Center for Judicial Accountability, Inc. (CJA)

From: Brodie, Frederick <Frederick.Brodie@ag.ny.gov>
Sent: Monday, July 23, 2018 3:47 PM
To: 'jlandes@nycourts.gov'
Cc: 'Center for Judicial Accountability, Inc. (CJA)'; Paladino, Victor
Subject: CJA v. Cuomo, letter regarding appellant's OSC
Attachments: 7.23.18 Letter to Clerk.pdf; Exhibits to 7.23.18 Letter.pdf

Dear Ms. Landes,

Attached is a letter concerning appellant's application for an Order to Show Cause in *Center for Judicial Accountability v. Cuomo*, Albany Cty. Index # 5122-16. Also attached is a pdf of the exhibits referenced in the letter. As noted in the letter, we respectfully request that these be provided to the Justice who will determine appellant's application.

Thank you very much for your assistance.

Respectfully submitted,

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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS
ALBANY BUREAU

July 23, 2018

By email: jlandes@nycourts.gov
Hon. Robert D. Mayberger
Clerk of the Court
Appellate Division, Third Department
P.O. Box 7288, Capitol Station
Albany, NY 12224

Re: ***Center for Judicial Accountability v. Cuomo,***
Albany Cty. Index # 5122-16

Dear Mr. Mayberger,

I represent defendants-respondents in the above appeal, which is not yet perfected or docketed. I write in response to the emails received at 12:21 p.m. on July 20 and July 23, 2018, from plaintiff-appellant Elena Sassower to the Court.

Appellant proposes to bring an Order to Show Cause before the Court. While prepared to participate in oral argument at the Court's convenience, I write to explain defendants' position that the Order should not be signed at all. Instead, for the reasons set forth below, no emergency relief should be granted and the appeal should be briefed in the ordinary course.[1]

I therefore respectfully ask that this letter be provided in advance to the Appellate Division Justice who will hear appellant's application.

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[1] In this letter, for convenience, I have paraphrased appellant's arguments and have addressed only those I deem pertinent. 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).

Background

Appellant appeals from a judgment of Supreme Court, Albany County (Hartman, J.), which granted summary judgment to defendants in her citizen-taxpayer suit brought under State Finance Law §§ 123 *et seq*. The complaint challenged the 2016-2017 budget, in particular pay increases for the Judiciary. (*See* Exhibit 1, Excerpts from Record on Appeal ["R"] at 87-89.)

In her proposed Order to Show Cause, appellant seeks a temporary restraining order, pending a preliminary injunction. The proposed TRO includes, among other requested relief, an injunction prohibiting respondents from "disbursing any further monies to pay the judicial salary increases" recommended by the Commission on Legislative, Judicial and Executive Compensation and the Commission on Judicial Compensation, and prohibiting respondents from reimbursing counties for the district attorney salary increases based thereon. (Proposed TRO ¶5.)[2]

Although she attempts to shift the burden to respondents (*e.g.*, Sassower Aff. ¶¶47-48), the burden of establishing her case rests solely on Ms. Sassower – as plaintiff, as appellant, and as the movant seeking emergency relief.

A. Appellant Has Not Shown, and Cannot Show, a Probability of Success on the Merits.

The complaint at issue does not encompass the 2017-2018 budget year. Rather, it is directed against the 2016-2017 budget. This lawsuit therefore does not afford appellant a platform for emergency relief regarding the 2017-2018 budget. The authority to spend funds pursuant to the 2016-2017 budget appropriations has lapsed, and therefore no future expenditures will be paid pursuant to the 2016-2017 budget appropriation authority. *See* State Finance Law § 40; *see also* N.Y. Const. Art. 7, § 7. Consequently, this lawsuit can afford no prospective relief.

