

EXHIBIT 1

Plaintiffs' January 10, 2018 Notice of Appeal, with Pre-Calendar Statement [R.1-41]

SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY



----- X
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,

**NOTICE OF APPEAL
with pre-calendar statement**

-against-

Index #5122-16
RJI # 01-16-122174

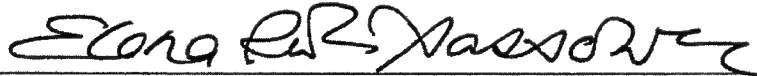
ANDREW M. CUOMO, in his official capacity as Governor
of the State of New York, JOHN J. FLANAGAN in his official
capacity as Temporary Senate President, THE NEW YORK
STATE SENATE, CARL E. HEASTIE, in his official capacity
as Assembly Speaker, THE NEW YORK STATE ASSEMBLY,
ERIC T. SCHNEIDERMAN, in his 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.

----- X
PLEASE TAKE NOTICE that plaintiffs hereby appeal to the Appellate Division, Third
Department, Justice Building, 5th Floor, Empire State Plaza, Albany, New York 12223, from the
decision and judgment of Acting Supreme Court Justice Denise A. Hartman, dated November 28,
2017 and entered in the Albany County Clerk's Office on December 8, 2017 (Exhibit A).

Dated: White Plains, New York
January 10, 2018

Yours, etc.



ELENA RUTH SASSOWER, unrepresented plaintiff,
individually & as Director of the Center for Judicial
Accountability, Inc., and on behalf of the People of the State
of New York & the Public Interest

10 Stewart Place, Apartment 2D-E
White Plains, New York 10603
914-421-1200
elena@judgewatch.org

TO: Albany County Clerk
Albany County Court House, Room 128
16 Eagle Street
Albany, New York 12207-1077

Attorney General Eric T. Schneiderman
The Capitol
Albany, New York 12224-0341
ATT: Assistant Attorney General Adrienne Kerwin/of Counsel

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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,

-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 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.

DECISION AND
JUDGMENT

Index No. 5122-16
RJI No. 01-16-122174

RECEIVED
2017 DEC -8 AM 10:37
ALBANY COUNTY CLERK

APPEARANCES:

ELENA RUTH SASSOWER
Plaintiff pro se
PO Box 8101
White Plains, New York 10602

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK
Adrienne J. Kerwin, AAG, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

Hartman, J.

In this citizen-taxpayer action for declaratory and injunctive relief, pro se plaintiff Elena Ruth Sassower challenges legislation enacted in 2015 that created the Commission on Legislative, Judicial & Executive Compensation (Commission) and budget legislation for the 2016-2017 fiscal year. In its December 21, 2016 Decision and Order, the Court granted in part defendants' pre-answer motion and dismissed nine of ten causes of action, but denied the motion with respect to the cause of action challenging the 2015 legislation. On May 5, 2017, this Court issued a Decision and Order denying plaintiff's application for disqualification and reargument, renewal, and vacatur of the Court's December 21, 2016 Decision and Order. On that same date, the Court issued an Amended Decision and Order correcting the recitation of papers considered in the December 21, 2016 Decision and Order.

Plaintiff now moves, by order to show cause, for disqualification, reargument, renewal, and vacatur of the Court's May 5, 2017 Decision and Order and the May 5, 2017 Amended Decision and Order. Once again plaintiff has failed to establish matters of fact or law that the Court overlooked or misrepresented that would warrant reargument, or new facts that would warrant renewal (*see* CPLR 2221 [d, [e]]). Nor has she established grounds for disqualification and vacatur (*see Matter of Maron v Silver*, 14 NY3d 230, 249 [2010] [Rule of Necessity]; *Pines v State of N.Y.*, 115 AD3d 80, 90-91

[2d Dept 2014] [same], *appeal dismissed* 23 NY3d 982 [2014]). Plaintiff's motion is therefore denied.

Respondents, having answered, cross-move for summary judgment on the sole remaining cause of action, both for lack of standing and on the merits, and for sanctions against plaintiff. Defendants waived their right to raise standing as a defense by failing to raise it in their pre-answer motion to dismiss or answer (*see Matter of Plainview-Old Bethpage Congress of Teachers v NY State Health Ins. Plan*, 140 AD3d 1329, 1330 [3d Dept 2016]; *Schulz v Silver*, 212 AD2d 293, 296 [3d Dept 1995]). In any event, plaintiff has asserted a sufficient nexus to the fiscal activity of the State to confer standing under State Finance Law § 123-b (1) (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813–814 [2003]).¹ But because defendants have demonstrated entitlement to judgment as a matter of law and plaintiff has not raised a material issue of fact in opposition, the motion for summary judgment is granted. The motion for sanctions, however, is denied.

Procedural Background

By Decision and Order dated December 21, 2016, as amended on May 5, 2017, the Court dismissed all of the complaint's causes of action but the sixth,

¹ Because plaintiff Sassower is not an attorney, this Court in its December 21, 2016 Decision and Order dismissed causes of action she seeks to assert on behalf of the Center for Judicial Accountability.

which challenged as unconstitutional the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation (Commission) (L 2015, ch 60, Part E § 3 [5]; S4610/A6721 2015). In its Decision and Order dated June 26, 2017, the Court denied plaintiff's motion for summary judgment on the sixth cause of action. In that decision, the Court divided the sixth cause of action into six sub-causes, labelled A–E. As the Court held, the law of the case disposes of Sub-Cause E—allegations that the budget bill that created the Commission was procured by fraud and in violation of due process failed to state a cause of action. The remaining sub-causes must also be resolved in favor of defendants.

The issues plaintiff raises must be viewed through the lens of the strong presumption of the constitutionality of legislative enactments. Where, as here, a plaintiff makes a facial challenge to a legislative enactment, that enactment will not be held unconstitutional unless the plaintiff demonstrates with “proof beyond a reasonable doubt” that “no set of circumstances exists under which the [enactment] would be valid” (*Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] [internal citations and quotation marks omitted]; see *Local Govt. Assistance Corp. v Sales Tax Asset Receivable Corp.*, 2 NY3d 524, 535 [2004]; *Hunter v Bd. of Supervisors*, 21 AD3d 622, 624 [3d Dept 2005]).

Sub-Causes A & B—Improper Delegation of Authority Claims

Plaintiff alleges in Subcauses A and B that the 2015 legislation unconstitutionally delegates legislative authority to the Commission. Although “the Legislature cannot pass on its law-making functions to other bodies[,] there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature” (*Boreali v Axelrod*, 71 NY2d 1, 10 [1987]).

