ("Compl."), without exhibits, is annexed hereto at **Exhibit A**.

4. Specifically, Plaintiffs alleged that: (1) the Legislature's proposed budget for Fiscal Year 2016-2017 is unconstitutional, Compl. ¶¶ 24-33; (2) the Judiciary's proposed budget for 2016-2017 is unconstitutional, Compl. ¶¶ 35-39; (3) budget bill S.6401-a/A.9001-a is unconstitutional over and beyond the legislative and judiciary budgets it embodies, "without revision," Compl. ¶¶ 41-47; (4) the process by which the State budget for Fiscal Year 2016-2017 violated its own rules, and "nothing lawful or constitutional" can emerge therefrom, Comp. ¶¶ 49-53; (5) the process by which the State budget for Fiscal Year 2016-2017 was enacted violated Article VII, §§ 4, 5, and 6 of the New York State Constitution, Compl. ¶¶ 55-58; (6) Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, as written, for five separate reasons, including unconstitutional delegation, and the judicial salary increase recommendations by the Commission on Legislative, Judicial and Executive Compensation (the "Commission") are null and void,

## **Background**

Plaintiffs commenced a similar action in 2014 to challenge the Legislature's 2014–2015 budget. In October 2014, Supreme Court (McDonough, J.) dismissed three of the complaint's four causes of action. With leave of the Court, plaintiffs served and filed a supplemental complaint, which expanded their challenge to include the 2015–2016 budget, adding four new causes of action that mirrored the first four. In August, 2016, the Court dismissed the supplemental complaint and made a number of declarations validating the challenged budgets. The Court denied plaintiffs' motion to serve a second supplemental complaint, which would have added an additional eight causes of action and which included the 2016–2017 budget, explaining that proposed causes of action 9–12 were "patently devoid of merit" and that proposed causes of action 13–16 arose "out of materially different facts and legal theories" than those that had been alleged in the 2014 complaint.

In this action, plaintiffs' first four causes of action are essentially identical to the first four causes of action asserted in the 2014 action, as well as causes of action 9–13 asserted in the proposed second supplemental complaint in that action. Cause of action five in this complaint replicates part of causes of action 12 and 16 from the 2014 proposed second supplemental complaint. And causes of action 6–9 in this complaint correspond to causes of action 13–16 from the 2014 proposed second supplemental complaint. Cause of

action 10 in this complaint does not appear to have a counterpart from the 2014 action.

**The Complaint's Assertion of Claims on Behalf of the Center for Judicial Accountability Dismissed**

CPLR 321 (a) requires corporations to appear by attorney. Plaintiff Elena Ruth Sassower is not an attorney. Accordingly, the complaint is dismissed to the extent that it seeks to assert causes of action on behalf of the Center for Judicial Accountability (*see Pelaez v Silverstone*, 19 NY3d 954 [2012]; *Boente v Peter C. Kurth Off. of Architecture & Planning, P.C.*, 113 AD3d 803, 804 [2d Dept 2014]).

**Personal Jurisdiction**

The Office of the Attorney General argues that the Court lacks personal jurisdiction over defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore because plaintiff herself made service upon them. "Although CPLR 2103 (a) requires service to be made by a person who is not a party to the action, a violation of this provision is a mere irregularity which does not vitiate service" where, as here, no resulting prejudice is shown" (*Neroni v Follender*, 137 AD3d 1336, 1337 [3d Dept 2016] [internal quotation marks omitted]). Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.

### **The First Five Causes of Action Are Dismissed**

In its April 2016 decision, the Court held that causes of action 9–12 in the proposed second supplemental complaint were “patently devoid of merit,” given the Court’s dismissal of similar causes of action regarding prior budget years (*citing Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Because causes of action 1–4 are identical to those the Court held “patently devoid of merit,” they are barred (*see Maki v Bassett Healthcare*, 141 AD3d 979, 981 [3d Dept 2016]). Likewise, the fifth cause of action, which alleges violations of New York State Constitution Article VII, §§ 4, 5, 6, must be dismissed because it restates arguments and claims already rejected by the Court in its prior decisions.

