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,

Plantiffs-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.

SSD 23

Appellate Division
Third Department
No. 527081

AFFIRMATION IN OPPOSITION TO MOTION TO STRIKE AND FOR OTHER RELIEF

Frederick A. Brodie, an attorney licensed to practice in the State of New York, affirms the following under penalty of perjury pursuant to C.P.L.R. 2106:

1. I am an Assistant Solicitor General, of counsel in this matter to Letitia James, Attorney General of the State of New York, attorney for

defendants-respondents Governor Andrew M. Cuomo, the New York State Senate, the New York State Assembly, the Attorney General, Temporary President of the Senate John J. Flanagan,[1] Assembly Speaker Carl E. Heastie, New York State Comptroller Thomas DiNapoli, and Chief Judge Janet M. DiFiore in the above-captioned action. Except where otherwise indicated, I have personal knowledge of the matters set forth herein.

2. I submit this affirmation in opposition to the motion of plaintiffs-appellants Center for Judicial Accountability, Inc. and Elena Ruth Sassower (together, "plaintiffs") to strike the respondents' June 27, 2019 memorandum in opposition to appellants' motions (i) for leave to appeal; and (ii) for reargument and other relief (the "June 27 memorandum"). This affirmation provides factual support for certain arguments made in the accompanying memorandum in opposition to plaintiff's motion.

[1] The caption lists as a defendant the former Attorney General and the former temporary president of the Senate in their "official capacity." Based on that phrase, my understanding is that the intended defendants would be whoever currently fills those positions.

The Office of the Attorney General Has Determined That Defending Against this Appeal is in the Interest of the State

3. The 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 in Supreme Court, Albany County; in the Appellate Division, Third Department; and in plaintiffs' attempted appeals to this Court.

4. None of the respondents has objected to the Attorney General's representation or sought to have different counsel appear on this appeal.

Respondents' June 27 Memorandum Was Prepared Through an Objectively Reasonable Process Designed to Avoid Errors

5. I was the primary drafter of the June 27 memorandum.

6. In preparing the June 27 memorandum, I reviewed the two sets of motion papers that plaintiffs filed in this Court, and which respondents were required to answer: (1) the May 31, 2019 motion for reargument of the order dismissing plaintiffs' appeal; and (2) the June 6, 2019 motion for leave to appeal. My review encompassed plaintiff Sassower's 41-page moving affidavit and 18 exhibits in support of the reargument motion, including Exhibit D, the supposed "Legal Autopsy" of the Court's May 2, 2019 dismissal order. I also reviewed relevant portions of the record from

plaintiffs' appeal to the Appellate Division, Third Department. And I reviewed relevant cases, statutes, rules, and other legal authorities. Those authorities included a recent decision by Supreme Court, Albany County, which followed the Third Department's ruling in this case, and which I appended to the June 27 memorandum.

7. My draft of the June 27 memorandum benefited from review and comments by Assistant Solicitor General Victor Paladino, who is supervising my work on this appeal. After providing comments, Mr. Paladino ultimately approved the June 27 memorandum for filing.

8. Based on conversations with Mr. Paladino, I understand that he has been admitted to the bar for 31 years. I also know that Mr. Paladino has successfully argued important constitutional cases before this Court.

9. On June 13, 2019, I circulated a draft of the June 27 memorandum to representatives of each of our clients. None of our clients objected to the filing of the June 27 memorandum.

10. Before the filing date, at my request, a legal assistant in our office separately checked the case, statute, and record citations contained in the June 27 memorandum to confirm their accuracy.

11. Plaintiffs' reargument motion and their motion for leave to leave to appeal were both noticed for the return date of July 8, 2019, but demanded that opposing papers be served by July 1, 2019. I served the memorandum four days before that date, on June 27.

Respondents' March 26 SSD Letter Was Prepared Through an Objectively Reasonable Process Designed to Avoid Errors

12. Respondents' March 26, 2019 SSD letter was prepared through a similar objectively reasonable process designed to avoid errors. In drafting the letter, I consulted respondents' brief on the merits to the Appellate Division, Third Department; relevant portions of the record in the Third Department; relevant case law; and other authorities. A draft of the letter was reviewed by Mr. Paladino. A draft was also sent to representatives of the respondents for review, and none of them objected to its submission on their behalf. The citations in the letter were checked for accuracy by an experienced legal assistant.

I Have Represented the Respondents On Appeal in Subjective Good Faith

13. I have been a lawyer for 30 years. I graduated *magna cum laude* from Brown University in 1984, and from Yale Law School in 1987.