As defendants argue, the Commission’s enabling legislation contains both standards and reasonable safeguards. The legislation provides a specific task to the Commission and defined guidelines for it to consider in furtherance of that task. It directs the Commission to “examine, evaluate and make recommendations with respect to adequate levels of compensation” for judges and members of the Legislature. The Commission must

“take into account . . . 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 § 2 [3]). The Commission must also have access to and use court and agency data (L 2015, ch 60, Part E § 3 [5]). Finally, the legislation gives the Legislature and Governor an opportunity to veto the recommendations before they take on the force of law by following the usual constitutional process for enacting a statute (L 2015, ch 60, Part E § 3 [7]). This constitutes “adequate guidance” (see *Matter of Retired Public Employees Assn. v Cuomo*, 123 AD3d 92, 97 [3d Dept 2014]).

“Enabling statutes even broader than this one have been found constitutional” (*McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252, 253 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007], *appeal dismissed* 9 NY3d 891 [2007]; see also e.g. *Shattenkirk v Finnerty*, 62 NY2d 949, 951 [1984]). In short, because “the basic policy decisions underlying the [Commission] have been made and articulated by the Legislature,” the Commission legislation is not an unconstitutional delegation of legislative power (*N.Y. State Health Facilities Assn. v Axelrod*, 77 NY2d 340 [1991]; see *Dalton v Pataki*, 5 NY3d 243, 262–263 [2005]; compare *St. Joseph’s Hospital v Novello*, 43 AD3d 139 [4th Dept 2007] [declining to address constitutionality of delegation of authority that allowed for de facto legislative veto])). Thus, defendants are entitled to judgment as a matter of law on sub-causes A and B.

Sub-Cause C—New York Constitution Article XIII, Section 7

Plaintiff alleges that the State Constitution forbids the increase of judicial and legislative salaries during the term for which the judge or legislator was elected. As the Court noted in its earlier decision, although the Constitution does forbid increases for legislators during the term for which they were elected, it contains no such prohibition against increases in judges' salaries. Rather, the provision that applies to judicial salaries expressly forbids decreases but does not mention increases (*Compare* Article VII, § 7 with Article VI, § 25 [a]). Thus, the Court needs to look no further than the plain text of the State Constitution to dispose of plaintiff's argument with respect to the judiciary. And as the Court previously held with respect to legislative raises, plaintiff cannot prove that "no set of circumstances exists under which the Act would be valid" because the Commission has not recommended any pay raise for legislators (*see Moran Towing*, 99 NY2d at 448 [internal quotation marks omitted]).

Sub-Cause D—Article VII, Sections 2, 3, and 6

Plaintiff alleges that the budget bills resulting in the enactment of the law creating the Commission (S4610/A6721 2015) violated New York State Constitution Article VII, Sections 2, 3, and 6. When the Governor submits a budget to the Legislature, he must also submit bills containing all appropriations and proposed legislation (*see* NY Const Art VII, § 3). The

Governor may submit supplemental budget bills and amendments “within thirty days” of submitting the budget and, “with the consent of the legislature, at any time before the adjournment thereof” (*id.*). “No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill” (NY Const Art VII, § 6).

Plaintiff argues that the bill creating the Commission must be invalidated because it was not introduced by the Governor and was not submitted within the prescribed 30-day window. Plaintiff also argues that the bill establishing the Commission violated the requirement that items in appropriation bills relate specifically to an appropriation in the bill.

Assuming without deciding justiciability (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 97 [2004]; *Saxton v Carey*, 44 NY2d 545, 549-551 [1978]), this sub-cause of action must be denied. With regard to timeliness, Article VII, Section 3 allows the submission of budget bills “at any time” with the consent of the Legislature. Although no formal consent appears in the record, the Legislature’s consideration and passage of the bill is effective consent in itself. In any event, the 30-day timeframe appears to be precatory, not mandatory. Unlike, for instance, Article III, Section 14, which states that “[n]o bill shall be passed or become a law unless it has been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its

final passage,” Article VII, Section 6 contains no such mandatory language (*cf.* *Maybe v State*, 4 NY3d 415, 419-421 [2005] [holding that rationale underlying a Governor’s statement of necessity to allow a bill to be passed without being before Legislature for three days is not susceptible to judicial review]). Nor does the Commission bill violate Article VII, Section 6 of the State Constitution. The creation of the Commission relates specifically to items of appropriation in the 2015 budget for judicial and legislative pay and is not “essentially non-budgetary” (*Pataki*, 4 NY3d at 98-99; *see Schuyler v S. Mall Constructors*, 32 AD2d 454 [3d Dept 1969]).

Prudential considerations further weigh against invading the province of the Governor and Legislature. “[T]he consequences of judicial second-guessing of the Governor’s and the Legislature’s choice” to create the Commission by budget bill outside the 30-day window could be “draconian” (*Maybe*, 4 NY3d at 420; *see Schulz v State*, 81 NY2d 336, 348-349 [1993]). If the Court “accepted plaintiff’s argument here, any statute, no matter how important to the state,” would be subject to invalidation if passed under similar circumstances (*Maybe*, 4 NY3d at 420).

Finally, the particular circumstances of this case also counsel restraint. Plaintiff did not commence this action until September 2016, well after the Commission bill was signed by the Governor in April 2015, the Commission issued its Final Report on Judicial Compensation on December 24, 2015, and

its recommendations took on the force of law on April 1, 2016. While the Court recognizes that invalidation of the Commission and of the raises that followed is precisely the relief plaintiff seeks, the relief she requests in her sixth cause of action must be denied (*see Schulz*, 81 NY2d 336, 348-349 [1993]).

Accordingly, it is

ORDERED that plaintiff's motion for disqualification, reargument, renewal, and vacatur is denied;

ORDERED that defendants' motion for sanctions is denied;

ORDERED that summary judgment is granted in favor of defendants; and

ORDERED AND ADJUDGED AND DECLARED that plaintiff has not demonstrated that the Laws of 2015, ch 60, Part E § 3 [5], which created the Commission on Legislative, Judicial & Executive Compensation, is facially unconstitutional.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment is being transmitted to defendant's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Judgment does not constitute entry or filing under CPLR 2220 or 5016 and counsel is not relieved from the applicable provisions of those rules

respecting filing and service.

