State of New York
Court of Appeals

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,

SSD 23

Plaintiffs-Appellants,

-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 STATE OF 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-Respondents.

MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION TO VACATE AND FOR OTHER RELIEF

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Supreme Court, Albany County – Index No. 5122-16
Appellate Division, Third Department No. 527081

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PRELIMINARY STATEMENT

This litigation is over.

Supreme Court, Albany County, rendered final judgment for defendants on the merits in 2017. After denying appellants' four separate motions for substantive relief, the Appellate Division, Third Department, unanimously affirmed in 2018. In 2019, this Court dismissed appellants' direct appeal. Subsequently, the Court denied appellants' motion for reargument of the dismissal and denied appellants' motion for leave to appeal. Throughout the lengthy and tortuous progress of this litigation, no judge has ruled in appellants' favor on the merits of any claim.

Appellants' motion practice has become vexatious. The Court should deny their latest motion and rule that no further motions may be filed in this case.

ARGUMENT

APPELLANTS' MOTION SHOULD BE DENIED

A. The motion must be dismissed as to CJA.

Center for Judicial Accountability, Inc. (CJA) is a corporation. (*See* Record on Appeal to Appellate Division, Third Department [R] 91.) Under C.P.L.R. § 321(a), "a corporation or voluntary association *shall* appear by

attorney" (emphasis added). *See, e.g., State Farm Mut. Ins. Co. v. Croyle Enters., Inc.,* 10 N.Y.3d 800, 800 (2008).

Appellants ought to be familiar with that provision. Supreme Court twice dismissed CJA's claims because it was not represented by an attorney. (R322-323, 530.) The Third Department affirmed that holding. *CJA v. Cuomo,* 167 A.D.3d 1406, 1409 (3d Dep't 2018). In its May 2 order, this Court dismissed CJA's purported appeal for the same reason. (11/25/19 Affidavit of Elena Ruth Sassower [Sassower Aff.] Ex. B-1 at 1.) Further, citing C.P.L.R. § 321(a), all three of this Court's October 24, 2019 orders dismissed appellants' motion as to CJA "upon the ground that Sassower is not Center for Judicial Accountability, Inc.'s authorized legal representative." (Sassower Aff. Ex. A-1 at 1, A-2 at 1, A-3 at 1.)

Notwithstanding that unbroken string of rulings, the present motion purports to be brought on behalf of both appellants. (*See* 11/25/19 Notice of Mtn. at 1.) CJA is still not represented by counsel. The Court should not countenance appellants' willful disregard of the C.P.L.R.'s clear mandate and the courts' orders.

B. Appellants' jurisdictional argument is incorrect and self-defeating.

Appellants argue that the Court lacked jurisdiction based on *Oakley v. Aspinwall,* 3 N.Y. 547 (1850). (11/25/19 Notice of Mtn. ¶1.) They made the same argument previously. (*See* 5/31/19 Notice of Rearg. Mtn. ¶2(a).) This Court denied their motion, necessarily rejecting the claim.

As we previously pointed out (6/27/19 Mem. in Opp. at 15), *Oakley* involved a statutory prohibition on having judges preside over their relatives' cases. *See Oakley*, 3 N.Y. at 551. No such statutory prohibition exists here. Moreover, in this precise context—judicial salaries—this Court has held that the Rule of Necessity overrides a judge's economic conflict. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 248-49 (2010).

Ultimately, appellants' jurisdictional argument is self-defeating. If this Court lacks jurisdiction to consider appellants' putative appeal (as they urge), then the appeal must be dismissed for lack of jurisdiction. That is exactly what the Court did on May 2, 2019. (*See* Sassower Aff. Ex. B-1 at 1-2.)

C. Section 100.3(F) of the Judicial Conduct Rules does not apply.

Appellants contend that the disclosure and consent procedure in 22 N.Y.C.R.R. § 100.3(F) applies here. (11/25/19 Notice of Mtn. ¶2.) They said the same thing previously. (*See* 5/31/19 Notice of Rearg. Mtn. ¶2(b).) As we explained then (6/27/19 Mem. in Opp. at 17), section 100.3(F) applies only after a judge has been disqualified under 22 N.Y.C.R.R. § 100.3(E), which did not happen here. Further, disclosure under 22 N.Y.C.R.R. § 100.3(F) is voluntary: a judge "may disclose" the basis for disqualification.

D. The Court's rulings against appellants do not show "actual bias."

Appellants ask that all six Judges who denied and dismissed their prior motions be disqualified for "actual bias," and argue that such bias is "demonstrated by [the Judges'] October 24, 2019 and May 2, 2019 Orders." (11/25/19 Notice of Mtn. ¶3.) Appellants sought disqualification based on "actual bias" previously. (*See* 5/31/19 Notice of Mtn. ¶3.) By denying and dismissing appellants' motion, the Court necessarily rejected their argument. Denial of a motion for disqualification does not create a new ground for disqualification. As we explained previously, bias

will not be inferred from adverse rulings. *See Knight v. N.Y. State & Local Ret. Sys.*, 266 A.D.2d 774, 776 (3d Dep't 1999); *accord Matter of Cori XX.*, 155 A.D.3d 113, 117 (3d Dep't 2017); *S.L. Green Props., Inc. v. Shaoul*, 155 A.D.2d 331, 332 (1st Dep't 1989). (*See* 6/27/19 Mem. in Opp. at 13.) Were the law otherwise, every decision would result in a disqualification motion.

