

COPY

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,

Plaintiffs,

DECISION AND
ORDER

-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. HEASTIE,
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 P. 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,

Index No. 5122-16
RJI No. 01-16-122174

Defendants.

APPEARANCES:

ELENA RUTH SASSOWER
Plaintiff pro se
PO Box 8101
White Plains, New York 10602

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK
Adrienne J. Kerwin, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

Hartman, J.

Plaintiff Elena Ruth Sassower, pro se, commenced this action primarily challenging the constitutionality of the Legislature's 2016-2017 budget bills. By Decision and Order dated December 21, 2016, this Court dismissed all but plaintiff's sixth cause of action, in which she additionally challenged the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation as unconstitutional. Plaintiff now moves by order to show cause for summary judgment on the sixth cause of action. Because plaintiff has not demonstrated entitlement to summary judgment, her motion is denied.

Plaintiff also moves for leave to file a supplemental complaint and for a declaration that the Legislature's 2017-2018 budget bills are invalid and an order enjoining the Legislature from enacting and disbursing funds pursuant to 2017-2018 Legislative/Judiciary Budget Bill # S.2001/A.3001. The proposed supplemental complaint re-alleges for the 2017-2018 budget year causes of action that have been dismissed or denied for the 2015-2016 and 2016-2017 budget years. Thus, leave to file a supplemental complaint is denied.

Finally, plaintiff has submitted for the Court's signature subpoenas duces tecum for legislative records and an application for preliminary injunctive relief. Denial of the motion for leave to file a supplemental complaint renders moot her requests for subpoenas duces tecum and preliminary relief.

Procedural History and Background

By Decision and Order dated December 21, 2016, the Court dismissed nine of the ten causes of action asserted in the complaint for failure to state a cause of action, but denied defendants' motion to dismiss with respect to the sixth cause of action. By Decision and Order dated May 5, 2017, the Court denied plaintiff's motion to disqualify and to renew and reargue the December 21, 2016 decision. That same day, the Court issued an Amended Decision and Order, which amended the December 21, 2016 decision to add a recitation of the papers considered.

Plaintiff now moves for summary judgment on the sole surviving cause of action. The sixth cause of action alleges that Chapter 60, Part E of the Laws of 2015, which created the Commission on Legislative, Judicial & Executive Compensation (the Commission) violates the New York State Constitution. The Commission is comprised of three members appointed by the Governor, one by the temporary president of the senate, one by the speaker of the assembly, and two by the chief judge (§ 3.1). The statute requires the Commission, every four years, to

“examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for members of the legislature, judges and justices of the state-paid courts of the unified court system, statewide elected officials, and those state officers referred to in section 169 of the executive law”

(§ 2.1). The Commission's recommendations "have the force of law, and shall supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law, section 169 of the executive law, and sections 5 and 5-a of the legislative law, unless modified or abrogated by statute prior to April first of the year as to which such determination applies to legislative and executive compensation" (§ 7).

Plaintiff's sixth cause of action alleges that the 2015 legislation is unconstitutional in five sub-causes of action. She claims that (A) it unconstitutionally gives the Commission's recommendations the force of law; (B) it unconstitutionally delegates legislative power without proper safeguards; (C) it violates Article XIII § 7 of the New York State Constitution; (D) it was passed in violation of Article VII §§ 2, 3, and 6 of the New York State Constitution; and (E) it was passed as a result of fraud and in violation of due process. Plaintiff asserts that, as of the Court's December 21, 2016 decision, the record contained facts and law entitling her to summary judgment. In addition to plaintiff's moving affidavit and exhibits, the Court has examined the complaint (and the proposed second supplemental complaint from an earlier action that is incorporated therein) to decide this motion.

Motion for Summary Judgment

The party moving for summary judgment bears the burden of submitting evidence in admissible form demonstrating entitlement to judgment as a matter of law. Once the moving party has met its burden, the burden shifts to the party opposing summary judgment to submit evidence in admissible form that establishes that a material issue of fact exists (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]; *Staunton v Brooks*, 129 AD3d 1371, 1372 [3d Dept 2015]). To succeed in a facial challenge to the constitutionality of a statute, a plaintiff must “surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt” (*Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] [internal quotation marks omitted]). To succeed, the plaintiff “must establish that no set of circumstances exists under which the Act would be valid” (*id.* [internal quotation marks omitted]).

