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,

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 MOTIONS FOR (i) LEAVE TO APPEAL; AND (ii) REARGUMENT/RENEWAL AND OTHER RELIEF

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PRELIMINARY STATEMENT

Respondents submit this memorandum in opposition to the motions of plaintiffs-appellants Elena Ruth Sassower and Center for Judicial Accountability, Inc. ("CJA") for (i) leave to appeal ("Leave Mtn."); and (ii) reargument/renewal and other relief ("Rearg. Mtn."). For the reasons set forth below, both motions should be denied.

STATEMENT OF FACTS

For the facts and legal issues underlying this case, respondents respectfully refer the Court to their brief filed in the Appellate Division, Third Department, September 21, 2018 ("R.Br.") and, where appropriate, to the Record on Appeal ("R").

ARGUMENT

POINT I

LEAVE TO APPEAL SHOULD BE DENIED

A. Leave to Appeal Should Be Denied Because Plaintiffs' Procedural Defaults and Errors Would Prevent the Court from Reaching the Merits

The procedural defects that supported dismissal of plaintiffs' purported appeal as of right (*see* Respondents' 3/26/19 Letter) continue to exist, have not been cured, and cannot be removed. Thus, if leave were

granted, this Court could not reach the "many, many" questions of law referenced by plaintiffs (Leave Mtn. at 4; *accord id.* at 14-16). Because procedural defects would bar this Court from addressing the merits of plaintiffs' main arguments, leave to appeal should be denied.

1. CJA cannot appear without counsel.

As a corporation, CJA cannot appear in this Court without an attorney. *See* C.P.L.R. § 321(a). Two Supreme Court Justices, the Third Department, and this Court have all ruled that counsel is required. (R322-323, 530; Leave Mtn. Ex. A at 4, Ex. D-2.) Because the corporate entity has no attorney, its appeal must be dismissed. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Croyle Enters., Inc.,* 10 N.Y.3d 800, 800 (2008); *Matter of Naroor v. Gondal,* 5 N.Y.3d 757, 757 (2005), *recon. denied,* 5 N.Y.3d 198 (2005).

2. The first four causes of action are barred by collateral estoppel.

Plaintiffs' first four causes of action were found to be meritless in the predecessor lawsuit. (*See* R.Br. at 14-15; R321; Leave Mtn. Ex. A-1 at 7-8.) Plaintiffs never perfected an appeal in that case, and thus lost the right to challenge Justice McDonough's rulings. *See People ex rel.*

Washington v. Napoli, 14 N.Y.3d 858, 858 (2010) (dismissing appeal where appellant's challenge to offender status "had already been unsuccessfully litigated and was therefore barred by collateral estoppel").

3. Plaintiffs' claims as to budget years 2014-2015 and 2015-2016 are barred by collateral estoppel and res judicata.

Plaintiffs' claims as to budget years 2014-2015 and 2015-2016 are the subject of unappealed declaratory judgments in the predecessor action. (R323.) (*See* R.Br. at 14-16.) Any attempt to relitigate them in this action is consequently barred by both collateral estoppel and res judicata. *See People v. Evans*, 94 N.Y.2d 499, 502 (2000), *rearg. denied*, 96 N.Y.2d 755 (2001).

4. Plaintiffs' claims as to the 2017-2018 budget year are limited to whether Supreme Court abused its discretion in denying their motion to supplement the complaint.

Plaintiffs cannot attack the 2017-2018 budget year in this appeal, because Supreme Court denied their motion to supplement the complaint to include such claims. (*See* R69.) The denial of a motion to supplement a complaint is reviewed for abuse of discretion. *John D. Park & Sons v. Hubbard*, 198 N.Y. 136, 139-40 (1910); *Congelosi v. Dep't of Corrections*

& *Community Supervision,* 120 A.D.3d 874, 874 (3d Dep't 2014), *lv. denied,* 24 N.Y.3d 909 (2014). Supreme Court's denial fell comfortably within its discretion. (*See* R.Br. at 16-18.) The alternative would have been an infinitely expanding litigation with plaintiffs adding a new claim every year.

5. Plaintiffs' claims as to the 2016-2017 budget year are moot.

To the extent plaintiffs challenge expenditures from the 2016-2017 budget year, their appeal is moot because the authority to spend funds pursuant to the 2016-2017 budget appropriations has lapsed. *See* State Finance Law § 40; N.Y. Const. Art. 7, § 7. (*See also* R.Br. at 18-19.)