In 1987-88, I served as a law clerk for the Honorable Joseph L. Tauro, a U.S. District Judge in the District of Massachusetts. In 1988-89, I served as a law clerk for the Honorable Bruce M. Selya, a Judge of the U.S. Court of Appeals for the First Circuit.

14. I was admitted to practice in the State of New York on January 24, 1989. On September 5, 1989, I started private practice as an associate at the law firm of Winthrop, Stimson, Putnam & Roberts (now known as Pillsbury Winthrop Shaw Pittman LLP) in New York, NY. I was elected a partner of that firm effective March 1, 1996, and continued to practice in the firm's New York City litigation department through February 2015.

15. At the end of February 2015, I voluntarily left my law firm and moved to Albany, New York, to begin a new career in public service. I began work as an Assistant Solicitor General with the New York State Office of the Attorney General on March 9, 2015. Since that time, a Westlaw search indicates that I have participated in briefing and/or argued more than 60 appeals as an employee of the Office of the Attorney General. In my legal career, I have participated in briefing and/or argued at least six cases in this Court.

16. During the course of my long and active career as a lawyer, I have never been sanctioned or had a misconduct grievance filed against me.

17. I have no desire to defraud the Court in this or any other appeal. To the contrary, I take care to ensure that the papers I submit to courts are trustworthy.

18. I continue to believe that the arguments in the June 27 memorandum and the March 26 SSD letter have legal and factual merit. The legal basis for each of respondents' arguments may be found in the various cases, statutes, and other legal authorities cited in the text and footnotes pertaining to that particular argument in the June 27 memorandum and the March 26 SSD letter. The basis for each factual statement in the June 27 memorandum and the March 26 SSD letter may be found in the citations to the record that pertain to the statement.

Conclusion

19. A fair and accurate copy of this Court's May 2, 2019 order dismissing the captioned appeal is attached as Exhibit 1.

20. A fair and accurate copy of the December 27, 2018 memorandum and order of the Appellate Division, Third Department in this case is attached as Exhibit 2.

For the reasons discussed above and in respondents' accompanying memorandum, plaintiffs' motion should be denied in all respects.

Dated: Albany, New York
August 19, 2019

Frederick A Brodie

FREDERICK A. BRODIE

EXHIBIT 1

State of New York
Court of Appeals

Decided and Entered on the second day of May, 2019

Present, Hon. Jenny Rivera, *Senior Associate Judge, **presiding.***

SSD 23
Center for Judicial Accountability, Inc.
et al.,
Appellants,
v.
Andrew M. Cuomo &c., et al.,
Respondents.

Appellants having appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without costs, by the Court sua sponte, insofar as taken on behalf of Center for Judicial Accountability, Inc. by Elena Ruth Sassower, upon the ground that Sassower is not Center for Judicial Accountability, Inc.'s authorized legal representative (see CPLR 321[a]); and it is further

ORDERED, that the appeal is dismissed without costs, by the Court sua sponte, insofar as taken by Elena Ruth Sassower on her own behalf from the December 27, 2018 Appellate Division order affirming the final judgment, upon the ground that no

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substantial constitutional question is directly involved and, from the remaining Appellate Division orders, upon the ground that such orders do not finally determine the action within the meaning of the Constitution.

Chief Judge DiFiore took no part.

H Davis

Heather Davis
Deputy Clerk of the Court

EXHIBIT 2

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 27, 2018 527081

CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,
Plaintiff,
and

ELENA RUTH SASSOWER, Individually and as Director of the Center for Judicial Accountability, Inc.,
Appellant,
v

ANDREW M. CUOMO, as Governor of the State of New York, et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: November 13, 2018

Before: McCarthy, J.P., Clark, Mulvey and Rumsey, JJ.

Elena Ruth Sassower, White Plains, appellant pro se.

Barbara D. Underwood, Attorney General, Albany (Frederick A. Brodie of counsel), for respondents.

Rumsey, J.

Appeal from a judgment of the Supreme Court (Hartman, J.), entered December 8, 2017 in Albany County, which, among other

things, granted defendants' cross motion for summary judgment.

