No. 527081

Supreme Court, Albany County Index No. 5122-16

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-

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,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO RELIEF SOUGHT IN APPELLANT'S ORDER TO SHOW CAUSE

BARBARA D. UNDERWOOD
Attorney General of the State of New York
Attorney for Error! Reference source not found.
The Capitol
Albany, NY 12224-0341
(518) 776-2317

JEFFREY W. LANG
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General of Counsel

Dated: August 3, 2018

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PRELIMINARY STATEMENT

Respondents submit this memorandum in opposition to the relief sought in appellant's order to show cause, signed August 2, 2018.[1] In addition to the arguments set forth below, we rely upon respondents' letter to the Clerk dated July 23, 2018. This memorandum supplements that letter, and references it only to orient the reader.

The memorandum is organized as follows. In Point I(A) through (G), we examine each item of relief sought in the Order to Show Cause. In Point II, we rebut appellant's allegations of fraud and her request for sanctions.

As shown below, the relief sought by appellant – particularly the preliminary injunction – should be denied. Indeed, by withholding judicial salary increases implemented since 2011, the requested preliminary injunction would violate the State Constitution's guarantee that judicial compensation "shall not be diminished during the term of office for which [the judge] was elected or appointed." N.Y. Const. Art. VII, § 7. (*See* Point I(E)(1).) Therefore, no injunctive relief should be granted. Briefing should proceed in the ordinary course, with respondents being afforded two months to file their merits brief.

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[1]Pages from the Record not previously included in Exhibit 1 to respondents' July 23, 2018 letter are submitted as an exhibit herewith. For a presentation of appellant's claims, the Court is urged to consult her papers in support of the Order to Show Cause, her appellate brief, and the record, all available on appellant's website, www.judgewatch.org.

ARGUMENT

POINT I

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

A. Paragraph 1, Calling for Judicial Disclosures, Should Be Denied.

While Judges are required to recuse themselves if their impartiality might reasonably be questioned, they are not required to disclose the reasons for their recusal. *See* 22 N.Y.C.R.R. § 100.3(E). Nor are they required to provide information about their fitness to judge particular matters. For those reasons and the ones set forth in the July 23 letter at 6, the judicial disclosures sought in paragraph 1 should be denied.

B. Paragraph 2, Calling for Disclosures by Attorney General Underwood, Should Be Denied.

The Attorney General's office is defending respondents against this action, as it did successfully below and in the prior action before Justice McDonough. The Attorney General is authorized to defend State officers and entities in litigation, *see* Exec. L. §§ 63(1), and to litigate in support of the constitutionality of the State's statutes, *see* Exec. L. § 71(1). In this case, she has done both.

Nothing in the Executive Law or the State Finance Law entitles appellant to "findings of fact and conclusions of law" by the Attorney General

on the merits of appellant's case (8/1/18 Reply Aff. ¶5). Indeed, it is impossible to answer appellant's request for findings and conclusions "as to the respects in which the December 24, 2015 report" of the Commission on Legislative, Judicial and Executive Compensation (the Commission) "*on its face,* violates Chapter 60, Part E, of the Laws of 2015" (8/1/18 Reply Aff. ¶4). The Attorney General successfully defended the legality of the Commission in Supreme Court. We do not believe the Commission's report violated the enabling statute. Thus, no such findings and conclusions exist.

Attorney General Underwood has no conflict of interest. She is defending both herself and the other State officers and entities, all of whom are defendants-respondents. Defendants-respondents are united in their interest in defeating appellant's claims.

Nor did Justice Hartman have a conflict of interest from having formerly worked in the Attorney General's office. The situation is analogous to one where a judge, who was formerly a district attorney, hears a criminal case. This Court has allowed such judges to act in such circumstances, even when, as district attorney, the judge had prosecuted the defendant for unrelated matters. *See, e.g., People v. Casey,* 61 A.D.3d 1011, 1015 (3d Dep't), *lv. denied,* 12 N.Y.3d 913 (2001); *People v. Mitchell,* 288 A.D.2d 622, 623 (3d Dep't 2001), *lv. denied,* 99 N.Y.2d 536 (2002); *People v. Jones,* 143 A.D.2d 465, 466-67 (3d Dep't 1988). Here, the case against recusal is even stronger: there is no

evidence that Justice Hartman was involved with the defense of this lawsuit or the lawsuit before Justice McDonough before taking the bench.

