

SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

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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,

**Affidavit in Further Support
of Plaintiffs' Order to Show
Cause, in Reply/Opposition to
Defendants' Cross-Motion, &
for Other Relief**

Oral Argument Requested

-against-

Index #5122-16

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,

Defendants.

-----X
STATE OF NEW YORK)
WESTCHESTER COUNTY) ss.:

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the above-named individual plaintiff in this citizen-taxpayer action [State Finance Law Article 7-A (§123 *et seq.*)], unrepresented by counsel, seeking representation/intervention by the New York State Attorney General, consistent with State Finance Law §123 *et seq.* and Executive Law §63.1. I am fully familiar with all the facts, papers, and proceedings had herein.

2. This affidavit is submitted to swear to the truth of plaintiffs' accompanying memorandum of law, which I wrote and incorporate by reference; to annex the exhibits referred to therein and to highlight their significance; and to furnish facts pertaining to the service of plaintiffs' summons and verified complaint that are both misrepresented and missing from AAG Kerwin's September 15, 2016 affirmation accompanying her cross-motion to dismiss plaintiffs' complaint, as likewise from her memorandum of law.

3. Additionally, and consistent with State Finance Law §123-c(4), which requires that citizen-taxpayer actions be "promptly determined" and "have preference over all other causes", this affidavit is submitted in support of a hearing, as immediately as possible, on plaintiffs' September 2, 2016 order to show cause for a preliminary injunction, with TRO, and, additionally, for a preliminary conference pursuant to §202.12 of the Uniform Civil Rules for the Supreme Court and County Court on which this Court relies.¹

4. In support of the Court's THRESHOLD duty to disclose facts bearing on its fairness and impartiality for the reasons set forth at pages 4-5 of plaintiffs' memorandum of law, annexed is plaintiffs' September 23, 2016 FOIL request to the Governor and Senate for records from which the Court's pertinent professional background and employment history in the office of the Attorney General would be reflected (Exhibit L). No response has yet been received.

5. In support of the Court's THRESHOLD duty to inquire as to who at the Attorney General's office has independently determined plaintiffs' entitlement to the Attorney General's representation/intervention herein, pursuant to State Finance Law Article 7-A and Executive Law §63.1, for the reasons set forth at pages 1-2 of plaintiffs' memorandum of law, annexed are my

¹ See, this Court's Rules -- <http://www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml#preliminary> and the Uniform Civil Rules for the Supreme Court and County Court: <http://www.nycourts.gov/rules/trialcourts/202.shtml#12>.

September 8, 2016 and September 16, 2016 e-mails to AAG Kerwin making those inquiries (Exhibits M-1 and M-2). As I received no response from her or anyone else, attached is plaintiffs' related, but more extensive September 28, 2016 FOIL request to the Attorney General's office (Exhibit N).

6. In support of the Court's granting of the TRO which Justice McDonough struck from plaintiffs' September 2, 2016 order to show cause in a further demonstration of the actual bias, born of interest, that he exhibited throughout the course of the predecessor citizen-taxpayer action, as chronicled by plaintiffs' Exhibit G to their verified complaint, annexed is the stenographic transcript of the September 2, 2016 oral argument before him (Exhibit O).

Notwithstanding the availability of a TRO in a citizen taxpayer action is unequivocally set forth by State Finance Law §123-e(2), which I had furnished to Justice McDonough repeatedly in the prior citizen-taxpayer action, including as referred-to in plaintiffs' Exhibit G (at p. 9), he began the September 2, 2016 oral argument by asking me, yet again, "whether or not the CPLR prohibits TROs against a public officer or municipal corporation in restraining them from statutory duties" (p. 4, lns. 10-13). My response was to state:

"Yes, sir. We have been around that block before and this is a citizen-taxpayer action under State Finance Law Article 7A and Section 123-e(2) reads as follows:

The Court, at the commencement of an action pursuant to this article, or at any time subsequent thereto and prior to entry of judgment, upon application by the plaintiff or the Attorney General on behalf of the People of the state, may grant a preliminary injunction and impose such terms and conditions as may be necessary to restrain the defendant if he or she threatens to commit or is committing an act or acts which, if committed or continued during the pendency of the action, would be detrimental to the public interest.

