Supreme Court of the State of New York
Appellate Division – Third Department

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-

No. 527081

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 RESPONSE TO APPELLANT'S MOTION FOR DISQUALIFICATION, REARGUMENT, AND RENEWAL

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Dated: September 24, 2018

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PRELIMINARY STATEMENT

Respondents submit this memorandum in opposition to appellant's motion to disqualify Presiding Justice Garry and Justices Egan, Devine, and Pritzker from deciding her appeal in this case, and to renew or reargue the denial of her prior motion for injunctive relief.[1] Appellant's motion is meritless, and the requested relief should be denied.

ARGUMENT

THE RELIEF SOUGHT IN APPELLANT'S ORDER TO SHOW CAUSE SHOULD BE DENIED

A. Presiding Justice Garry and Justices Egan, Devine, and Pritzker Need Not Recuse Themselves

A judge must recuse himself or herself from a case if it is one where the judge "is a party"; "has been attorney or counsel"; "is interested"; or "is related by consanguinity or affinity to any party to the controversy within the sixth degree." Judiciary Law § 14.

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[1]This memorandum responds to the arguments in appellant's moving affidavit. Because the Center for Judicial Accountability is not represented by counsel and thus not properly before the Court (*see* Point I[A] of respondents' brief on the merits), we refer only to the claims of appellant Sassower. Since the claims of the two putative appellants are identical, this convention does not affect the result. For a presentation of appellant's claims, the Court is urged to read her moving papers, her appellate brief, and the record, all available on appellant's website, www.judgewatch.org.

Appellant does not show any of those conditions here. The only one remotely applicable—that the Justices are "interested" in a case concerning judicial salaries—is overridden by the Rule of Necessity because any state judge would face the same purported conflict. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 248-49 (2010). Appellant implicitly recognizes the insufficiency of this purported conflict, since she asks that the case be transferred to another judicial department or the Court of Appeals, either of which would be equally affected. (*See* Sept. 10, 2018 Affidavit of Elena Ruth Sassower [Sassower Aff.] ¶2.)

Absent a ground for legal disqualification under Judiciary Law § 14, the judge presiding over a matter "is the sole arbiter of recusal." *People v. Moreno,* 70 N.Y.2d 403, 405 (1987). The decision to recuse, or to continue presiding over a case, is a "matter of conscience" for the Court. *Robert Marini Builder Inc. v. Rao,* 263 A.D.2d 846, 848 (3d Dep't 1999). If one or more Justices who denied the preliminary injunction motion were to conclude that continued adjudication of this case would violate their conscience, then the merits could and should be decided by a panel drawn from the six Justices of this Court who did not participate in deciding the preliminary injunction motion.

Nevertheless, if a judge is satisfied that he or she can serve impartially, that judge "has an obligation *not* to recuse himself or herself." *Robert Marini,* 263 A.D.2d at 848 (emphasis added; citation and internal quotation marks omitted).

Here, the Court would act properly by fulfilling its obligation to decide this case. Appellant has tendered no "demonstrable proof of bias," *see Modica v. Modica,* 15 A.D.3d 635, 636 (2d Dep't 2005), beyond this Court's denial of her preliminary injunction motion. 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." *Gonzalez v. L'Oreal USA, Inc.,* 92 A.D.3d 1158, 1160 (3d Dep't), *lv. dismissed,* 19 N.Y.3d 874 (2012).

The August 7 order is five sentences long and does not pass on the merits of appellant's claims. Her argument that the order somehow shows bias is "mere speculation." *Matter of Aaron v. Kavanagh,* 304 A.D.2d 890, 891 (3d Dep't), *lv. denied,* 1 N.Y.3d 502 (2003).

Nor can appellant create a conflict of interest by filing a misconduct complaint against the Justices who denied her motion (*see* Sassower Aff. ¶3). "A litigant cannot be allowed to create a sham controversy by suing a judge without justification, and then to use that sham as a means for achieving the judge's recusal." *Spremo v. Babchik,* 155 Misc.2d 796, 799-800 (Sup. Ct. Queens Cty. 1992), *modified on other grounds and aff'd as modified,* 216 A.D.2d 382 (2d Dep't), *lv. denied,* 86 N.Y.2d 709 (1995). If such a tactic were permitted, it "would allow any litigant to thwart the legal process by merely filing a complaint against the judge hearing the case." *Jones v. City of Buffalo,* 867 F.Supp. 1155, 1163 (W.D.N.Y. 1994) (citation omitted).