Dated: Albany, New York
November 28, 2017

Denise A. Hartman
Denise A. Hartman
Acting Justice of the Supreme Court

Papers Considered

1. Order to Show Cause Dated June 16, 2017 and Moving Affidavit, with Exhibits A-G
2. Defendants' Affirmation in Opposition to Plaintiff's Order to Show Cause and in Support of Defendants' Cross-Motion, with Exhibits A-AA
3. Defendants' Memorandum of Law in Opposition to Plaintiff's Order to Show Cause and in Support of Defendants' Cross-Motion
4. Plaintiff's Letter Dated July 27, 2017
5. Plaintiff's Affidavit in Reply and in Opposition, with Exhibits H-J
6. Plaintiff's Memorandum of Law in Reply and in Further Support

SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

2017 JUN 12 PM 2:03
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----- X
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,

**NOTICE OF APPEAL
with pre-calendar statement**

-against-

Index #5122-16
RJI # 01-16-122174

ANDREW M. CUOMO, in his official capacity as Governor
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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.

----- X
PLEASE TAKE NOTICE that plaintiffs hereby appeal to the Appellate Division, Third
Department, Justice Building, 5th Floor, Empire State Plaza, Albany, New York 12223, from two
interconnected decisions and orders of Acting Supreme Court Justice Denise A. Hartman, each dated
May 5, 2017 and entered in the Albany County Clerk's Office on May 9, 2017:

- (1) Judge Hartman's May 5, 2017 decision and order (Exhibit A), denying, "in its entirety", plaintiffs' order to show cause for her disqualification, vacatur of her December 21, 2016 decision and order, disclosure, reargument/renewal, and other relief; and
- (2) Judge Hartman's May 5, 2017 amended decision and order (Exhibit B), identical to her original December 21, 2016 decision and order, except for its inclusion of a CPLR §2219(a) recitation of "papers used on the motion".

Dated: White Plains, New York
June 10, 2017

Yours, etc.



ELENA RUTH SASSOWER, unrepresented plaintiff,
individually & as Director of the Center for Judicial
Accountability, Inc., and on behalf of the People of the State
of New York & the Public Interest

10 Stewart Place, Apartment 2D-E
White Plains, New York 10603
914-421-1200
elena@judgewatch.org

TO: Albany County Clerk
Albany County Court House, Room 128
16 Eagle Street
Albany, New York 12207-1077

Attorney General Eric T. Schneiderman
The Capitol
Albany, New York 12224-0341
ATT: Assistant Attorney General Adrienne J. Kerwin/of Counsel

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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,

-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 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
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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.

AMENDED
DECISION AND
ORDER*

Index No. 5122-16
RJI No. 01-16-122174

APPEARANCES:

ELENA RUTH SASSOWER
Plaintiff pro se
PO Box 8101
White Plains, New York 10602

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK
Adrienne J. Kerwin, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

*Amended to include a recitation of the papers considered.

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Hartman, J.

Plaintiffs Center for Judicial Accountability and Elena Sassower seek a declaratory judgment under the State Finance Law that the Legislature's and Judiciary's proposed 2016–2017 budgets are improper and that the budgeting process violates various New York State Constitutional and statutory provisions, and an injunction blocking certain disbursements under the 2016–2017 legislative and judicial budget bill, including judicial pay raises and district attorney salary grants. Plaintiffs also move for a preliminary injunction preventing disbursement of funds.

Defendants move to dismiss the complaint to the extent it seeks to assert claims on behalf of the Center for Judicial Accountability. They also move to dismiss the complaint against defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore for lack of personal jurisdiction. Defendants further move to dismiss each cause of action pursuant to CPLR 3211 (a) (7).

Plaintiff's motion for preliminary relief is denied. Defendants' motion to dismiss the complaint to the extent it seeks to assert claims on behalf of the Center for Judicial Accountability is granted. Defendants' motion to dismiss for lack of personal jurisdiction is denied. Defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) is granted to the extent that all causes of action except the sixth are dismissed.

Background

Plaintiffs commenced a similar action in 2014 to challenge the Legislature's 2014–2015 budget. In October 2014, Supreme Court (McDonough, J.) dismissed three of the complaint's four causes of action. With leave of the Court, plaintiffs served and filed a supplemental complaint, which expanded their challenge to include the 2015–2016 budget, adding four new causes of action that mirrored the first four. In August, 2016, the Court dismissed the supplemental complaint and made a number of declarations validating the challenged budgets. The Court denied plaintiffs' motion to serve a second supplemental complaint, which would have added an additional eight causes of action and which included the 2016–2017 budget, explaining that proposed causes of action 9–12 were "patently devoid of merit" and that proposed causes of action 13–16 arose "out of materially different facts and legal theories" than those that had been alleged in the 2014 complaint.

In this action, plaintiffs' first four causes of action are essentially identical to the first four causes of action asserted in the 2014 action, as well as causes of action 9–13 asserted in the proposed second supplemental complaint in that action. Cause of action five in this complaint replicates part of causes of action 12 and 16 from the 2014 proposed second supplemental complaint. And causes of action 6–9 in this complaint correspond to causes of action 13–16 from the 2014 proposed second supplemental complaint. Cause of

action 10 in this complaint does not appear to have a counterpart from the 2014 action.

The Complaint's Assertion of Claims on Behalf of the Center for Judicial Accountability Dismissed

CPLR 321 (a) requires corporations to appear by attorney. Plaintiff Elena Ruth Sassower is not an attorney. Accordingly, the complaint is dismissed to the extent that it seeks to assert causes of action on behalf of the Center for Judicial Accountability (see *Pelaez v Silverstone*, 19 NY3d 954 [2012]; *Boente v Peter C. Kurth Off. of Architecture & Planning, P.C.*, 113 AD3d 803, 804 [2d Dept 2014]).

Personal Jurisdiction

The Office of the Attorney General argues that the Court lacks personal jurisdiction over defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore because plaintiff herself made service upon them. "Although CPLR 2103 (a) requires service to be made by a person who is not a party to the action, a violation of this provision is a mere irregularity which does not vitiate service" where, as here, no resulting prejudice is shown" (*Neroni v Follender*, 137 AD3d 1336, 1337 [3d Dept 2016] [internal quotation marks omitted]). Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.