B. The Factors Set Forth in 22 N.Y.C.R.R. § 500.22(b)(4) Show that Leave to Appeal Should Be Denied

Procedural defects aside, the proposed appeal does not satisfy this Court's leave-grant criteria.

1. The issues plaintiffs would raise lack public importance.

The issues the Court would hear are not ones of public importance. As shown in Point I(A), procedural defects would preclude the Court from addressing the constitutional issues identified by plaintiffs. The appeal

would devolve into a litany of idiosyncratic complaints by plaintiffs about the way the courts handled this litigation. Those complaints are meritless: they reflect the mistaken view that plaintiffs' papers are self-evidently correct, and that any disagreement with them is frivolous or fraudulent. (*See, e.g.*, Notice of Rearg. Mtn. ¶2[d]-[e]; Rearg. Mtn. Ex. D.)

2. Plaintiffs' claims on the merits are not novel.

The constitutional issues that plaintiffs wish to raise are not novel in any event. For more than 40 years, the law has been settled that the Constitution permits "the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976). Against the background of that settled law, in dismissing the appeal as of right, this Court found the unlawful delegation claim—as well as plaintiffs' other constitutional claims—to be insubstantial and not leaveworthy.

The Third Department's decision followed settled law on delegation of power. The enabling statute specified the operative standard, namely, that judicial compensation must be "adequate." (R1080.) The statute set forth six non-exclusive factors to consider in determining whether

judicial salaries "warrant an increase." (R1080-1081.) The "basic policy decision[]" that judges should receive "adequate" compensation, as determined by relevant factors, was thus "made and articulated by the Legislature." *Matter of N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991). (*See* Leave Mtn. Ex. A at 5-6; R.Br. at 33-35.)

The statute also provided reasonable structural safeguards. The Legislature reserved to itself the right to "modif[y] or abrogate[]" the Commission's recommendations through the ordinary process of passing a statute. (R1082.) The Commission was required to send its recommendations to the Legislature by December 31. (R1081.) The recommendations would become law only if the Legislature declined to act by April 1, more than three months later. (R1082; *see also* Leave Mtn. ex. A at 6; R.Br. at 36.)

3. The Third Department's order did not conflict with prior law.

The Third Department's order did not conflict with this Court's decisions or create a conflict among the Appellate Division's departments. Rather, the Legislature's limited delegation of authority to the Commission was permitted under a uniform line of judicial decisions.

A similarly structured commission, created to address excess hospital capacity, was held constitutional by two Departments of the Appellate Division. *See McKinney v. Comm'r, N.Y. State Dep't of Health,* 41 A.D.3d 252, 253 (1st Dep't), *lv. denied,* 9 N.Y.3d 815 (2007); *St. Joseph Hosp. v. Novello,* 43 A.D.3d 139 (4th Dep't), *app. dismissed,* 9 N.Y.3d 988 (2007), *lv. denied,* 10 N.Y.3d 702 (2008).

Supreme Court, Nassau County, in 2016 upheld the constitutionality of this very Commission. *Coll v. N.Y.S. Commission on Legislative, Judicial and Executive Compensation,* Index No. 2598-2016 (Sup. Ct. Nassau Cty. Sept. 1, 2016) (reproduced at R428).

Most recently, Supreme Court, Albany County, adhered to the Appellate Division's decision in this case and upheld legislative pay raises for 2019 that resulted from a "nearly identical" process. *Delgado v. State,* Index No. 907537-18, slip op. at 10, 15, 17 (Sup. Ct. Albany Cty. Jun. 7, 2019) (copy attached).[1]

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[1] Although *Delgado* held that recommendations to limit legislators' outside income went beyond the committee's authority, *id.*, slip op. at 12-17, the present appeal involves no such recommendations.

No New York court has ever held that delegating the determination of judicial salaries to a commission, based on the consideration of relevant factors and subject to Legislative amendment or veto, would be unconstitutional. None of the various decisions of this Court listed by plaintiffs (Leave Mtn. at 12-14) even addressed the issue. Thus, there is no conflict within the courts.

POINT II

THE RELIEF SOUGHT IN PLAINTIFFS' REARGUMENT MOTION SHOULD BE DENIED

A. Leave to Renew Should Be Denied

A motion for leave to renew must be "based upon new facts which were previously unavailable." *Bhoj v. Bargold Storage Systs.*, 303 A.D.2d 437, 438 (2d Dep't 2003). The new facts must be material. *See* C.P.L.R. 2221(e)(2) (facts or law offered on renewal must be sufficient to "change the prior determination"); *Rosenthal v. Cooper,* 224 A.D.2d 330, 330 (1st Dep't 1996).