### **Causes of Action Seven through Ten Are Dismissed**

Causes of action seven and eight both challenge the actions of the Commission on Legislative, Judicial, and Executive compensation, which is not a party to this action. Accordingly, these causes of action must be dismissed. The ninth cause of action challenges the constitutionality of “three-men-in-a-room” budget negotiation. As defendants point out, the negotiation of the 2016–2017 budget is moot, because the budget has passed (*see N.Y. Pub. Interest Research Group, Inc. v Regan*, 91 AD2d 774 [3d Dept 1982], *lv denied* 58 NY2d 610 [1983]). Assuming without deciding that the exception for issues capable of repetition but evading review applies, plaintiff has failed to state a cause of

action. Taking all the allegations in the complaint as true, plaintiff has not alleged a violation of law. None of the authority cited by plaintiff prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiations (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 85 [2004]; *Urban Justice Ctr. v Pataki*, 38 AD3d 20, 27–30 [1st Dept 2006], *appeal dismissed, lv denied* 8 NY3d 958 [2007]).

The tenth cause of action must also be dismissed. Plaintiff's itemization arguments are non-justiciable (*Pataki*, 4 NY3d at 96; *Urban Justice Ctr.*, 38 AD3d at 30). And the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary. Lastly, the reference to fiscal year 2014–2015 rather than 2016–2017 is a typographical error that does not invalidate the challenged legislation (*see Matter of Morris Bldrs., LP v Empire Zone Designation Bd.*, 95 AD3d 1381, 1383 [3d Dept 2012]).

#### **Cause of Action Six States a Claim**

“When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference” (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). The key question before the court on a CPLR 3211 (a) (7) motion to dismiss is “whether the facts alleged fit within any cognizable legal theory

(*Loch Sheldrake Beach & Tennis Inc. v Akulich*, 141 AD3d 809, 814 [3d Dept 2016]).

Plaintiff argues that the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation (Commission) violates the New York State Constitution (*see* Chapter 60, Laws of 2015 [Part E]). In particular, she argues that the provision therein that gives the Commission's recommendations the "force of law" violates the separation of powers doctrine and improperly delegates legislative function to the Commission. She further argues that the legislation violates Article XIII, § 7 of the New York State Constitution, which states that the compensation of public officers "shall not be increased or diminished during the term for which he or she shall have been elected or appointed." Plaintiff raises additional challenges to the form and timing of the bill by which the legislation was introduced, among other things.

Here, on the record before it, the Court cannot say that plaintiff's claim is not cognizable. Defendants argue that the Appellate Division has already approved of commissions similar to the Commission here (*see McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252 [1st Dept 2007]). But the Court does not consider *McKinney* to be sufficiently analogous to this case to foreclose any and all challenge to the Commission legislation. Nor does *McKinney* address all the arguments raised by plaintiff.

**Motion for Preliminary Injunction Denied**

Plaintiff has not demonstrated a likelihood of success on the merits or irreparable harm. Thus, she is not entitled to preliminary relief (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Eklund v Pinkey*, 31 AD3d 908, 909 [3d Dept 2006]).

Accordingly, it is

**ORDERED** that plaintiff's motion for preliminary relief is denied; it is

**ORDERED** that defendants' motion to dismiss the causes of action asserted by the Center for Judicial Accountability is granted; it is

**ORDERED** that defendants' motion to dismiss the complaint against defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore for lack of personal jurisdiction is denied; it is

**ORDERED** that the motion to dismiss for failure to state a cause of action is granted with respect to causes of action one through five and seven through ten and those causes of action are dismissed; it is

**ORDERED** that the motion to dismiss for failure to state a cause of action is denied with respect to cause of action six; it is

**ORDERED** that defendants have 30 days from the date of this order to answer; it is

**ORDERED** that plaintiff's request for oral argument is denied.



This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to defendant's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Dated: Albany, New York  
December 21, 2016

*Denise A. Hartman*

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Denise A. Hartman  
Acting Supreme Court Justice