The First Five Causes of Action Are Dismissed

In its April 2016 decision, the Court held that causes of action 9–12 in the proposed second supplemental complaint were “patently devoid of merit,” given the Court’s dismissal of similar causes of action regarding prior budget years (*citing Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Because causes of action 1–4 are identical to those the Court held “patently devoid of merit,” they are barred (*see Maki v Bassett Healthcare*, 141 AD3d 979, 981 [3d Dept 2016]). Likewise, the fifth cause of action, which alleges violations of New York State Constitution Article VII, §§ 4, 5, 6, must be dismissed because it restates arguments and claims already rejected by the Court in its prior decisions.

Causes of Action Seven through Ten Are Dismissed

Causes of action seven and eight both challenge the actions of the Commission on Legislative, Judicial, and Executive compensation, which is not a party to this action. Accordingly, these causes of action must be dismissed. The ninth cause of action challenges the constitutionality of “three-men-in-a-room” budget negotiation. As defendants point out, the negotiation of the 2016–2017 budget is moot, because the budget has passed (*see N.Y. Pub. Interest Research Group, Inc. v Regan*, 91 AD2d 774 [3d Dept 1982], *lv denied* 58 NY2d 610 [1983]). Assuming without deciding that the exception for issues capable of repetition but evading review applies, plaintiff has failed to state a cause of



action. Taking all the allegations in the complaint as true, plaintiff has not alleged a violation of law. None of the authority cited by plaintiff prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiations (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 85 [2004]; *Urban Justice Ctr. v Pataki*, 38 AD3d 20, 27–30 [1st Dept 2006], *appeal dismissed, lv denied* 8 NY3d 958 [2007]).

The tenth cause of action must also be dismissed. Plaintiff's itemization arguments are non-justiciable (*Pataki*, 4 NY3d at 96; *Urban Justice Ctr.*, 38 AD3d at 30). And the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary. Lastly, the reference to fiscal year 2014–2015 rather than 2016–2017 is a typographical error that does not invalidate the challenged legislation (*see Matter of Morris Bldrs., LP v Empire Zone Designation Bd.*, 95 AD3d 1381, 1383 [3d Dept 2012]).

Cause of Action Six States a Claim

“When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference” (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). The key question before the court on a CPLR 3211 (a) (7) motion to dismiss is “whether the facts alleged fit within any cognizable legal theory

(*Loch Sheldrake Beach & Tennis Inc. v Akulich*, 141 AD3d 809, 814 [3d Dept 2016]).

Plaintiff argues that the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation (Commission) violates the New York State Constitution (see Chapter 60, Laws of 2015 [Part E]). In particular, she argues that the provision therein that gives the Commission's recommendations the "force of law" violates the separation of powers doctrine and improperly delegates legislative function to the Commission. She further argues that the legislation violates Article XIII, § 7 of the New York State Constitution, which states that the compensation of public officers "shall not be increased or diminished during the term for which he or she shall have been elected or appointed." Plaintiff raises additional challenges to the form and timing of the bill by which the legislation was introduced, among other things.

Here, on the record before it, the Court cannot say that plaintiff's claim is not cognizable. Defendants argue that the Appellate Division has already approved of commissions similar to the Commission here (see *McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252 [1st Dept 2007]). But the Court does not consider *McKinney* to be sufficiently analogous to this case to foreclose any and all challenge to the Commission legislation. Nor does *McKinney* address all the arguments raised by plaintiff.

t **Motion for Preliminary Injunction Denied**

1 Plaintiff has not demonstrated a likelihood of success on the merits or
2 irreparable harm. Thus, she is not entitled to preliminary relief (*Nobu Next*
3 *Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Eklund v Pinkey*,
4 31 AD3d 908, 909 [3d Dept 2006]).

5 Accordingly, it is

6 **ORDERED** that plaintiff's motion for preliminary relief is denied; it is

7 **ORDERED** that defendants' motion to dismiss the causes of action
8 asserted by the Center for Judicial Accountability is granted; it is

9 **ORDERED** that defendants' motion to dismiss the complaint against
10 defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan,
11 the New York State Senate, and Chief Judge Janet M. DiFiore for lack of
12 personal jurisdiction is denied; it is

13 **ORDERED** that the motion to dismiss for failure to state a cause of action
14 is granted with respect to causes of action one through five and seven through
15 ten and those causes of action are dismissed; it is

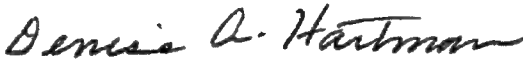
16 **ORDERED** that the motion to dismiss for failure to state a cause of action
17 is denied with respect to cause of action six; it is

18 **ORDERED** that defendants have 30 days from the date of this order to
19 answer; it is

20 **ORDERED** that plaintiff's request for oral argument is denied.

This constitutes the Amended Decision and Order of the Court. The original Amended Decision and Order and all other papers are being transmitted to the County Clerk for filing.

Dated: Albany, New York
May 5, 2017


Denise A. Hartman
Acting Supreme Court Justice

Papers Considered

1. Order to Show Cause Dated September 2, 2016
2. Notice of Right to Seek Intervention
3. Letter Dated September 7, 2016, Correcting Complaint
4. Affidavit of Service Dated September 8, 2016
5. Summons and Verified Complaint, with Exhibits A-K
6. Notice of Cross-Motion to Dismiss the Complaint
7. Affirmation in Opposition to Plaintiff's Application for Preliminary Injunctive Relief and in Support of Defendants' Motion to Dismiss
8. Memorandum of Law in Opposition to Plaintiffs' Application for Preliminary Injunctive Relief and in Support of Defendants' Cross-Motion to Dismiss the Complaint
9. Plaintiff's Affidavit in Further Support of Plaintiffs' Order to Show Cause, in Reply/Opposition to Defendants' Cross Motion & Other Relief
10. Plaintiff's Memorandum of Law in Further Support of Order to Show Cause for a Preliminary Injunction, in Reply/Opposition to Defendants' Cross-Motion, & for Other Relief

Plaintiffs' August 5, 2017 Notice of Appeal, with Pre-Calendar Statement [R.61-79]

SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

----- x
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,

**NOTICE OF APPEAL
with pre-calendar statement**

-against-

Index #5122-16
RJI # 01-16-122174

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 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.
-----x



PLEASE TAKE NOTICE that plaintiffs hereby appeal to the Appellate Division, Third
Department, Justice Building, 5th Floor, Empire State Plaza, Albany, New York 12223, from each
and every part of the decision and order of Acting Supreme Court Justice Denise A. Hartman, dated
June 26, 2017 and entered in the Albany County Clerk's Office on July 3, 2017 (Exhibit A).

Dated: White Plains, New York
August 5, 2017

Yours, etc.