Sub-Causes A and B—Separation of Powers Claims

Plaintiffs first two sub-causes allege that the legislation that created the Commission violates separation of powers principles. “Derived from the separation of powers doctrine, the principle that the legislative branch may not delegate all of its lawmaking powers to the executive branch has been applied with the utmost reluctance (*Boreali v Axelrod*, 71 NY2d 1, 9 [1987]). Thus, although “the Legislature cannot pass on its law-making functions to other

bodies[,] there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature” (*id.* at 10; see *Matter of Retired Public Employees Assn. v Cuomo*, 123 AD3d 92, 97 [3d Dept 2014] [rejecting claim that legislature unconstitutionally delegated its legislative powers to the Civil Service Commission]).

Plaintiff argues nonetheless that the Legislature cannot constitutionally give a commission’s findings and regulations the “force of law.” Plaintiff’s reliance on the dissent in *St. Joseph’s Hospital v Novello* (43 AD3d 139 [4th Dept 2007]) is misplaced. There, the majority of the court upheld a statute that created a commission to make and report its recommendations for, among other things, closing healthcare facilities. The commission’s recommendations had the force of law unless the governor declined to approve them, or if each house of the Legislature adopted a resolution rejecting them. The court upheld the delegation of powers, reasoning that “even if the legislative veto provision were unconstitutional, that provision does not invalidate the remainder of the Legislation” because it would be severable (*id.* at 146). The dissent was of the opinion that the legislative veto provision violated the Presentment Clause and separation of powers doctrine and was not severable (*id.* at 151–154).

The legislation at issue here does not provide for a legislative veto. Rather, the Commission’s recommendations will take effect unless the

Legislature and Executive follow the usual constitutional process for enacting a statute. The constitutional infirmity that concerned the dissent in *St. Joseph's Hospital* is not present here. Thus, neither the majority opinion nor the dissent in that case supports plaintiff's contention that the 2015 legislation violates the separation of powers doctrine because it improperly gives Commission recommendations the force of law.

Nor has plaintiff established that the statute otherwise unconstitutionally delegates legislative powers to the Commission. Although the Commission is entitled to make binding recommendations regarding the pay of public officers and officials, plaintiff has not shown that, by granting such power to the Commission, the Legislature has ceded its "fundamental legislative or policymaking authority" (*Med. Socy. v Serio*, 100 NY2d 854, 864 [2003]). The Commission bill provides a specific task and defined guidelines for the Commission to consider in furtherance of that task (L 2015, ch 60, Part E § 3; see *McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252, 253 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007]). Accordingly, plaintiff has not established her entitlement to judgment as a matter of law on either of her separation of powers sub-causes of action.

Sub-Cause C—Article XIII, Section 7

Plaintiff alleges that the Commission bill violates Article XIII, Section 7 of the New York State Constitution. The Commission bill specifies that

recommended salary increases for judges would take effect on April 1 of any of the four years after the Commission's establishment (L 2015, ch 60, Part E § 2 [b] [1]). For members of the Legislature and statewide elected officials and officers, a recommended increase would go into effect on "the first of January after the November general election at which members of the state legislature are elected" (L 2015, ch 60, Part E § 2 [b] [2]).

State Constitution Article XIII, Section 7 states that the compensation of State officers named in the Constitution must be fixed by law and "shall not be increased or diminished during the term for which he or she shall have been elected or appointed." And State Constitution Article III, Section 6 provides that legislators' salaries must be fixed by law and may not be "increased or diminished during, and with respect to, the term for which he or she shall have been elected." In contrast, Article VI, Section 25 provides that judicial salaries shall be established by law and "shall not be diminished during the term of office for which he or she was elected or appointed."