E. The Attorney General has not committed fraud, misrepresentation, or other misconduct.

Defendants previously explained why appellants' repeated allegations of "litigation fraud" are legally baseless. (6/27/19 Mem. in Opp. at 18-19.) By denying and dismissing appellants' motion, the Court necessarily rejected appellants' contrary argument. Appellants have no ground for resurrecting these meritless claims. (*See* 11/25/19 Notice of Mtn.¶4.)

As explained previously, the Attorney General's papers were submitted in subjective good faith and were prepared through an objectively reasonable process designed to avoid errors. (8/19/19 Brodie Aff. in Opp. to Mtn. to Strike ¶¶5-18.) The factual assertions in the Attorney General's papers were supported by citations to appropriate portions of the record, while the legal arguments were supported by

citations to applicable statutes, rules, and cases. The Office of the Attorney General stands by its submissions.

F. The Court did not overlook appellants' arguments.

Appellants assert that the Court overlooked "ALL the facts, law, and legal argument presented by appellants' May 31, 2019, June 6, 2019, and August 8, 2019 motions." (11/25/19 Notice of Mtn. ¶5.) In our view, the Court did not overlook appellants' arguments, but instead rejected them. To the extent the Court feels it overlooked a particular point, respondents respectfully refer to their opposition memoranda dated June 27, 2019 and August 19, 2019 for responsive arguments.

G. The Court's orders were lawfully signed.

Appellants' claim that the Court's orders were "not lawfully signed" (11/25/19 Notice of Mtn. ¶6[a]) must be rejected. A deputy, such as the deputy clerk who executed the challenged orders, is empowered to "perform the duties of his [or her] principal during the absence or inability to act of his [or her] principal." Public Officers Law § 9. Mr. Asiello, the principal, was permitted to recuse himself and need not provide appellants with any reason for doing so.

Even if the orders were defectively executed (and they were not), under C.P.L.R. § 2002 "[a]n error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced." Here, the presence of a deputy clerk's signature did not prejudice appellants at all. The result for appellants would be no different if Mr. Asiello, rather than the deputy clerk, signed the orders. *Accord* C.P.L.R. § 2001 ("if a substantial right of a party is not prejudiced," a "mistake, omission, defect or irregularity shall be disregarded").

H. The Court's order in *Delgado* does not show bias.

Appellants' argument that the Court's order in *Delgado v.* State, 2019 N.Y. Slip Op. 84536 (Ct. App. Nov. 21, 2019) somehow shows bias (*see* 11/25/19 Notice of Mtn. ¶6[b]) is meritless. This Court transferred the appeal in *Delgado* to the Appellate Division, Third Department, because it determined that a direct appeal could not be taken from Supreme Court on the facts of that case. No such issue was presented here because appellants appealed to the Third Department rather than attempting a direct appeal to this Court.

I. Chief Administrative Judge Marks is not a party.

Appellants assert that "Chief Administrative Judge Lawrence Marks and other judges of the Unified Court System are colluding in fraud and deceit before the current Commission on Legislative, Judicial and Executive Commission." (11/25/19 Notice of Mtn. ¶6[c].) That allegation does not belong in this case. Chief Administrative Judge Marks is not a party to this proceeding—nor is any other judge aside from Chief Judge DiFiore, who did not participate in the challenged decisions. And appellants' lawsuit challenged actions of the prior commission, not the current one. (The current commission was not created until 2018, after Supreme Court entered judgment below.)

J. This proceeding cannot be transferred to federal court.

Appellants ask for an order "securing a federal forum" for their claims. (11/25/19 Notice of Motion ¶¶1, 3, 4.) Federal courts are courts of limited jurisdiction that possess only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). We know of no Constitutional or statutory basis for transferring this case to federal court. Moreover, Supreme Court's judgment on the merits, affirmed by the Third Department, is res

judicata and would preclude the federal courts from acting. Finally, as we noted previously (6/27/19 Mem. in Opp. at 17), appellants chose to bring both this case and the predecessor lawsuit in the State courts. They should not be permitted to engage in after-the-fact forum-shopping.

K. Appellants should be precluded from filing any further motions in this case.

The present motion is the fourth that appellants have filed in this Court, *after* having their appeal dismissed. Appellants similarly filed four substantive motions in the Appellate Division. The motions have been largely repetitive, and appellants did not prevail on the merits of any of them. Among other things, the present motion seeks to reargue the denial of a motion for reargument. If such motions were permitted, litigation would never conclude, as the losing party could bring an infinite series of reargument motions.

By the time this motion was filed, appellants should have realized that their case was lost. At the very least, as argued above in § A, they should have realized that CJA could not proceed without counsel.

In short, this motion was improperly undertaken to delay or prolong the resolution of this litigation. *See* 22 N.Y.C.R.R. § 130-1.1(c)(2). It is also without merit in law and cannot be supported by a reasonable

argument for the extension, modification, or reversal or existing law. *See* 22 N.Y.C.R.R. § 130-1.1(c)(1). To prevent continued vexatious litigation, the Court should order that no further motions may be filed in this action.

CONCLUSION

Appellants' motion should be denied in all respects, and the Court should enter an order precluding appellants from filing any further motions in this action.

Dated: Albany, New York
December 10, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.13(c)(1), Frederick A. Brodie, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this memorandum, the body of this memorandum contains 1,722 words, which complies with the limitations stated in 22 N.Y.C.R.R § 500.13(c)(1).

Frederick A. Brodie