In September 2016, plaintiff Center for Judicial Accountability, Inc. (hereinafter CJA) and plaintiff Elena Ruth Sassower, CJA's director, commenced this action seeking, among other things, a declaratory judgment that the bill establishing the budgets for the Legislature and the Judiciary for the 2016-2017 fiscal year (2016 NY Senate-Assembly Bill S6401, A9001) was unconstitutional and also seeking an injunction permanently enjoining respondents from making certain disbursements under the bill, including judicial salary increases. Plaintiffs also simultaneously moved for a temporary restraining order and a preliminary injunction enjoining defendants from distributing money pursuant to the budget bill. Defendants cross-moved to dismiss the complaint to the extent that it sought to assert claims on behalf of the CJA, because it was not represented by counsel, and to dismiss all 10 causes of action for failure to state a cause of action. Supreme Court declined to grant a temporary restraining order and, in December 2016, denied plaintiffs' motion for a preliminary injunction and partially granted defendants' cross motion by dismissing all claims asserted by the CJA and 9 of the 10 causes of action asserted by Sassower. The court denied defendants' motion to dismiss the sixth cause of action, which challenged the law that created the Commission on Legislative, Judicial and Executive Compensation (hereinafter the Commission) (see L 2015, ch 60, part E) on various constitutional and procedural grounds. Sassower's motion to disqualify Justice Hartman and to vacate, renew and reargue the December 2016 order was denied in May 2017. After issue was joined, Sassower moved for summary judgment on the sixth cause of action and for leave to file a supplemental complaint. The motion was denied. In June 2017, Sassower moved to reargue the court's decision denying her motion for reargument and disqualification. In response, defendants opposed the motions and cross-moved for summary judgment dismissing the sixth cause of action. In November 2017, the court granted defendants' cross motion for summary judgment and dismissed the sixth cause of action. Sassower appeals.

We first consider several threshold issues. Sassower contends that Supreme Court erred by denying her motion for recusal. Sassower correctly notes that Justice Hartman has a pecuniary interest in this action because she is paid in accordance with the salary schedule that is being challenged. Ordinarily, recusal is warranted when a judge has an interest in the litigation (see Matter of Maron v Silver, 14 NY3d 230, 249 [2010]). "However, the Rule of Necessity provides a narrow exception to this principle, requiring a biased adjudicator to decide a case if and only if the dispute cannot be otherwise heard" (Pines v State of New York, 115 AD3d 80, 90 [2014] [internal quotation marks, brackets and citations omitted], appeal dismissed 23 NY3d 982 [2014]; see Matter of Maron v Silver, 14 NY3d at 249). The self-interest inherent in adjudicating a dispute involving judicial compensation would provide grounds for disqualifying not only Justice Hartman, but every judge who might replace her. Accordingly, the Rule of Necessity permitted Justice Hartman to decide this action on the merits (see Pines v State of New York, 115 AD3d at 90-91).

Nor was Justice Hartman required to recuse herself for any other reason. "Absent a legal disqualification under Judiciary Law § 14, which is not at issue here, a trial judge is the sole arbiter of recusal[,] and his or her decision, which lies within the personal conscience of the court, will not be disturbed absent an abuse of discretion" (Kampfer v Rase, 56 AD3d 926, 926 [2008] [internal quotation marks and citations omitted], lv denied 11 NY3d 716 [2009]). We perceive no abuse of discretion here. Justice Hartman's prior employment by the Attorney General's office does not mandate recusal (see e.g. People v Lee, 129 AD3d 1295, 1296 [2015], lv denied 27 NY3d 1001 [2016]; People v Curkendall, 12 AD3d 710, 714 [2004], lv denied 4 NY3d 743 [2004]).

Moreover, Supreme Court's decisions do not evince any instance of fraudulent conduct, concealment or misrepresentation. In this regard, Sassower argues that the court acted fraudulently by failing to specifically address each of her legal arguments and disagreeing with her legal conclusions. A court need not address, in its decision, every

argument raised by a party, and a ruling that is not to a litigant's liking does not demonstrate either bias or misconduct (see Gonzalez v L'Oreal USA, Inc., 92 AD3d 1158, 1160 [2012], lv dismissed 19 NY3d 874 [2012]). Similarly, the Attorney General's office was not required to address every argument made by Sassower; 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. We similarly find unavailing Sassower's argument that the Attorney General, who is a defendant, must be disqualified from representing the Attorney General's codefendants based on a conflict of interest. The Attorney General has a statutory duty to represent defendants in this action, who are united in interest (see Executive Law § 63 [1]; Matter of Grzyb v Constantine, 182 AD2d 942, 943 [1992], lv denied 80 NY2d 755 [1992]).