And it continues, a temporary restraining order may be granted pending a hearing for a preliminary injunction notwithstanding the requirements of Section 6313 of the Civil Practice Law and Rules, where it appears that immediate and

irreparable injury, loss, or damage will result unless the defendant is restrained before a hearing can be [had].

Now, we have here the disbursement of huge amounts of taxpayer money. Unless it is possible to claw back that amount of money, [it] represents a dissipation of public resources, taxpayer money, and it is for that reason that the statute provides for a TRO” (p. 4, ln. 14 - p. 5, ln. 14).

AAG Kerwin’s response to my quoting of State Finance Law §123-e(2), with its explicit negating of the applicability CPLR §6313, was, yet again, to ignore it, as she had every time previously, and baldly purport, without any presentation of law or fact in substantiation:

“Your Honor, as we did last go-round on this, the state still believes that CPLR 6313(a) prohibits a TRO here.” (p. 9, ln. 25 – p. 10, ln. 2).

And Justice McDonough, too, consistent with what he had done previously with respect to the availability of a TRO in a citizen-taxpayer action, furnished no law or fact to substantiate his ruling, which was:

“...I do find, having heard oral argument as well as my review of the papers, that it is this Court’s measured opinion that CPLR 6313 forbids the granting of a TRO against a public officer in this case in regards to restraining [] public officer[s] from the performance of statutory duties.” (p. 11, ln. 24 – p. 12, ln. 4).

In so stating, neither Justice McDonough nor AAG Kerwin denied or disputed that it is to prevent dissipation of public monies that State Finance Law §123-e(2) allows for a TRO. Nor did either of them claim that a claw-back would be possible to recover the disbursed funds. AAG Kerwin’s bald comment on the subject was simply: “there’s nothing before the Court that shows any type of irreparable harm to be suffered by the plaintiffs or the citizen-taxpayers, if the Court views it that way.” (p. 10, lns. 4-8). Justice McDonough’s ruling was even more bald: “I find that the plaintiffs have failed to make out and demonstrate irreparable harm.” (p. 13, lns. 14-15).

Nor did either of them deny or dispute any aspect of what I stated in answer to Justice McDonough’s question: “Do you want to speak to the presumption of constitutionality that goes along with the state’s action in this regard that you’re seeking to preclude?” (p. 6, lns. 17-20). It was,

as follows:

“I think it is quite fortuitous, all things considered, that Your Honor happens to be the part one judge because nobody would know the truth of the record here better than Your Honor, notwithstanding your decisions. As you know, the – when Your Honor rendered the amended decision of August 1, you stated that with respect to causes of action 13 through 16 a separate action should be brought. So that’s why we’re here today, bringing that separate action.

You are familiar already with the serious and substantial nature of those causes of action with respect to the statute, as written and as applied, establishing that the commission on legislative, judicial and executive compensation was a rider in violation -- it was an unconstitutional rider inserted into budget legislation. It had no connection to the budget and it was – so it was violative of Article 7, Section 6. It was also, as I pointed out in I believe it was cause of action 13, it was also untimely because it was introduced and amended on the same day, being March 31, 2015, and under the Constitution it could not be submitted at that point of time. It could have been submitted up until I believe it’s 30 days and then afterward with leave. It was not. It was on the eve of the new fiscal year. It was presented as an entirely new bill and it was the subject – it was advanced through fraud and I have a cause of action setting this forth including the video of the Senate Finance Committee meeting at which Senator Squadron asked about when it was amended. He knew nothing about this. And there was colloquy by Senator DeFrancisco, who was chairing, who purported, pretended that it had been introduced long ago, sometime long ago. In fact that was a lie to a fellow senator without which that bill –

...