ELENA RUTH SASSOWER, unrepresented plaintiff,
individually & as Director of the Center for Judicial
Accountability, Inc., and on behalf of the People of the State
of New York & the Public Interest

1.

10 Stewart Place, Apartment 2D-E
White Plains, New York 10603
914-421-1200
elena@judgewatch.org

TO: Albany County Clerk
Albany County Court House, Room 128
16 Eagle Street
Albany, New York 12207-1077

Attorney General Eric T. Schneiderman
The Capitol
Albany, New York 12224-0341
ATT: Assistant Attorney General Helena Lynch/of Counsel

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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,

-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 NEW
YORK STATE SENATE, CARL E. HEASTIE,
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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.

Index No. 5122-16
RJI No. 01-16-122174

DECISION AND
ORDER

APPEARANCES:

ELENA RUTH SASSOWER
Plaintiff pro se
PO Box 8101
White Plains, New York 10602

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK
Adrienne J. Kerwin, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

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Hartman, J.

Plaintiff Elena Ruth Sassower, pro se, commenced this action primarily challenging the constitutionality of the Legislature's 2016-2017 budget bills. By Decision and Order dated December 21, 2016, this Court dismissed all but plaintiff's sixth cause of action, in which she additionally challenged the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation as unconstitutional. Plaintiff now moves by order to show cause for summary judgment on the sixth cause of action. Because plaintiff has not demonstrated entitlement to summary judgment, her motion is denied.

Plaintiff also moves for leave to file a supplemental complaint and for a declaration that the Legislature's 2017-2018 budget bills are invalid and an order enjoining the Legislature from enacting and disbursing funds pursuant to 2017-2018 Legislative/Judiciary Budget Bill # S.2001/A.3001. The proposed supplemental complaint re-alleges for the 2017-2018 budget year causes of action that have been dismissed or denied for the 2015-2016 and 2016-2017 budget years. Thus, leave to file a supplemental complaint is denied.

Finally, plaintiff has submitted for the Court's signature subpoenas duces tecum for legislative records and an application for preliminary injunctive relief. Denial of the motion for leave to file a supplemental complaint renders moot her requests for subpoenas duces tecum and preliminary relief.

Procedural History and Background

By Decision and Order dated December 21, 2016, the Court dismissed nine of the ten causes of action asserted in the complaint for failure to state a cause of action, but denied defendants' motion to dismiss with respect to the sixth cause of action. By Decision and Order dated May 5, 2017, the Court denied plaintiff's motion to disqualify and to renew and reargue the December 21, 2016 decision. That same day, the Court issued an Amended Decision and Order, which amended the December 21, 2016 decision to add a recitation of the papers considered.

Plaintiff now moves for summary judgment on the sole surviving cause of action. The sixth cause of action alleges that Chapter 60, Part E of the Laws of 2015, which created the Commission on Legislative, Judicial & Executive Compensation (the Commission) violates the New York State Constitution. The Commission is comprised of three members appointed by the Governor, one by the temporary president of the senate, one by the speaker of the assembly, and two by the chief judge (§ 3.1). The statute requires the Commission, every four years, to

“examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for members of the legislature, judges and justices of the state-paid courts of the unified court system, statewide elected officials, and those state officers referred to in section 169 of the executive law”

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(§ 2.1). The Commission's recommendations "have the force of law, and shall supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law, section 169 of the executive law, and sections 5 and 5-a of the legislative law, unless modified or abrogated by statute prior to April first of the year as to which such determination applies to legislative and executive compensation" (§ 7).

Plaintiff's sixth cause of action alleges that the 2015 legislation is unconstitutional in five sub-causes of action. She claims that (A) it unconstitutionally gives the Commission's recommendations the force of law; (B) it unconstitutionally delegates legislative power without proper safeguards; (C) it violates Article XIII § 7 of the New York State Constitution; (D) it was passed in violation of Article VII §§ 2, 3, and 6 of the New York State Constitution; and (E) it was passed as a result of fraud and in violation of due process. Plaintiff asserts that, as of the Court's December 21, 2016 decision, the record contained facts and law entitling her to summary judgment. In addition to plaintiff's moving affidavit and exhibits, the Court has examined the complaint (and the proposed second supplemental complaint from an earlier action that is incorporated therein) to decide this motion.

Motion for Summary Judgment

The party moving for summary judgment bears the burden of submitting evidence in admissible form demonstrating entitlement to judgment as a matter of law. Once the moving party has met its burden, the burden shifts to the party opposing summary judgment to submit evidence in admissible form that establishes that a material issue of fact exists (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]; *Staunton v Brooks*, 129 AD3d 1371, 1372 [3d Dept 2015]). To succeed in a facial challenge to the constitutionality of a statute, a plaintiff must “surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt” (*Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] [internal quotation marks omitted]). To succeed, the plaintiff “must establish that no set of circumstances exists under which the Act would be valid” (*id.* [internal quotation marks omitted]).

Sub-Causes A and B—Separation of Powers Claims

Plaintiffs first two sub-causes allege that the legislation that created the Commission violates separation of powers principles. “Derived from the separation of powers doctrine, the principle that the legislative branch may not delegate all of its lawmaking powers to the executive branch has been applied with the utmost reluctance (*Boreali v Axelrod*, 71 NY2d 1, 9 [1987]). Thus, although “the Legislature cannot pass on its law-making functions to other

bodies[,] there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature” (*id.* at 10; *see Matter of Retired Public Employees Assn. v Cuomo*, 123 AD3d 92, 97 [3d Dept 2014] [rejecting claim that legislature unconstitutionally delegated its legislative powers to the Civil Service Commission]).

Plaintiff argues nonetheless that the Legislature cannot constitutionally give a commission’s findings and regulations the “force of law.” Plaintiff’s reliance on the dissent in *St. Joseph’s Hospital v Novello* (43 AD3d 139 [4th Dept 2007]) is misplaced. There, the majority of the court upheld a statute that created a commission to make and report its recommendations for, among other things, closing healthcare facilities. The commission’s recommendations had the force of law unless the governor declined to approve them, or if each house of the Legislature adopted a resolution rejecting them. The court upheld the delegation of powers, reasoning that “even if the legislative veto provision were unconstitutional, that provision does not invalidate the remainder of the Legislation” because it would be severable (*id.* at 146). The dissent was of the opinion that the legislative veto provision violated the Presentment Clause and separation of powers doctrine and was not severable (*id.* at 151–154).