B. Appellant's Motion for Reargument and Renewal Should Be Denied

1. Reargument Should Be Denied Because Appellant Fails to Show the Court Overlooked or Misapprehended Her Arguments

A motion for reargument must be based on facts or law that the court determining the prior motion "overlooked or misapprehended." C.P.L.R. 2221(d)(2). Appellant has not shown that the Court's denial of her motion met that standard.

The Court acted reasonably in denying the emergency relief appellant sought. Whether to grant a preliminary injunction lies within the Court's discretion. *See Aetna Ins. Co. v. Capasso,* 75 N.Y.2d 860, 862 (1990). Here, the Court properly exercised its discretion to deny plaintiff's motion in light of the facts and circumstances before it. As shown in respondents' July 23, 2018, letter and August 3, 2018, opposition memorandum, those facts and circumstances included the six-month delay between the notice of appeal and appellant's application for emergency relief; appellant's failure to show irreparable injury because the 2015-2016 budget had already been spent; the fact that appellant's lawsuit did not address the 2017-2018 budget (leave to supplement the complaint with such claims was denied); the Commission's compliance with its enabling statute; the injury to judges and district attorneys if their compensation were to be reduced; and, as to judges, the unconstitutionality of such a reduction.

Appellant's conduct after entry of the Court's order further supports denial of reargument. Before filing her reargument motion, appellant waited out the entire 30-day period. (*See* Sassower Aff. ¶2 n.1.) If there were a true emergency justifying a TRO and preliminary injunction, she

could and should have moved for reargument immediately, rather than strategically delaying her filing until shortly before respondents' brief on the merits was due.

In any event, the purpose of a preliminary injunction "is to preserve the status quo" until "a decision is reached on the merits." *Matter of Heisler v. Gingras,* 238 A.D.2d 702, 703 (3d Dep't 1997). Because the Court's decision denying a preliminary injunction did not pass on the merits of plaintiff's appeal, it cannot support an inference that any member of the panel had formed a view on that subject—let alone an impermissible bias.

2. Renewal Should Be Denied Because Appellant Has Not Submitted Any New Facts or Law

A motion for renewal must be based upon "new facts not offered on the prior motion that would change the prior determination" or upon "a change in the law that would change the prior determination." C.P.L.R. 2221(e)(2). Appellant offers no such facts or law, other than this Court's August 7 order and papers that were before the Court at that time.

Appellant is mistaken in arguing that respondents were required to submit an affirmation or affidavit in opposition to her motions.

(Sassower Aff.¶¶10, 14.) The August 2 Order to Show Cause directed respondents to "show cause before this Court ... why an order should not issue." Respondents complied by referring to the record on appeal (having submitted around 50 pages of excerpts) and citing relevant statutes and case law.

C. Appellant's Motion to Vacate the Decision Based on "Fraud, Misrepresentation, or Other Misconduct" Should Be Denied

Appellant's allegations of fraud and misconduct (*e.g.*, Sassower Aff. ¶13) reflect her general assumption that her complaint is self-evidently correct, and that any opposition to her lawsuit must therefore be frivolous or fraudulent. That assumption is mistaken.

Respondents' position, and their opposition papers, had merit. Indeed, respondents prevailed (a) on the preliminary injunction motion in this Court; (b) in Supreme Court before Justice Hartman; and (c) in Supreme Court in the prior lawsuit before Justice McDonough. On the preliminary injunction motion specifically, respondents' July 23, 2018 letter and their August 3, 2018 opposition memorandum contained factual references, legal citations, and legal arguments that supported

the contentions made. Both submissions fell comfortably within the broad range of permitted advocacy.

Finally, in their July 23 letter, their August 3 memorandum, and their appellate brief—and in this memorandum as well—respondents have urged the Court to read appellant's papers and the record. (7/23/18 Ltr. at 1 n.1; 8/3/18 Mem. at 1 n.1; 9/21/18 Brief at 1 n.1; *supra* at 1 n.1.) That is the opposite of fraudulent concealment.

D. Appellant Has No Right to Additional Disclosure of the Justices' Personal Information

In the alternative, appellant requests disclosure regarding the Justices' "financial and other interests" and their "personal and professional relationships." (Order to Show Cause ¶4.) The request should be denied. The authority cited, 22 N.Y.C.R.R. § 100.3(F), provides that judges who disqualify themselves "may disclose" the basis for disqualification on the record. It does not say they must do so. The rule does not provide for any disclosure unless the judge has first decided that disqualification is necessary.

CONCLUSION

The relief sought in appellant's order to show cause should be denied in all respects.

Dated: Albany, New York
September 24, 2018

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Uniform Appellate Division Rules (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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