Plaintiffs point to no facts that were previously unavailable, other than (i) this Court's dismissal of their appeal; and (ii) the Attorney General's citation to that dismissal in other litigation. (Rearg. Mtn. at 17.) When the appeal was dismissed, this Court was undoubtedly aware

its order would have legal effect and could be cited where relevant. Consequently, neither "fact" is material and renewal should be denied.

B. Leave to Reargue Should Be Denied

In a motion for reargument, plaintiffs must identify "matters of fact or law allegedly overlooked or misapprehended by the court." C.P.L.R. 2221(d)(2). Here, plaintiffs claim this Court overlooked "ALL the facts, law, and argument" in their March 26 and April 11, 2019 letters. (Rearg. Mtn. at 11; capitalization in original.)

Obviously the Court did not overlook everything plaintiffs said. Rather, the Court made three precise holdings, as to which plaintiffs' arguments were immaterial.

First, the Court held that CJA's appeal could not be heard because it was not represented by counsel. (Rearg. Mtn. Ex. A-1.) That result was legally required by C.P.L.R. 321(a). (*See* Point I[A][1].)

Second, the Court held that no substantial constitutional question was "directly involved" in plaintiffs' appeal on the merits. (Rearg. Mtn. Ex. A-1.) That holding was correct because plaintiffs' procedural errors and defaults would prevent the Court from reaching the constitutional

issues that plaintiffs wish to raise (*see* Point I[A]), and because the underlying claims were governed by settled law in any event.

Third, the Court held that the Third Department's denial of four interlocutory motions did not "finally determine the action within the meaning of the Constitution." (Rearg. Mtn. Ex. A-1.) That holding was correct as well. The action was finally determined by the Third Department's December 27, 2018 Memorandum and Order. (Leave Mtn. Ex. A-1.) That order was issued more than a week after all of plaintiffs' interlocutory motions had been denied. (*See* Leave Mtn. Exs. A-2, A-3, A-4, A-5.) Plaintiffs do not explain how the denial of any of their motions would have finally determined the action.

Because each of the Court's three precise holdings was correct, leave to reargue should be denied.

C. The Court Had Jurisdiction to Dismiss the Appeal

Plaintiffs' "threshold" argument that this Court lacked jurisdiction to dismiss their appeal (Notice of Rearg. Mtn. ¶2) must be rejected for multiple reasons.

1. Disqualification was not required because the Rule of Necessity applies to this case.

The Rule of Necessity allowed this Court to dismiss the appeal in this case, despite the fact that its Judges have an economic interest in being paid adequate salaries (Rearg. Mtn. at 18-19). Specifically, this Court has held that the Rule of Necessity enables it to decide litigation concerning judicial compensation, because any state judge would face the same purported conflict. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 248-49 (2010).

Indeed, plaintiffs tacitly acknowledge the Rule of Necessity's application when they ask that Supreme Court justices be designated to decide the appeal. (Notice of Rearg. Mtn. ¶5.) Supreme Court justices and the Judges of this Court all have a financial interest in adequate salaries.

Plaintiffs' argument that this Court did not "invoke" the Rule of Necessity (Rearg. Mtn. at 4, 5) is misguided. The Rule need not be formally "invoked" by a court when deciding a matter. When the Rule applies, the court "*must* hear and dispose of" the issues presented. *Maron,* 14 N.Y.3d at 248-49 (emphasis added).

To be sure, if individual judges believe the potential economic effect of a challenge to judicial salaries renders them unable to decide the

matter fairly and impartially, they should recuse themselves. Under such circumstances, the decision to recuse, or to continue presiding over a case, is entrusted to the judge's discretion and rests "within the personal conscience" of the judge. *People v. Glynn*, 21 N.Y.3d 614, 618 (2015); *accord Matter of Robert Marini Builder, Inc. v. Rao*, 263 A.D.2d 846, 848 (3d Dep't 1999). But if judges are satisfied they can serve impartially, they have "an obligation *not* to recuse." *Marini*, 263 A.D.2d at 848 (emphasis added; citation and internal quotation marks omitted); *accord Silber v. Silber*, 84 A.D.3d 931, 932 (2d Dep't 2011).

2. There is no evidence of "actual bias".

Plaintiffs assert that this Court harbors "actual bias" against them (Rearg. Mtn. at 15) based on a supposed "reputational interest" in the judiciary budget (Rearg. Mem. at 21) and "professional and personal relationships" with other judges (Rearg. Mem. at 28). But "the mere allegation of bias is insufficient to require recusal." *Marini*, 263 A.D.2d at 848; *accord Matter of Taja K.*, 51 A.D.3d 1027, 1027 (2d Dep't 2008).