The legislation at issue here does not provide for a legislative veto. Rather, the Commission’s recommendations will take effect unless the

Legislature and Executive follow the usual constitutional process for enacting a statute. The constitutional infirmity that concerned the dissent in *St. Joseph's Hospital* is not present here. Thus, neither the majority opinion nor the dissent in that case supports plaintiff's contention that the 2015 legislation violates the separation of powers doctrine because it improperly gives Commission recommendations the force of law.

Nor has plaintiff established that the statute otherwise unconstitutionally delegates legislative powers to the Commission. Although the Commission is entitled to make binding recommendations regarding the pay of public officers and officials, plaintiff has not shown that, by granting such power to the Commission, the Legislature has ceded its "fundamental legislative or policymaking authority" (*Med. Socy. v Serio*, 100 NY2d 854, 864 [2003]). The Commission bill provides a specific task and defined guidelines for the Commission to consider in furtherance of that task (L 2015, ch 60, Part E § 3; see *McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252, 253 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007]). Accordingly, plaintiff has not established her entitlement to judgment as a matter of law on either of her separation of powers sub-causes of action.

Sub-Cause C—Article XIII, Section 7

Plaintiff alleges that the Commission bill violates Article XIII, Section 7 of the New York State Constitution. The Commission bill specifies that

ng recommended salary increases for judges would take effect on April 1 of any of
St. the four years after the Commission's establishment (L 2015, ch 60, Part E § 2
or [b] [1]). For members of the Legislature and statewide elected officials and
on officers, a recommended increase would go into effect on "the first of January
es after the November general election at which members of the state legislature
are elected" (L 2015, ch 60, Part E § 2 [b] [2]).

ie State Constitution Article XIII, Section 7 states that the compensation
h of State officers named in the Constitution must be fixed by law and "shall not
e be increased or diminished during the term for which he or she shall have been
g elected or appointed." And State Constitution Article III, Section 6 provides
l that legislators' salaries must be fixed by law and may not be "increased or
t diminished during, and with respect to, the term for which he or she shall have
r been elected." In contrast, Article VI, Section 25 provides that judicial salaries
; shall be established by law and "shall not be diminished during the term of
office for which he or she was elected or appointed."

Conspicuously absent from Article VI, Section 25 is a prohibition on
granting increases to judicial compensation during their terms. Thus plaintiff
erroneously relies on Article XIII, Section 7's general prohibition against
compensation increases for the State's constitutional officers during the terms
for which they were elected or appointed to argue that the State Constitution
forbids judicial pay raises during judges' current terms of election or

appointment. And to the extent that plaintiff argues that the 2015 legislation creating the Commission unconstitutionally provides for a pay raise to legislators or the State's constitutional officers during the terms in which they have been elected or appointed, given that no pay raise has been recommended or effected, she has not established that "no set of circumstances exists under which the Act would be valid" (*Moran Towing*, 99 NY2d at 448).

Sub-Cause D—Article VII, Sections 2, 3, and 6

Plaintiff has also failed to satisfy her summary judgment burden with respect to her argument that the budget bills resulting in the enactment of the bill creating the Commission (S4610/A6721 2015) violated New York State Constitution Article VII, Sections 2, 3, and 6. Plaintiff has not established that the violations she claims are justiciable or that she is entitled to any relief. The fact that the State Constitution requires the Governor to submit a budget and budget bill before February 1st does not mean that a citizen has standing to seek a court order invalidating legislation passed in violation of that requirement. Likewise, whether the Commission's enabling legislation represents an expenditure or provides revenue, or "relate[s] specifically to some particular appropriation in the bill" may be political questions and not judiciable in this action (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 95–97 [2004]).

Sub-Cause E – Fraud and Due Process

The final allegation in plaintiff's sixth cause of action is that the budget bills creating the Commission were enacted fraudulently and in violation of due process. These allegations have already been rejected by the Court in its Amended Decision and Order dated December 21, 2016.

In sum, plaintiff has not demonstrated that she is entitled to judgment as a matter of law on any of the allegations contained in her sixth cause of action. Neither plaintiff's repeated allegations of fraud, deceit, and collusion, nor her refusal to accept prior court decisions on virtually the same issues satisfies her burden on a motion for summary judgment.

Motion for Leave to File Supplemental Complaint

Plaintiff's motion to file a supplemental complaint is denied. "[L]eave to amend a complaint rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit" (*Moon v Clear Channel Communs., Inc.*, 307 AD2d 628, 629 [3d Dept 2003]). All but one cause of action in the proposed supplemental complaint simply restate for budget year 2017–2018 causes of action that the Court has already determined to be devoid of merit. The remaining proposed cause of action merely restates the facial challenge to the 2015 legislation creating the Commission. It

contains no material "additional or subsequent transactions or occurrences" that would warrant a supplemental pleading (CPLR 3025 [b]).

Requests for Preliminary Relief and Subpoenas Duces Tecum

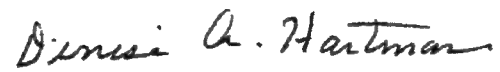
Plaintiff's requests for preliminary declaratory and injunctive relief and subpoenas duces tecum for State Senate and Assembly records are related to the claims she seeks to assert concerning the 2017–2018 budget. Such requests are rendered moot by the denial of the motion to file a supplemental complaint (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714–715 [1980]).

Accordingly, it is

ORDERED that plaintiff's motion brought on by order to show cause dated March 29, 2017, is denied in its entirety.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to defendants' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Dated: Albany, New York
June 26, 2017


Denise A. Hartman
Acting Supreme Court Justice

s”
Papers Considered

1. Summons and Verified Complaint, with Exhibits A–K
2. Order to Show Cause with Preliminary Injunction & TRO
3. Affidavit in Support of Order to Show Cause, with Exhibits 1–3
4. Verified Supplemental Complaint (Proposed)
5. Affirmation of Helena Lynch, Dated April 21, 2017, with Exhibits 1–10
6. Memorandum of Law in Opposition to Plaintiffs’ Application for Partial Summary Judgment, to Supplement the Complaint, and for a Preliminary Injunction and Restraining Order
7. Affidavit in Reply & in Further Support of Plaintiffs’ March 29, 2017 Order to Show Cause with Preliminary Injunction & TRO, with Exhibits 4–15
8. Plaintiffs’ Memorandum of Law in Reply & in Further Support of Their March 29, 2017 Order to Show Cause with Preliminary Injunction & TRO
9. Judicial Subpoena Duces Tecum to New York State Senate Records Access Officer Secretary of the Senate Francine Patience
10. Judicial Subpoena Duces Tecum to New York State Assembly Records Access Officer Robin Marilla

SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

----- X
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,

-against-

VERIFIED COMPLAINT
Index #5122-16

JURY TRIAL DEMANDED

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 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.
----- X

“It is the purpose of the legislature to recognize that each individual citizen and taxpayer of the state has an interest in the proper disposition of all state funds and properties. Whenever this interest is or may be threatened by an illegal or unconstitutional act of a state officer or employee, the need for relief is so urgent that any citizen-taxpayer should have and hereafter does have a right to seek the remedies provided for herein.”