C. Paragraph 3, Calling for an Expedited Briefing Schedule, Should Be Denied.

Appellant's proposed briefing schedule, if adhered to by the Court, would have made respondents' brief due on Friday, July 27 (*see* 7/24/18 Aff. ¶35) – only three days after the appeal was perfected and six days *before* appellant was prepared to argue her TRO. That schedule is obviously untenable. As the oral argument and appellant's papers have made clear, appellant has a wide range of complaints about the operation of the judiciary, the Attorney General's office, and State government as a whole. Assimilating the record, researching the issues, and addressing each of appellant's claims will take time.

The undersigned attorney is the only person at the Office of the Attorney General assigned to draft respondents' brief in this appeal. Even if more lawyers were brought into the project as appellant suggests (*see* 8/1/18 Reply Aff. Ex. Z at 20), it would not save time. Each lawyer would separately need to read the lengthy record and understand appellant's numerous arguments.

Ordinarily, this Court's scheduling notice would afford respondents at least four weeks in which to file their brief. In a case with a record of this size, the undersigned counsel would move for an extension of at least another 30 days. At the oral argument on August 2, appellant characterized this as a

"monumental case." If the case is as important as appellant believes, then respondents should be given adequate time to brief it.

D. Paragraph 4, Asking the Court to Subpoena the Record in This Case and a Prior Case, Should Be Denied in Part.

Appellant asks this Court to subpoena the record in this case and her prior action, *Center for Judicial Accountability v. Cuomo,* Index No. 1788-14. An order to show cause and supboena are not necessary for this Court to obtain the record of a prior action from Supreme Court. The Court may obtain the records through ordinary methods. Still, because appellant seeks such relief, we address it here.

As to this action, appellant seeks the "free standing exhibits" that she brought to the courthouse on March 29, 2017. (7/24/18 Aff. ¶¶ 37-38.) To the extent that appellant will cite any exhibits outside the printed record, copies of the specific exhibits relied upon should be furnished to respondents' counsel.

As to the prior case, respondents do not object to this Court's issuing a subpoena to the Albany County Clerk. Justice Hartman referenced that prior case in her May 5, 2017 Amended Decision and Order. (*See* Record on Appeal ["R"] 56.) Having the prior record may assist the Court, particularly if respondents argue that some or all of the present action is precluded by *res judicata* or collateral estoppel.

With that said, respondents object to paragraph 4's recitation that the subpoena should be issued "for purposes of confirming plaintiffs-appellants' evidentiary entitlement to summary judgment on each of their causes of action, as well as to the granting, in its entirety, of their March 29, 2017 order to show cause with preliminary injunction and TRO." We believe the record will confirm no such thing; to the contrary, Justice McDonough granted declaratory relief in favor of defendants. (R315-326.)

E. The Preliminary Injunction in Paragraph 5 Should Be Denied.

1. *The Preliminary Injunction Would Violate the State Constitution.*

The requested preliminary injunction would enjoin respondents from "disbursing any further monies to pay the judicial salary increases" based on the Commission's reports. Such relief would effectively reduce current judicial compensation by eliminating that portion attributable to the Commission's reports. It would therefore violate Article VII, § 7 of the State Constitution, which provides that a judge's compensation "shall not be diminished during the term of office for which [the judge] was elected or appointed." To prevent a constitutional violation, the requested preliminary injunction must be denied.

2. *Appellant Delayed in Seeking Interim Relief.*

In the July 23 letter, we argued that appellant's six-month delay in filing the instant motion weighed against a preliminary injunction. (7/23/18 Ltr. at 5.) In response, appellant avers that she perfected her appeal three months before the deadline. (8/1/18 Aff. Ex. Z at 20-21.) But appellant did not need to perfect an appeal before seeking emergency relief. She needed only to file a notice of appeal and then move for emergency relief in this Court. The six-month delay was a strategic choice: appellant waited until her brief was ready to file, and then demanded that respondents file their brief in only three days. (*See supra* § C.)

Indeed, after this Court scheduled a TRO hearing for July 24, 2018, appellant unilaterally insisted on delaying her own TRO, even though the Court and the undersigned counsel were ready to proceed. That conduct underscores the absence of a true emergency.

3. *The Case Includes No Claim for the Current Year.*

As demonstrated in the July 23 letter at 2-3, the case that reached this Court from Albany County does not include any claim based on the current budget year. The complaint was filed in September 2016. Without amendment or supplementation, it thus could not have addressed the 2017-2018 or 2018-2019 budget year. Appellant understood that. She therefore moved "pursuant

to CPLR § 3025(b), granting leave to plaintiffs to supplement their September 2, 2016 verified complaint (pertaining to fiscal year 2016-2017) by their March 28, 2017 verified supplemental complaint (pertaining to fiscal year 2017-2018)." (R636; parentheticals in original.) The motion effectively sought to amend the complaint to cover the 2017-2018 budget year. Because Justice Hartman denied that motion, the 2017-2018 budget year is not part of this case. And no motion to amend or supplement the complaint was ever made with respect to 2018-2019.