Plaintiffs provide no evidence to show that any specific interest has affected the Judges in this case. Their "evidence" of actual bias seems to be the fact that the Court dismissed their appeal, a ruling plaintiffs feel

is "insupportable" (Rearg. Mtn. at 15). But bias "will not be inferred" from adverse rulings. *Knight v. N.Y. State & Local Ret. Sys.*, 266 A.D.2d 774, 776 (3d Dep't 1999); *accord S.L. Green Props., Inc. v. Shaoul,* 155 A.D.2d 331, 332 (1st Dep't 1989). "[T]he fact that a judge issues a ruling that is not to a party's liking does not demonstrate either bias or misconduct." *Matter of Gonzalez v. L'Oreal USA, Inc.*, 92 A.D.3d 1158, 1160 (3d Dep't), *lv. dismissed,* 19 N.Y.3d 874 (2012).

Plaintiffs' additional attacks on two individual Judges do not present cognizable evidence of bias.

First, Chief Judge DiFiore "took no part" in the decision to dismiss the appeal. (Rearg. Mtn. Ex. A-1.) Therefore, even if bias on her part were credibly alleged (and it has not been), the issue would be immaterial.

Second, the statement that Sassower and Judge Garcia "were adversaries five years ago" (Rearg. Mtn. 30) does not establish bias on Judge Garcia's part. The attached exhibit, an unsigned order to show cause and supporting material, shows that the prior litigation predated this case and that Judge Garcia was not a party. (*See* Rearg. Mtn. Ex. I.) Sassower does not appear to have been a party either, but rather asserted that she had standing to intervene as a member of the public. (Rearg.

Mtn. Ex. I ¶2.) The exhibit shows that Sassower had no interaction with Judge Garcia, but rather left phone messages that he did not return. (Rearg. Mtn. Ex. I ¶5.)

In any event, plaintiffs have not provided a "reasonable justification" for failing to present their arguments concerning Judge Garcia in their previous two letters to this Court. *See* C.P.L.R. 2221(e)(3).

3. The Judiciary Law did not deprive this Court of jurisdiction to dismiss plaintiffs' appeal.

Judiciary Law §14 precludes a judge from deciding "an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

"Actual bias" is not a statutory ground for disqualification under Judiciary Law §14. *Matter of Rotwein,* 291 N.Y. 116, 123 (1943) (citing prior enumeration of provision). The only statutory disqualifier alleged here is that the Judges are "interested" because they benefit from judicial salary increases. As shown above, this Court expressly held in *Maron* that the Rule of Necessity overrides such an interest. (*See* Point II[C][1].)

The case plaintiffs cite for their jurisdictional argument, *Oakley v. Aspinwall,* 3 N.Y. 547 (1850) (*see* Notice of Rearg. Mtn. ¶¶1, 2[a], 3; Rearg. Mtn. at 1, 3-4, 15, 20, 33 n.28), does not assist them. In *Oakley,* the judge was related to one of the parties. The Court observed that "[p]artiality and bias are presumed from the relationship or consanguinity of a judge to the party," and that presumption was "conclusive and disqualifie[d] the judge." *Id.* at 550. A statute forbade the judge from sitting under those circumstances. *Id.* at 551. No such express statutory prohibition exists here.

D. Respondents are Properly Represented by the Attorney General

Plaintiffs err in arguing that the Attorney General acts under a conflict of interest (Rearg. Mtn. at 34, 35-36).

First, there is no conflict between the Attorney General and her clients (none of whom has objected to the representation). As the Third Department observed, the Attorney General and her clients are "united in interest." (Leave Mtn. Ex. A at 4.) All wish to see the Legislature's authorizing statute and the Commission's resulting recommendations upheld and implemented.

Second, the Attorney General has no financial interest in this case. The recommendations at issue concern only judicial salaries, not executive-branch pay. (*See* R1089.) The fact that the Attorney General's pay may be subject to future review by a different commission (*see* Rearg. Mtn. at 37) does not establish a conflict in *this* case.