Supreme Court properly dismissed the claims asserted by the CJA because it was not represented by counsel.[1] Corporations are required to appear by attorney to prosecute or defend a civil action (CPLR 321 [a]). Causes of action asserted by a corporation are properly dismissed when the corporation does not appear by attorney (see Moran v Hurst, 32 AD3d 909, 910 [2006]; Ficalora v Town Bd. Govt. of E. Hampton, 276 AD2d 666, 666 [2000], appeal dismissed 96 NY2d 813 [2001]). We further find unavailing Sassower's argument that Executive Law § 63 (1) and State Finance Law article 7-A require that the Attorney General be directed to provide her with representation or intervene on her behalf. Executive Law § 63 (1) empowers the Attorney General to prosecute and defend all actions and proceedings in which the state is interested – it does not authorize the Attorney General to represent private citizens. Similarly, State Finance Law article 7-A contains no provision that requires the Attorney General to prosecute a citizen-taxpayer action commenced by a private citizen or that allows a citizen to compel the Attorney General to provide representation in such actions.

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[1] We note that no appeal has been asserted on behalf of the CJA by an attorney (see Schaal v CGU Ins., 96 AD3d 1182, 1183 n 2 [2012]).

Turning to the merits, Supreme Court properly granted defendants' cross motion for summary judgment dismissing the sixth cause of action, which was divided into sections A through E, and which alleged that the enabling statute that created the Commission is facially unconstitutional with respect to judicial compensation. "A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that[,] in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the [legislation] would be valid" (Matter of Moran Towing Corp. v Urbach, 99 NY2d 443, 448 [2003] [internal quotation marks and citations omitted]). Sassower failed to meet this heavy burden.

In sections A and B of the sixth cause of action, Sassower alleged that the enabling statute unconstitutionally delegated legislative authority to the Commission in contravention of the separation of powers doctrine and without reasonable safeguards or standards. "While the Legislature cannot delegate its lawmaking functions to other bodies, there is no constitutional prohibition against the delegation of power to an agency or commission to administer the laws promulgated by the Legislature, provided that power is circumscribed by reasonable safeguards and standards" (Matter of Retired Pub. Empls. Assn., Inc. v Cuomo, 123 AD3d 92, 97 [2014] [internal quotation marks, brackets and citations omitted]).

A predecessor to the Commission – the Commission on Judicial Compensation – was created in 2010 in response to the Court of Appeals decision in Matter of Maron v Silver (14 NY3d 230) to remedy a separation of powers violation by requiring that the proper level of judicial compensation be determined on a regular basis based on objective factors independent of other political considerations (see Larabee v Governor of the State of N.Y., 27 NY3d 469, 472 [2016]; Senate Introducer's Mem in Support, Bill Jacket, L 2010, ch 567).[2] As relevant here, the

[2] The powers and duties of both the 2010 Commission on Judicial Compensation and the 2015 Commission regarding judicial compensation were substantially identical.

Commission was directed to examine, on four-year intervals, the prevailing adequacy of judicial compensation and to make recommendations regarding whether such compensation warrants adjustment during the ensuing four-year period (see L 2015, ch 60, part E; see also Larabee v Governor of the State of N.Y., 27 NY3d at 472). The Legislature further provided for implementation of any increases in compensation (see L 2015, ch 60, part E, § 4). Recommendations regarding judicial compensation are required to be submitted by December 31 of the year in which the Commission is appointed and have the force of law, unless modified or abrogated by statute prior to April 1 of the succeeding year (see L 2015, ch 60, part E; see also Larabee v Governor of the State of N.Y., 27 NY3d at 472).

In the 2015 enabling statute at issue here, the Legislature made the determination that judicial salaries must be appropriate and adequate. The Legislature directed the Commission to examine judicial salaries and make recommendations regarding the adequacy of judicial compensation based on numerous factors specified by the Legislature, including "the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the state's ability to fund increases in compensation and non-salary benefits" (L 2015, ch 60, part E). The factors established by the Legislature provide adequate standards and guidance for the exercise of discretion by the Commission. Moreover, the enabling statute contains the safeguard of requiring that the Commission report its recommendations directly to the Legislature so that it would have sufficient time to exercise its prerogative to reject any Commission recommendations before they become effective. Thus, we conclude that the statute does not unconstitutionally delegate legislative power to the Commission.