In her reply papers, appellant asserts that this case challenged every budget year "in perpetuity." (8/1/18 Reply Aff. Ex. Z at 12.) To the extent this lawsuit disputes the legality of the Commission (or makes a similar structural challenge to the budget process), its resolution may affect future fiscal years. But any claim based on a future budget would still remain unripe until that budget is adopted. If advanced prior to the budget's adoption, such a claim would also be speculative because the particulars of the future budget would not be known.

At oral argument, appellant observed that the judicial pay raises are "cumulative" and remain in the budget. But appellant has forfeited her ability to challenge budgets prior to 2016-2017. In the prior action (Index No. 1788-14), on August 1, 2016, Justice McDonough granted declaratory relief to defendants sustaining the budgets for 2014-1015 and 2015-2016. (R323.)

Appellant never perfected an appeal of that decision and order. Instead, she commenced the present action seeking relief for 2016-2017, which is a separate proceeding (Index No. 5122-16). She can no longer challenge Justice McDonough's decision in the prior case; *res judicata* and collateral estoppel would bar any such challenge.

Even if this Court were to conclude that Justice Hartman abused her discretion in denying the motion to supplement (and there is no indication she did), the appropriate relief would be remittal to Supreme Court with directions to permit supplementation. Defendants then would have an opportunity to answer the allegations concerning 2017-2018 and 2018-2019. It would be unfairly prejudicial if the Court were to consider new claims on appeal concerning the most recent two fiscal years, while respondents had no chance to answer and defend against them.

4. *Itemization*

Precedent from the Court of Appeals makes clear that the failure of a budget to include "itemized estimates" of expenditures (*see* 7/24/18 Aff. Ex. A at 5-7; R100) is not justiciable. Itemization is purely for the legislature's convenience, and "the degree of itemization" must be "determined by the Governor and the Legislature, not by judicial fiat." *Saxton v. Carey,* 44 N.Y.2d 545, 550-51 (1978). (*Accord* R57 and cases cited.)

5. *Budget Negotiations*

As Supreme Court observed, nothing prohibits the Governor from meeting with leaders of the Assembly and Senate and negotiating a budget. (R57.) Indeed, as the Court of Appeals observed in *Saxton,* the drafters of the Constitution "certainly envisioned" that budgets would be decided through "the political process" and "interplay between the various elected representatives of the people." 44 N.Y.2d at 550. The absence of a negotiated solution could have the undesirable result of a standoff and shutdown of State government.

6. *Commission's Compliance with Enabling Statute*

At the August 2 oral argument on the TRO, appellant asserted that the Commission did not consider the factors it was supposed to consider under 2015 N.Y. Laws ch. 60, § E (*see* R1080-1081). In fact, the Commission's Chair stated that the Commission "considered a broad range of pertinent data, beginning with the factors delineated in Part E of Chapter 60." (R1084.) And the Commission's report expressly discussed every factor identified in the statute: the overall economic climate (R1094); rates of inflation (R1093, 1098); changes in public-sector spending (R1093, 1100); levels of compensation in other states and the federal government (R1093-1096, 1098-1100); levels of compensation in government, academia, and private and nonprofit enterprise (R1094, 1099); and the State's ability to fund increased compensation (R1094).

In any event, the Commission was not required to list each factor it considered. Parole cases provide a good analogy. The Commission's mandate that it "shall take into account all appropriate factors including, but not limited to" an itemized list (R1080-1081) resembles the mandate in Executive Law § 259-i that the Parole Board's procedures "shall require that the following [factors] be considered." Exec. L. § 259-i(2)(c)(A). This Court has held that the Parole Board "is not required to specifically articulate all of those factors in its decision." *Matter of Comfort v. N.Y. State Div. of Parole,* 68 A.D.3d 1295, 1296 (3d Dep't 2009); *accord Matter of Duffy v. N.Y.S. Dep't of Corrections & Community Supervision,* 132 A.D.3d 1207, 1208 (3d Dep't 2015). The same should be true for the Commission.

F. The Settlement Conference Sought in Paragraph 6 Would Be Fruitless

Respondents' July 23 letter did not address the demand for a settlement conference. We do so now.

Appellant has sued the Governor, the Assembly, the Senate, the Comptroller, the Chief Judge of the Court of Appeals, and the Attorney General – all three branches of the State's government. At oral argument, appellant urged that her lawsuit challenges "the whole of the budget" under which the New York State government operates. Given the breadth of appellant's demands, we see no chance for settlement.