To be sure, in Supreme Court, appellant moved to amend her complaint by supplementing it with claims based on the 2017-2018 budget. Supreme Court denied that motion, however. (*See* R68-69.) Appellant did not obtain any

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[2] All references herein to the proposed OSC and Sassower Affidavit are to the version that appellant sent to the Court by email on Monday, July 22, 2018, at 10:52 a.m.

relief from that denial.[3] Instead, she noticed an appeal from the denial of leave to amend (R61-62), but failed to perfect that appeal within the requisite time. The appeal was therefore deemed abandoned as a matter of law. *See* 22 N.Y.C.R.R. § 800.12.

Having abandoned her interlocutory appeal from the denial of leave to amend, appellant is barred from appealing the issue now. *See Sawhorse Lumber and More, Inc. v. Ameli,* 2 A.D.3d 1082, 1083 (3d Dep't 2003).

Even if appellant were not barred from challenging Supreme Court's interlocutory order denying leave to amend, the issue before this Court regarding current expenditures would ***not*** be whether the 2017-2018 budget is constitutional. Rather, the only issue would be whether Supreme Court abused its discretion in denying leave to amend to add claims concerning 2017-2018.

The decision as to whether amendment should be allowed is "committed to the discretion of the trial court, and its exercise of that discretion will not be lightly set aside." *Brown v. Samalin & Bock, P.C.,* 155 A.D.2d 407, 408 (2d Dep't 1989); *see, e.g., Robert v. Bango,* 146 A.D.3d 1101, 1103 (3d Dep't 2017). Here, Supreme Court denied leave to amend because it had already dismissed or denied the same claims for 2015-2016 and 2016-2017. (R69.) That denial of leave fell comfortably within Supreme Court's wide discretion. *See Cafferty v. Cahill,* 53 A.D.3d 1007, 1008 (3d Dep't 2008); *accord Brown,* 155 A.D.2d at 408. On appeal from such a discretionary decision, Ms. Sassower cannot demonstrate the probability of success on the merits required by *Nobu Next Door, LLC v. Fine Arts Hous., Inc.,* 4 N.Y.3d 839, 840 (2005).

Even if this Court were to conclude that Supreme Court erred in denying leave to amend, the remedy would not be to grant the relief sought in the proposed amendment. Rather, the matter would have to be remitted to Supreme Court, so that defendants could answer and defend against the allegations for 2017-2018.

B. Appellant Has Not Shown, and Cannot Show, Immediate and Irreparable Injury.

Under C.P.L.R. 6313(a), "[n]o temporary restraining order may be granted ... against a public officer ... of the state to restrain the performance of statutory duties." The State Finance Law creates a limited exception for

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[3] Appellant could also have filed a new, separate action for 2017-2018. But no such action appears to have been filed.

citizen-taxpayer suits "where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before a hearing can be had." State Finance Law § 123-e(2). Appellant has not met the requirements of that exception.

First, as discussed above, the underlying lawsuit challenges the budget for 2016-2017. Because the authority to spend funds pursuant to the 2016-2017 budget appropriations has lapsed, no future expenditures will be paid pursuant to the 2016-2017 budget appropriation authority. Consequently, a TRO or preliminary injunction would not prevent any injury.

Second, to the extent appellant complains that judicial pay raises have increased her taxes (*see, e.g.*, Sassower Aff. ¶2), she has not shown irreparable harm. Salary expenses and the resulting taxes are expenditures of money. As this Court has observed, "monetary damages simply are not irreparable and are an insufficient harm to support the issuing of an injunction." *Winkler v. Kingston Housing Auth.*, 238 A.D.2d 711, 712 (3d Dep't 1997).

Finally, the harm from granting the TRO and injunction would far outweigh the alleged harm from continuing to operate under the 2017-2018 budget. Enactments are presumed to be constitutional, and litigants asserting that a statute is facially unconstitutional must surmount that presumption by proof "beyond a reasonable doubt." *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (internal quotation marks and citation omitted).