In any event, this is all laid out in the 13th cause of action and I would respectfully say that that cause of action is so serious and substantial, so on its face concerning as to require the TRO. This is apart from the unconstitutionality of the statute as applied. Okay. We’re just now talking about how it was procured, how it was procured.

...

The money – the huge amount of taxpayer money is being funneled somewhere from the judiciary budget from the re-appropriations and the now second cause of action here reviews the serious and substantial issue with respect to the re-appropriations. Firstly, there is a question whether the re-appropriations of the judiciary were certified. Then there is a problem as to whether or not those re-appropriations actually are proper re-appropriations. And one of the issues is that there is a transfer provision and it appears that through the transfer interchange provision that is part of the re-appropriation section, as well as the appropriation section, the money for the

judicial salary increases is somewhere being funneled out from the re-appropriations. It's completely unidentified." (p. 6, ln. 23 – p. 9, ln. 22).

The transcript shows that AAG Kerwin simply ignored this oral presentation of specific aspects of unconstitutionality presented by the thirteenth cause of action of plaintiffs' March 23, 2016 verified second supplemental complaint – now embodied in plaintiffs' sixth cause of action of their instant complaint (¶¶60, 67-68 & incorporated ¶¶407-423) – and, additionally, by what is now their second cause of action (¶¶35, 39 & incorporated ¶¶320-331), baldly stating:

“even if the regular standard for TRO was applied, there's nothing before the Court to show any merit to the underlying claims. ...All that is before the Court is an affirmation by Ms. Sassower and exhibits that include papers from our last lawsuit and the things she has written. So based on the evidence before the Court, the TRO should be denied.” (p. 10, lns. 3-12).

As for Justice McDonough, he allowed me to reply to what AAG Kerwin had stated, before completely ignoring what I had said. The transcript shows the following:

Justice McDonough: “Ms. Sassower, I'll give you a last chance to respond if you like.”

Sassower: “The pleadings are verified, as I believe is required in citizen-taxpayer actions. It alleges all manner of unconstitutionality, statutory and rule violations and fraud, larceny of taxpayer dollars. It is particularized, meeting the standards required in pleadings alleging fraud and it is substantiated by evidence.

The records of the predecessor citizen-taxpayer action show unequivocally that plaintiffs were entitled to...summary judgments as a matter of law. For Ms. Kerwin to get up here and say there's nothing, that there's some question as to the merit of this case is contemptuous of the Court.

I would respectfully request one minute to address the further relief with respect to the counties because under county law 700.11 distribution of moneys for District Attorney salary reimbursement to the counties is in the month of September and I have tried to ascertain when in the month of September and from what I see, it is continuously throughout and includes the first week of September.

I don't know how that money passes to the counties, whether it is actually disbursed from the comptroller or from the Division of Criminal Justice Services – I tried to ascertain that information – but I will tell you that money will be disbursed. And, as I said, there are problems, including certification problems, with respect to – [holding up Aid to Localities Budget Bill #S.6403-d/A.9003-d] this is what we're talking about, the aid to localities budget, and 60 pages that are the Division of Criminal Justice Services budget in which is the aid to counties for District Attorney salary reimbursement.” (p. 10, ln. 13 – p. 11, ln. 21).

Justice McDonough's full ruling was as follows:

“All right. I do find, having heard oral argument as well as my review of the papers, that it is the Court's measured opinion that CPLR 6313 forbids the granting of a TRO against a public officer in this case in regards to restraining that public officer from the performance of statutory duties. Regardless, even if such a TRO was permitted, I find that the plaintiffs in this case have failed to demonstrate a likelihood of success on the merits, particularly in regards to the strong presumption of constitutionality and the fact that parties challenging constitutionality must demonstrate a statute's invalidity beyond a reasonable doubt, citing *State United Teachers ex rel Magee, M-A-G-E-E, versus State*. That's a Third Department case from this year, 2016. The cite is 140 AD3d 90.