Of course, if ordered to participate in a settlement conference, respondents will do so in good faith. We would ask, however, that briefing of this appeal be suspended while the settlement process is ongoing.

G. The "Other and Further Relief" Requested by Appellant is Not Appropriate

Respondents' July 23 letter did not address the two items of "other and further relief" sought by appellant. We do so now.

First, appellant's request for an investigation of the handling of her disciplinary complaints against various members of the Attorney General's staff is improper. As shown in an exhibit to appellant's reply affidavit, the Attorney Grievance Committee on July 20 declined to pursue her complaints. (8/2/18 Reply Aff. Ex. AA.) The Grievance Committee was not a defendant below, and is not a respondent in this appeal. Nothing in this appeal provides the Court with a platform for ordering an investigation of the Grievance Committee's conduct.

Second, appellant requests $100 in costs. Her requested TRO, however, was denied on August 2. If the bulk of the other relief she seeks is likewise denied, those costs should be awarded to respondents.

POINT II

APPELLANT'S ALLEGATIONS OF FRAUD ARE BASELESS, AND HER REQUEST FOR SANCTIONS SHOULD BE DENIED

Appellant's multiple allegations of fraud by the courts and the Attorney General's office are baseless. Indeed, in appellant's prior action, Justice McDonough found such allegations "wholly unsubstantiated." (R321.) Nonetheless, appellant continues to allege that the Attorney General's office and the courts are engaged in fraud. Most recently, she has averred that "virtually every line" of our July 23 letter was a fraud on the Court. (8/1/18 Reply Aff., Ex. Z at 1.)

Appellant misunderstands the nature and elements of fraud. Her claims of fraudulent concealment appear to derive from instances when a court or opposing counsel disagreed with her legal position and/or did not directly address every single one of her numerous arguments. (*See, e.g.,* 8/1/18 Reply Aff. Ex. Z at 3 [stating that respondents' counsel, while identifying appellant's website, "fail[ed] to furnish the Court with the specific webpages or location on CJA's website"]; 4 [respondents' papers "essentially conceal[ed] the ENTIRE content of appellant Sassower's moving affidavit"]; 10 [respondents "conceal[ed] and falsifie[d] the true facts – which are that appellants have met their burden of establishing their entitlement to a TRO and preliminary injunction"].)

That is not fraud. First, for fraud by concealment, there must be a duty to disclose. *Towne v. Kingsley,* 2018 N.Y. Slip Op. 05387, 2018 WL 3463152, *2 (3d Dep't July 19, 2018). Counsel has no duty to repeat the opposing side's arguments, especially when they have already been filed with the Court.

Second, failure to address an argument is not fraud. An argument might be unimportant in light of other points. It might be refuted elsewhere. Or it might be immaterial, duplicative, or just plain meritless.

Third, taking a legal position that appellant opposes – even if a court later rules in appellant's favor – is not fraud. *See Zuyder Zee Land Corp. v. Broadmain Bldg. Co.,* 86 N.Y.S.2d 827, 828 (Sup. Ct. N.Y. Cty.) (representation as to effect of lease terms, "involving as it did the interpretation of a written document, falls in the category of an opinion or statement of law which, even when inaccurate, cannot afford a basis for recovery in fraud"), *aff'd without op.,* 276 A.D. 751 (1st Dep't 1949); and case cited in 7/23/18 Letter at 5 & n.4.

Finally, in footnote 1 on the first page of the July 23, 2018 letter, respondents' counsel wrote: "For a full presentation of Ms. Sassower's contentions, I urge the Court to read her moving papers, appellate brief, and the record (available at her website, www.judgewatch.org)." Thus, rather than concealing appellant's papers, counsel "urge[d]" the Court to read them.

Appellant's request for sanctions under 22 N.Y.C.R.R. § 130-1.1 (8/1/18 Reply Aff. ¶3[1]) should therefore be denied. Respondents' opposition is not

frivolous; to the contrary, respondents prevailed below and in the prior lawsuit before Justice McDonough. The July 23 letter contained factual references, legal citations, and legal arguments that supported the contentions made. The letter fell comfortably within the broad range of permitted advocacy.

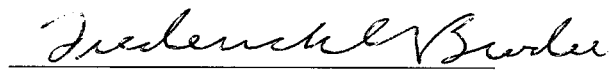
CONCLUSION

The relief sought in appellant's order to show cause should be denied, except that the Court should obtain the record from *Center for Judicial Accountability v. Cuomo,* Index No. 1788-14 (Sup. Ct. Albany Cty.).

Dated: Albany, New York
August 3, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General
State of New York
Attorney for Respondents

By: 
FREDERICK A. BRODIE
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2317

JEFFREY W. LANG
Deputy Solicitor General
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of Counsel

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