Supreme Court has already rejected appellant's challenges, and set forth persuasive reasons for doing so. As the court held, the "three men in a room" budget negotiation was legal because nothing prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiations. (*See* R57.) The legislation creating a commission on legislative, executive, and judicial compensation contained reasonable standards and provided for a legislative veto through the ordinary process for enacting a statute. (*See* R35-36.) The measure simply implemented basic policy decisions already made by the Legislature. (*See* R36.) The Constitution does not forbid increases in judicial salaries. (*See* R37.) By passing the budget legislation, the Legislature necessarily consented to its submission outside the 30-day window. (*See* R37-38.) Supreme Court's and counsel's disagreement with plaintiff's contentions, or even failure to address some of them, does not amount to a fraud. *See*

Abraham v. Wechsler, 120 Misc. 811, 812 (Sup. Ct. N.Y. Cty. 1923), *aff'd,* 201 A.D. 876 (1st Dep't 1924).[4]

The above are only a few of the points that respondents would advance in their brief on the merits, but they sufficiently illustrate that appellant cannot show the budget statute is unconstitutional "beyond a reasonable doubt."

Meanwhile, judges and other people throughout the State have conducted their lives in reliance on the salaries that were funded by the budget. It would be a grave mistake to deprive them of money owed for their work in accordance with legislative enactments, without full briefing and due consideration by a full panel of the Court.

C. Appellant's Own Delay Undermines Her Request for Emergency Relief.

Appellant noticed her appeal on January 10, 2018. (R1-2.) That was more than six months before she decided to bring the instant application for emergency relief.

Prior to noticing an appeal from the judgment, appellant had noticed appeals from interlocutory orders on June 10, 2017 and August 5, 2017. (R42-43, 61-62.) She failed to perfect either interlocutory appeal within the nine-month time frame.

Appellant's delay belies any claim of urgency and supports denial of the relief sought. *See Mercury Service Systems, Inc. v. Schmidt,* 50 A.D.2d 533, 533 (1st Dep't 1975) (plaintiff's delay of 3½ months justified denial of preliminary injunction motion). 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). In light of plaintiff's own delay, this Court should exercise its discretion in favor of denying a preliminary injunction, and should direct that the appeal proceed on a normal briefing schedule.

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[4] "[T]he defendant represented that something was lawful, and the plaintiff claims it was unlawful. Such a representation does not amount to fraud." *Abraham,* 120 Misc. at 812.

D. CJA is Not Represented by Counsel, and therefore is Not Properly Before the Court.

CJA claims to be a "national, non-partisan, non-profit citizens' organization." (R91.) It is not, however, represented by counsel. Instead, CJA appears to be represented by appellant, whose brief states that she is suing "individually & as Director" of CJA. (Appellants' Brief at 70.) Appellant is not an attorney.[5]

An organization like CJA cannot appear *pro se*. Rather, it must be represented by an attorney. C.P.L.R. 321(a); *see, e.g., Schaal v. CGU Ins.*, 96 A.D.3d 1182, 1183 n.2 (3d Dep't 2012). Supreme Court properly dismissed CJA's claims for that reason. (R530.) That determination is not challenged on this motion. Without legal counsel, CJA cannot be heard in this Court and its purported appeal must be dismissed. *See Knobel v. Wei Group, LLP,* 160 A.D.3d 409, 409 (1st Dep't 2018).

E. Other Relief Sought by Appellant Should Be Denied.

Judicial disclosure. Citing § 100.3(F) of the Rules Governing Judicial Conduct, appellant seeks disclosure of "the financial interests of this Court's justices in this appeal ... as well as their personal, professional, and political relationships, impacting upon their fairness and impartiality." (Proposed TRO ¶1.) She is not entitled to that relief.

First, consideration of recusal is premature, because no panel has been selected. Second, the cited rule does not entitle plaintiff to any disclosure. It provides instead that, under certain circumstances, a judge who disqualifies him or herself "*may* disclose on the record" the basis for disqualification. 22 N.Y.C.R.R. § 100.3(F) (emphasis added). Third, the fact that appellant challenges judicial salaries does not require disqualification because every judicial officer would suffer the same purported conflict. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 248-49 (2010) (discussing Rule of Necessity); *Pines v. State,* 115 A.D.3d 80, 90-91 (2d Dep't) (similar), *app. dismissed,* 23 N.Y.3d 982 (2014).