Conspicuously absent from Article VI, Section 25 is a prohibition on granting increases to judicial compensation during their terms. Thus plaintiff erroneously relies on Article XIII, Section 7's general prohibition against compensation increases for the State's constitutional officers during the terms for which they were elected or appointed to argue that the State Constitution forbids judicial pay raises during judges' current terms of election or

appointment. And to the extent that plaintiff argues that the 2015 legislation creating the Commission unconstitutionally provides for a pay raise to legislators or the State's constitutional officers during the terms in which they have been elected or appointed, given that no pay raise has been recommended or effected, she has not established that "no set of circumstances exists under which the Act would be valid" (*Moran Towing*, 99 NY2d at 448).

Sub-Cause D—Article VII, Sections 2, 3, and 6

Plaintiff has also failed to satisfy her summary judgment burden with respect to her argument that the budget bills resulting in the enactment of the bill creating the Commission (S4610/A6721 2015) violated New York State Constitution Article VII, Sections 2, 3, and 6. Plaintiff has not established that the violations she claims are justiciable or that she is entitled to any relief. The fact that the State Constitution requires the Governor to submit a budget and budget bill before February 1st does not mean that a citizen has standing to seek a court order invalidating legislation passed in violation of that requirement. Likewise, whether the Commission's enabling legislation represents an expenditure or provides revenue, or "relate[s] specifically to some particular appropriation in the bill" may be political questions and not judiciable in this action (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 95–97 [2004]).

Sub-Cause E – Fraud and Due Process

The final allegation in plaintiff's sixth cause of action is that the budget bills creating the Commission were enacted fraudulently and in violation of due process. These allegations have already been rejected by the Court in its Amended Decision and Order dated December 21, 2016.

In sum, plaintiff has not demonstrated that she is entitled to judgment as a matter of law on any of the allegations contained in her sixth cause of action. Neither plaintiff's repeated allegations of fraud, deceit, and collusion, nor her refusal to accept prior court decisions on virtually the same issues satisfies her burden on a motion for summary judgment.

Motion for Leave to File Supplemental Complaint

Plaintiff's motion to file a supplemental complaint is denied. "[L]eave to amend a complaint rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit" (*Moon v Clear Channel Communs., Inc.*, 307 AD2d 628, 629 [3d Dept 2003]). All but one cause of action in the proposed supplemental complaint simply restate for budget year 2017–2018 causes of action that the Court has already determined to be devoid of merit. The remaining proposed cause of action merely restates the facial challenge to the 2015 legislation creating the Commission. It

contains no material “additional or subsequent transactions or occurrences” that would warrant a supplemental pleading (CPLR 3025 [b]).

Requests for Preliminary Relief and Subpoenas Duces Tecum

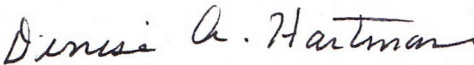
Plaintiff’s requests for preliminary declaratory and injunctive relief and subpoenas duces tecum for State Senate and Assembly records are related to the claims she seeks to assert concerning the 2017–2018 budget. Such requests are rendered moot by the denial of the motion to file a supplemental complaint (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714–715 [1980]).

Accordingly, it is

ORDERED that plaintiff’s motion brought on by order to show cause dated March 29, 2017, is denied in its entirety.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to defendants’ 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
June 26, 2017



Denise A. Hartman
Acting Supreme Court Justice

Papers Considered

1. Summons and Verified Complaint, with Exhibits A–K
2. Order to Show Cause with Preliminary Injunction & TRO
3. Affidavit in Support of Order to Show Cause, with Exhibits 1–3
4. Verified Supplemental Complaint (Proposed)
5. Affirmation of Helena Lynch, Dated April 21, 2017, with Exhibits 1–10
6. Memorandum of Law in Opposition to Plaintiffs' Application for Partial Summary Judgment, to Supplement the Complaint, and for a Preliminary Injunction and Restraining Order
7. Affidavit in Reply & in Further Support of Plaintiffs' March 29, 2017 Order to Show Cause with Preliminary Injunction & TRO, with Exhibits 4–15
8. Plaintiffs' Memorandum of Law in Reply & in Further Support of Their March 29, 2017 Order to Show Cause with Preliminary Injunction & TRO
9. Judicial Subpoena Duces Tecum to New York State Senate Records Access Officer Secretary of the Senate Francine Patience
10. Judicial Subpoena Duces Tecum to New York State Assembly Records Access Officer Robin Marilla