State Finance Law Article 7-A, §123: “Legislative purpose”

Plaintiffs, as and for their verified complaint, respectfully set forth and allege:

1. By this citizen-taxpayer action pursuant to State Finance Law Article 7-A [§123 *et seq.*], plaintiffs seek declaratory judgments as to the unconstitutionality and unlawfulness of the Governor’s Legislative/Judiciary Budget Bill #S.6401/A.9001, both the original bill and the enacted amended bill #S.6401-a/A.9001-a. The expenditures of the enacted budget bill – embodying the

Legislature's proposed budget for fiscal year 2016-2017, the Judiciary's proposed budget for fiscal year 2016-2017, and tens of millions of dollars in uncertified and nonconforming legislative and judicial reappropriations – are unconstitutional, unlawful, and fraudulent disbursements of state funds and taxpayer monies, which plaintiffs hereby seek to enjoin.

2. Plaintiffs also seek declarations voiding the judicial salary increases recommended by the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation because they are statutorily-violative, fraudulent, and unconstitutional, with further declarations striking the budget statute establishing the Commission – Chapter 60, Part E, of the Laws of 2015 – as unconstitutional and itself fraudulent – and injunctions to prevent further disbursement of state money pursuant thereto.

3. Additionally, plaintiffs seek declarations that the “process” by which the State budget for fiscal year 2016-2017 was enacted is unconstitutional, specifically including:

- the failure of Senate and Assembly committees and the full chambers of each house to amend and pass the Governor's appropriation bills and to reconcile them so that they might “become law immediately without further action by the governor”, as mandated by Article VII, §4 of the New York State Constitution;
- the so-called “one-house budget proposals”, emerging from closed-door political conferences of the Senate and Assembly majority party/coalitions;
- the proceedings of the Senate and Assembly joint budget conference committee and its subcommittees, conducted by staff, behind-closed-doors, based on the “one-house budget proposals”; and
- the behind-closed-doors, three-men-in-a-room budget deal-making by the Governor, Temporary Senate President, and Assembly Speaker.

4. Finally, plaintiffs seek declarations as to the unconstitutionality and unlawfulness of the appropriation item entitled “For grants to counties for district attorney salaries” in the Division of Criminal Justice Services' budget for fiscal year 2016-2017, contained in Aid to Localities Budget

Bill #S.6403-d/A.9003-d and of items of reappropriation therein pertaining to previous “grants to counties for district attorney salaries” and “recruitment and retention” incentives – and enjoining disbursement of state monies pursuant thereto.

5. For the convenience of the Court, a Table of Contents follows:

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* * *

VENUE

6. Pursuant to State Finance Law §123(c)(1), this action is properly venued in the Albany County Supreme Court, as Albany County is where the unconstitutional, unlawful, and fraudulent disbursements sought to be enjoined are occurring and where defendant state officers have their principal offices.

THE PARTIES

7. Plaintiff CENTER FOR JUDICIAL ACCOUNTABILITY, INC. (CJA) [hereinafter “CJA”] is a national, non-partisan, non-profit citizens’ organization, headquartered in White Plains, New York and incorporated in 1994 under the laws of the State of New York. In addition to the taxes it pays to the State of New York, its New York members pay taxes to the State of New York.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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,

DECISION AND
ORDER

-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 NEW
YORK STATE SENATE, CARL E. HEASTIE,
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Speaker, THE NEW YORK STATE ASSEMBLY,
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capacity as Attorney General of the State
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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,

Index No. 5122-16
RJI No. 01-16-122174

Defendants.

APPEARANCES:

ELENA RUTH SASSOWER
Plaintiff pro se
PO Box 8101
White Plains, New York 10602

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK
Adrienne J. Kerwin, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

Hartman, J.

Plaintiffs Center for Judicial Accountability and Elena Sassower seek a declaratory judgment under the State Finance Law that the Legislature's and Judiciary's proposed 2016–2017 budgets are improper and that the budgeting process violates various New York State Constitutional and statutory provisions, and an injunction blocking certain disbursements under the 2016–2017 legislative and judicial budget bill, including judicial pay raises and district attorney salary grants. Plaintiffs also move for a preliminary injunction preventing disbursement of funds.

Defendants move to dismiss the complaint to the extent it seeks to assert claims on behalf of the Center for Judicial Accountability. They also move to dismiss the complaint against defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore for lack of personal jurisdiction. Defendants further move to dismiss each cause of action pursuant to CPLR 3211 (a) (7).

Plaintiff's motion for preliminary relief is denied. Defendants' motion to dismiss the complaint to the extent it seeks to assert claims on behalf of the Center for Judicial Accountability is granted. Defendants' motion to dismiss for lack of personal jurisdiction is denied. Defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) is granted to the extent that all causes of action except the sixth are dismissed.

Background

Plaintiffs commenced a similar action in 2014 to challenge the Legislature's 2014–2015 budget. In October 2014, Supreme Court (McDonough, J.) dismissed three of the complaint's four causes of action. With leave of the Court, plaintiffs served and filed a supplemental complaint, which expanded their challenge to include the 2015–2016 budget, adding four new causes of action that mirrored the first four. In August, 2016, the Court dismissed the supplemental complaint and made a number of declarations validating the challenged budgets. The Court denied plaintiffs' motion to serve a second supplemental complaint, which would have added an additional eight causes of action and which included the 2016–2017 budget, explaining that proposed causes of action 9–12 were "patently devoid of merit" and that proposed causes of action 13–16 arose "out of materially different facts and legal theories" than those that had been alleged in the 2014 complaint.

In this action, plaintiffs' first four causes of action are essentially identical to the first four causes of action asserted in the 2014 action, as well as causes of action 9–13 asserted in the proposed second supplemental complaint in that action. Cause of action five in this complaint replicates part of causes of action 12 and 16 from the 2014 proposed second supplemental complaint. And causes of action 6–9 in this complaint correspond to causes of action 13–16 from the 2014 proposed second supplemental complaint. Cause of

action 10 in this complaint does not appear to have a counterpart from the 2014 action.