Third, plaintiffs' meritless threat of sanctions or prosecution (*see* Rearg. Mtn. 37) does not create a conflict on the Attorney General's part. In the predecessor case, Supreme Court "searched the records" and found "absolutely no basis" to award sanctions or take any other disciplinary action against defendants' counsel. (R329.) In both the predecessor case and this one, Supreme Court ruled in defendants' favor on the merits. (R31-41, 52-60, 68-79, 315-325.) On appeal in this case, the Appellate Division affirmed Supreme Court's judgment for defendants on the merits. (Leave Mtn. Ex. A.) In short, every judicial officer to consider plaintiffs' claims has rejected them.

Fourth, contrary to plaintiffs' suggestion (Rearg. Mtn. at 34), the Attorney General is not authorized to represent private parties like plaintiffs. *People v. Albany & Susquehanna R. Co.,* 57 N.Y. 161, 167-68 (1874); *Waldman v. State of New York,* 140 A.D.3d 1448, 1449 (3d Dep't

2016); *Matter of Cliff v. Vacco*, 267 A.D.2d 731, 732 (3d Dep't 1999), *lv. denied*, 94 N.Y.2d 762 (2000).

Conversely, the Attorney General's defense of respondents is expressly authorized by Executive Law §§63(1) and 71(1).[2]

E. There is No Basis for the Other Relief Plaintiffs Seek

None of the remaining requests for relief listed in plaintiffs' notice of motion has a legal basis.

First, no statute authorizes the New York State courts to transfer this case to the federal courts (*see* Notice of Rearg. Mtn. ¶¶1, 2[a]). The suggestion is particularly unseemly coming from plaintiffs, who chose to bring both this case and the predecessor lawsuit in the State courts.

Second, the disclosure and consent procedure in 22 N.Y.C.R.R. §100.3(F) (*see* Notice of Rearg. Mtn. ¶¶2[b], 3, 5) applies only when a judge has been disqualified under §100.3(E). There has been no such disqualification here.

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[2] Although such proof was unnecessary, respondents also provided the Third Department with their counsel's affirmation that "[t]he Office of the Attorney General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal." (11/2/18 Brodie Aff. ¶3.)

Third, to establish its jurisdiction, the Court properly required that a substantial constitutional question be directly involved (Rearg. Mtn. Ex. A-1 at 1-2; *see* Notice of Rearg. Mtn. ¶2[c]; Rearg. Mtn. at 12-14). That requirement is both sensible and necessary. Without it, parties could obtain review in this Court on any appeal by purporting to relitigate basic constitutional issues that have already been decided.

Finally, no procedure exists for designating unspecified Supreme Court justices to take this Court's place in deciding the appeal (*see* Notice of Rearg. Mtn. ¶5).

F. Plaintiffs' Allegations of "Litigation Fraud" are Baseless

We feel compelled to respond, briefly, to the allegations of fraud that permeate plaintiffs' motion papers. The Office of the Attorney General has not misled Supreme Court, the Appellate Division, or this Court.

Plaintiffs seem to believe that, when counsel or the Court fails to repeat each of their assertions verbatim, a "fraud" is somehow committed because plaintiffs' arguments have been "concealed." To cite an extreme example, plaintiffs claim this Court committed "judicial fraud" by abridging the case caption. (Rearg. Mtn. Ex. D at 1-2.)

Plaintiffs, of course, are wrong. As the Third Department recognized, "under our adversarial system, each party is permitted to make the arguments that he or she believes are most favorable to his or her position." (Leave Mtn. Ex. A-1 at 4.) A court is not required to "address, in its decision, every argument raised by a party" (Leave Mtn. Ex. A-1 at 3-4), and counsel need not do so in their briefs.

Nor is it "fraud" to take a legal position that plaintiffs oppose. *See Zuyder Zee Land Corp. v. Broadmain Bldg. Co.*, 86 N.Y.S.2d 827, 828 (Sup. Ct. N.Y. Cty.) (an "opinion or statement of law," even if inaccurate, "cannot afford a basis for recovery in fraud"), *aff'd without op.*, 276 A.D. 751 (1st Dep't 1949); *Abraham v. Wechsler,* 120 Misc. 811, 812 (Sup. Ct. N.Y. Cty. 1923) ("[T]he defendant represented that something was lawful, and the plaintiff claims it was unlawful. Such a representation does not amount to fraud."), *aff'd,* 201 A.D. 876 (1st Dep't 1924).

Finally, respondents' counsel have not sought to conceal plaintiffs' arguments. To the contrary, we urged the Third Department to read plaintiffs' papers and the record (*see, e.g.*, R.Br. at 1 n.1), and do so here as well.

CONCLUSION

Plaintiffs' motions should be denied in all respects.

Dated: Albany, New York
June 27, 2019

Respectfully submitted,

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