Additionally, I find that the plaintiffs have failed to make out and demonstrate irreparable harm and upon a balancing of the equities, all of these measures preclude the Court from ordering a TRO.” (p. 11, ln. 24 – p. 12, ln. 17).

Thus may be seen that NONE of the law or the facts which I presented at the September 2, 2016 oral argument as entitling plaintiffs to the granting of the TRO were in any way addressed by Justice McDonough or by AAG Kerwin. For that matter, they also did not deny, dispute, or address the proposition of law relating to Justice McDonough's disqualification that I raised at the outset of the September 2, 2016 argument. My colloquy with Justice McDonough was as follows:

Justice McDonough: “...Ms. Sassower, you can make whatever argument you'd like to make to the Court in regards to your TRO request.”

Sassower: “Your Honor is the part one judge and as such I am appearing before you. However, this order to show cause is not on[ly] for injunctive relief but to disqualify you from any contact with this case. I understand that you’re the duty judge.”

Justice McDonough: “That’s the same recusal request you made in similar lawsuits in the past; correct?”

Sassower: “Your Honor did not address ever the financial interest that you have, the serious, not alleged or appearance. Your Honor has a \$60,000 a year financial interest, salary interest.”

Justice McDonough: “As does every judge in the State of New York; correct?”

Sassower: “But as I identified at the outset of this case – I’m sorry, the predecessor case more than two years ago, the rule of necessity is that when all are disqualified, none are disqualified. However, where a judge cannot rise above his conflict of interest and manifests his bias, as this Court has done by decisions that upend all cognizable adjudicative, evidentiary standards; that are in every respect fraudulent decisions, then that judge must recognize his bias and step aside or be disqualified.”

Justice McDonough: “Okay. Let’s see if we can direct your comments towards the actual TRO that you’re requesting, because it is the Court’s intention to sign the order to show cause. The question becomes whether or not I’m doing to strike or leave in the temporary restraining order request –

Sassower: “Thank you.” (p. 3, ln. 1 – p. 4, ln. 7).

7. In further demonstration of plaintiffs’ showing at pp. 26-31 of their memorandum of law that AAG Kerwin has NO defense to their sixth, seventh, and eighth causes of action (¶¶59-80 & incorporated ¶¶385-457) and misrepresents the civil action *James Coll v. NYS Commission on Legislative, Judicial and Executive Compensation, NYS Legislature; NYS Governor* (Nassau Co. Index #2598-2016), including by annexing a demonstrably false September 1, 2016 decision of Nassau County Supreme Court dismissing it, annexed is Mr. Coll’s April 5, 2016 complaint (Exhibit P), from which can be seen that his challenge was to Commission statute, *as written* – and, specifically, to the “force of law” power of its salary recommendations.

8. In further demonstration of plaintiffs' showing at pp. 31-34 of their memorandum of law that AAG Kerwin has NO defense to their tenth cause of action (¶¶85-110), annexed are:

- (1) the responses received, to date, to plaintiffs' September 1, 2016 FOIL request, appended to the verified complaint as Exhibit K. The responses are: a September 9, 2016 e-mail from the Secretary of the Senate (Exhibit Q-1) and a September 9, 2016 letter from the Assembly's records access officer (Exhibit Q-2), each purporting they have no responsive documents, as well as a September 9, 2016 letter from the records access officer of the Division of the Budget (Exhibit Q-3) and a September 12, 2016 letter from the Comptroller's records access officer (Exhibit Q-4), both of whom have not yet substantively responded;
- (2) Plaintiffs' September 7, 2016 e-mail and its attached notice to the 62 counties of the State of New York, plus their institutional/lobbying entities, of their right to seek intervention (Exhibit R) – to which plaintiffs received no substantive response.