Supreme Court also properly dismissed sections C and D of the sixth cause of action. With respect to section C, we agree

that there is no constitutional prohibition against increasing judicial salaries during the term of office (see NY Const, art VI, § 25 [a]). In section D, Sassower alleged that the bill creating the Commission violated NY Constitution, article VII, §§ 2, 3 and 6. Pursuant to article VII, § 2, defendant Governor was required to submit a budget to the Legislature, as relevant here, by February 1, 2015. Inasmuch as Sassower acknowledged that the executive budget was submitted on January 21, 2015, there was no violation of this section. The original executive budget did not provide for creation of the Commission; rather, the enabling legislation was included in a supplemental budget bill that was submitted by the Governor on March 31, 2015 (see 2015 NY Senate-Assembly Bill S4610-A, A6721-A). However, as relevant here, article VII, § 3 allows submission of supplemental budget bills at any time with the consent of the Legislature. Although there is no evidence of formal consent, the Legislature's consideration and passage of the bill without objection is effective consent (cf. Winner v Cuomo, 176 AD2d 60, 64 [1992]). Article VII, § 6 requires that all provisions of any appropriation bill, or supplemental appropriation bill, submitted by the Governor must specifically relate to an appropriation in the bill. The purpose of this article is "to eliminate the legislative practice of tacking on to budget bills propositions which had nothing to do with money matters; that is, to prevent the inclusion of general legislation in appropriation bills" (Schuyler v South Mall Constructors, 32 AD2d 454, 456 [1969]). There was no violation of article VII, § 6 because the purpose for which the Commission was created – to provide for periodic review of the compensation of state officers – relates to items of appropriation in the budget (see id.).[3] Based on the foregoing, Supreme Court properly determined that defendants were entitled to summary judgment dismissing the sixth cause of action.

Supreme Court's dismissal of Sassower's remaining claims does not require extended discussion. The first through fourth causes of action assert claims that had been dismissed as meritless in a prior action. Sassower had commenced an action in 2014 against defendants challenging aspects of the 2014-2015

[3] We find no error in Supreme Court's prior dismissal of section E of the sixth cause of action.

budget. Supreme Court denied Sassower's motion for leave to amend her complaint in the prior action to, as relevant here, add four causes of action for the 2016-2017 budget year on the ground that they were "patently devoid of merit." Sassower did not appeal from the order that dismissed these claims. Supreme Court properly dismissed the first through fourth causes of action in this case because they are identical to the four proposed causes of action that were dismissed as meritless (see Biggs v O'Neill, 41 AD3d 1067, 1068 [2007]).

The fifth cause of action, which alleges violations of NY Constitution, article VII, §§ 4, 5 and 6, was also properly dismissed. Article VII, § 4 does not apply to appropriations for the Judiciary. The Governor issued a message of necessity that permitted the Legislature to take immediate action on the budget bill that contained the enabling legislation (see NY Const, art VII, § 5; Maybee v State of New York, 4 NY3d 415, 418-420 [2005] [construing a similar message of necessity provision in NY Const, art III, § 14]), and we have already determined that there was no violation of article VII, § 6.

The seventh cause of action, asserting that the statute was unconstitutional as applied, also was properly dismissed as the Legislature had no duty to exercise any oversight of the Commission and, further, the complaint failed to plead facts legally sufficient to demonstrate that any Commission members were actually biased. Dismissal of the eighth cause of action was also proper because the record shows that the Commission considered the requisite statutory factors in making its recommendation regarding judicial compensation. Supreme Court properly dismissed the ninth cause of action, which challenged the constitutionality of "three-men-in-a-room" budget negotiations between the Governor and the Legislature, because budget negotiations between the Governor and the leaders of the Senate and Assembly are not prohibited. Indeed, the Court of Appeals has observed that state budgets are often a "product of such negotiations, often extremely protracted ones" (Pataki v New York State Assembly, 4 NY3d 75, 85 [2004]).

Supreme Court also properly dismissed the tenth cause of action. The appropriation for state reimbursement for District Attorney salaries specifically supersedes County Law § 700 and any other contrary law. Moreover, the mistaken appropriation for budget year 2014-2015, rather than 2016-2017, was an obvious typographical error that is insufficient to invalidate the legislation (see Matter of Morris Bldrs., LP v Empire Zone Designation Bd., 95 AD3d 1381, 1383 [2012], affd sub nom. James Sq. Assoc. LP v Mullen, 21 NY3d 233 [2013]). Sassower's remaining contentions are either moot or have been considered and found to lack merit.

McCarthy, J.P., Clark and Mulvey, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court