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[5] *See* https://iapps.courts.state.ny.us/attorney/AttorneySearch (last visited July 22, 2018).

Appellant also seeks to disqualify Justice Lynch pursuant to § 100.3(E) of the rules. (Proposed TRO ¶1.) Because a panel has not been selected, this request again is premature.

Attorney General representation. Citing Executive Law § 63.1 and State Finance Law § 123 *et seq.*, appellant asks the Court to direct Attorney General Underwood to "identify who has determined 'the interests of the state' on this appeal" and appellant's "entitlement to the Attorney General's representation/intervention." (Proposed TRO ¶2.) No statute entitles appellant to a formal determination of "the interests of the state." Nor is she entitled to representation by the Attorney General as alleged (Sassower Aff ¶11).

Under Executive Law § 63(1), "[n]o action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality *of the state*, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant." (Emphasis added.) Because appellant is not an officer "of the state," the provision does not apply to her. While appellant protests that Executive Law §63(1) authorizes the Attorney General to "[p]rosecute" actions (Sassower Aff. ¶17), the statute nowhere entitles private citizens to compel or direct such prosecutions.

Similarly, while State Finance § 123-c(3) requires that citizen-taxpayer complaints be served on the attorney general, it does not require the attorney general to make a formal determination as to their merit or substitute herself as a plaintiff.

F. If Emergency Relief is Granted, a Substantial Undertaking Should Be Required.

Appellant's papers do not reflect the posting of an undertaking as required by C.P.L.R. 6312(b). If the Court grants any preliminary injunctive relief—and it should not—respondents request that a substantial bond requirement be imposed.

The bond should be large enough to cover "all damages and costs which may be sustained by reason of the injunction." C.P.L.R. 6312(b). Appellant seeks to enjoin the payment of judicial salary increase and the reimbursement of counties for district attorney salary increases based thereon. (Proposed TRO ¶5.) The judicial pay raises for 2016 totaled $27 million. Joel Stashenko,

"Judges Get Raises, Leaving OCA to Decide How to Pay for Them," N.Y.L.J. April 4, 2016 (attached as Exhibit 2). Appellant herself estimates that the salary increases resulting from Commission recommendations exceed $300 million. (Sassower Aff. ¶28.) Therefore, depending on the scope of the preliminary relief contemplated, the required bond should range from $27 million to northward of $300 million.

Again, respondents strongly urge the Court to deny appellant's requests for emergency or preliminary relief regarding the State budget. At a minimum, though, no such relief should be granted unless a sufficient undertaking has been posted.

G. The Briefing Schedule Should Not Be Accelerated

Citing section 123-c(4) of the State Finance Law, appellant asks for "an accelerated schedule for briefing, oral argument, and decision." (Proposed TRO ¶3.) Section 123-c(4) provides that a citizen-taxpayer action "shall have preference over all other causes in all courts" and "shall be promptly determined." The cited section does not, however, provide for accelerated briefing.

Given appellant's six-month delay in filing her brief, imposing an artificially shortened response time on respondents would be inequitable. In particular, the three-day deadline requested by plaintiff (Sassower Aff. ¶34) is wholly unrealistic. The reproduced record is almost 1,000 pages, and appellant's 70-page brief is full of cross-references and incorporations by reference. While appellant previously sent me a draft of her brief (*see* Sassower Aff. ¶32), appellate attorneys are not required to review the opposing party's unserved and unfiled draft briefs.

I am the Assistant Solicitor General assigned to represent respondents on appeal, and I am responsible for multiple pending matters. Those include, most notably, a brief due in the New York Court of Appeals on August 16 and an oral argument in the Appellate Division, Fourth Department, on September 7. I would therefore request two months to prepare respondents' brief in this matter.

Conclusion

The order to show cause should not be signed.

Respectfully,

FREDERICK A. BRODIE
Assistant Solicitor General

cc (by email):

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