9. As for the facts pertaining to service, addressed at pp 16-17 of plaintiffs' memorandum of law, AAG Kerwin's affirmation (at ¶7) and memorandum of law (at p. 5) create the false impression that service was not effected on defendants Governor Cuomo, Temporary Senate President Flanagan, the New York State Senate, and Chief Judge DiFiore, each stating: "Upon information and belief, service was attempted on [them] on September 2, 2016 by plaintiff Elena Sassower herself." (underlining added). In fact, I did serve those defendants – thereafter attesting to same by my affidavit of service (Exhibit S).

10. AAG Kerwin also fails to recite that upon the conclusion of the September 2, 2016 oral argument I not only stated to her that I was intending to immediately serve the four defendants for whom she was not accepting service, but my response to her upon her telling me that I could not serve them because I am a party. I stated that plaintiffs had no attorney and were entitled to representation by the Attorney General. I may have also asked her who in the Attorney General's office would be making that determination. In any event, by my September 8, 2016 e-mail, I asked her that question:

“I take this opportunity to reiterate plaintiffs’ request that the Attorney General intervene on plaintiffs’ behalf – or undertake our representation – which I stated to you on September 2, 2016, both during the court proceeding on plaintiffs’ order to show cause and thereafter. Please promptly advise who is independently evaluating our entitlement thereto pursuant to State Finance Law Article 7-A and Executive Law §63.1.” (Exhibit M-1, underlining in the original).

I received no answer – and, on September 16, 2016, stated this in a further e-mail to AAG Kerwin:

“Meantime, I am still waiting to hear from you as to THE THRESHOLD ISSUE of who, in the Attorney General’s office, has independently evaluated plaintiffs’ entitlement to the Attorney General’s representation/intervention on their behalf, pursuant to State Finance Law Article 7-A and Executive Law §63.1. Did such individual review your cross-motion papers? Please furnish me with that information IMMEDIATELY – as likewise the names of those charged with supervisory oversight of your work-product, over and beyond defendant Attorney General Schneiderman.” (Exhibit M-2, capitalization and underlining in the original).

Once again, I have received no response.


ELENA RUTH SASSOWER

Sworn to before me this
30th day of September 2016

NOVELETTE A BROCKINGTON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01BR6293108
Qualified in Westchester County
Commission Expires Nov. 25, 2017


Notary Public

TABLE OF EXHIBITS

- Exhibit L: plaintiffs' September 23, 2016 FOIL request to Governor Cuomo's records access office & to the Secretary of the Senate – "Nomination & Confirmation of Denise Hartman to the New York Court of Appeals"
- Exhibit M-1: plaintiffs' September 8, 2016 e-mail to AAG Kerwin
- Exhibit M-2: plaintiffs' September 16, 2016 e-mail to AAG Kerwin
- Exhibit N: plaintiffs' September 28, 2016 FOIL request to Attorney General Schneiderman's record access officer – "Assistant Attorney General Kerwin & Guidelines, Policies & Procedures"
- Exhibit O: transcript of September 2, 2016 oral argument of plaintiffs' order to show cause for preliminary injunctions, with TRO
- Exhibit P: April 5, 2016 complaint in *James Coll v. NYS Commission on Legislative, Judicial and Executive Compensation, NYS Legislature; NYS Governor* (Nassau Co. Index #2598-2016)
- Exhibit Q-1: September 9, 2016 e-mail from Secretary of the Senate
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- Exhibit Q-3: September 9, 2016 letter from Division of the Budget records access officer
- Exhibit Q-4: September 12, 2016 letter from Comptroller's records access officer
- Exhibit R: Plaintiffs' September 7, 2016 e-mail and its attached notice of right to seek intervention to the 62 counties of the State of New York, plus their institutional/lobbying entities
- Exhibit S: plaintiff Sassower's September 8, 2016 affidavit of service

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PLAINTIFF SASSOWER'S AFFIDAVIT
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ELENA RUTH SASSOWER, Plaintiff *Pro Se*, individually
& as Director of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York &
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September 30, 2016