The Complaint's Assertion of Claims on Behalf of the Center for Judicial Accountability Dismissed

CPLR 321 (a) requires corporations to appear by attorney. Plaintiff Elena Ruth Sassower is not an attorney. Accordingly, the complaint is dismissed to the extent that it seeks to assert causes of action on behalf of the Center for Judicial Accountability (*see Pelaez v Silverstone*, 19 NY3d 954 [2012]; *Boente v Peter C. Kurth Off. of Architecture & Planning, P.C.*, 113 AD3d 803, 804 [2d Dept 2014]).

Personal Jurisdiction

The Office of the Attorney General argues that the Court lacks personal jurisdiction over defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore because plaintiff herself made service upon them. "Although CPLR 2103 (a) requires service to be made by a person who is not a party to the action, a violation of this provision is a mere irregularity which does not vitiate service" where, as here, no resulting prejudice is shown" (*Neroni v Follender*, 137 AD3d 1336, 1337 [3d Dept 2016] [internal quotation marks omitted]). Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.

The First Five Causes of Action Are Dismissed

In its April 2016 decision, the Court held that causes of action 9–12 in the proposed second supplemental complaint were “patently devoid of merit,” given the Court’s dismissal of similar causes of action regarding prior budget years (*citing Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Because causes of action 1–4 are identical to those the Court held “patently devoid of merit,” they are barred (*see Maki v Bassett Healthcare*, 141 AD3d 979, 981 [3d Dept 2016]). Likewise, the fifth cause of action, which alleges violations of New York State Constitution Article VII, §§ 4, 5, 6, must be dismissed because it restates arguments and claims already rejected by the Court in its prior decisions.

Causes of Action Seven through Ten Are Dismissed

Causes of action seven and eight both challenge the actions of the Commission on Legislative, Judicial, and Executive compensation, which is not a party to this action. Accordingly, these causes of action must be dismissed. The ninth cause of action challenges the constitutionality of “three-men-in-a-room” budget negotiation. As defendants point out, the negotiation of the 2016–2017 budget is moot, because the budget has passed (*see N.Y. Pub. Interest Research Group, Inc. v Regan*, 91 AD2d 774 [3d Dept 1982], *lv denied* 58 NY2d 610 [1983]). Assuming without deciding that the exception for issues capable of repetition but evading review applies, plaintiff has failed to state a cause of

action. Taking all the allegations in the complaint as true, plaintiff has not alleged a violation of law. None of the authority cited by plaintiff prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiations (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 85 [2004]; *Urban Justice Ctr. v Pataki*, 38 AD3d 20, 27–30 [1st Dept 2006], *appeal dismissed, lv denied* 8 NY3d 958 [2007]).

The tenth cause of action must also be dismissed. Plaintiff's itemization arguments are non-justiciable (*Pataki*, 4 NY3d at 96; *Urban Justice Ctr.*, 38 AD3d at 30). And the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary. Lastly, the reference to fiscal year 2014–2015 rather than 2016–2017 is a typographical error that does not invalidate the challenged legislation (*see Matter of Morris Bldrs., LP v Empire Zone Designation Bd.*, 95 AD3d 1381, 1383 [3d Dept 2012]).

Cause of Action Six States a Claim

“When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference” (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). The key question before the court on a CPLR 3211 (a) (7) motion to dismiss is “whether the facts alleged fit within any cognizable legal theory

(*Loch Sheldrake Beach & Tennis Inc. v Akulich*, 141 AD3d 809, 814 [3d Dept 2016]).

Plaintiff argues that the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation (Commission) violates the New York State Constitution (see Chapter 60, Laws of 2015 [Part E]). In particular, she argues that the provision therein that gives the Commission's recommendations the "force of law" violates the separation of powers doctrine and improperly delegates legislative function to the Commission. She further argues that the legislation violates Article XIII, § 7 of the New York State Constitution, which states that the compensation of public officers "shall not be increased or diminished during the term for which he or she shall have been elected or appointed." Plaintiff raises additional challenges to the form and timing of the bill by which the legislation was introduced, among other things.

Here, on the record before it, the Court cannot say that plaintiff's claim is not cognizable. Defendants argue that the Appellate Division has already approved of commissions similar to the Commission here (see *McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252 [1st Dept 2007]). But the Court does not consider *McKinney* to be sufficiently analogous to this case to foreclose any and all challenge to the Commission legislation. Nor does *McKinney* address all the arguments raised by plaintiff.

Motion for Preliminary Injunction Denied

Plaintiff has not demonstrated a likelihood of success on the merits or irreparable harm. Thus, she is not entitled to preliminary relief (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Eklund v Pinkey*, 31 AD3d 908, 909 [3d Dept 2006]).

Accordingly, it is

ORDERED that plaintiff's motion for preliminary relief is denied; it is

ORDERED that defendants' motion to dismiss the causes of action asserted by the Center for Judicial Accountability is granted; it is

ORDERED that defendants' motion to dismiss the complaint against defendants Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate, and Chief Judge Janet M. DiFiore for lack of personal jurisdiction is denied; it is

ORDERED that the motion to dismiss for failure to state a cause of action is granted with respect to causes of action one through five and seven through ten and those causes of action are dismissed; it is

ORDERED that the motion to dismiss for failure to state a cause of action is denied with respect to cause of action six; it is

ORDERED that defendants have 30 days from the date of this order to answer; it is

ORDERED that plaintiff's request for oral argument is denied.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to defendant's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Dated: Albany, New York
December 21, 2016

Denise A. Hartman
Denise A. Hartman
Acting Supreme Court Justice

EXHIBIT 2

Judges Get Raises, Leaving OCA to Decide How to Pay for Them

New York Law Journal (Online)

April 4, 2016 Monday

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New York Law Journal

Length: 560 words

Byline: Joel Stashenko

Body

ALBANY - Judges are getting an 11 percent raise in the fiscal year that began Friday, but it is unclear where the Office of Court of Administration will find the money to pay for it.

The state's \$156 billion budget on the verge of adoption Friday did not alter the Commission on Legislative, Judicial, & Executive Compensation's pay raise recommendations for about 1,400 judges.

Under the law establishing the commission, its recommendations automatically go into effect unless the governor or Legislature expressly alters the plan prior to April 1. Neither did.

However, the budget did not include a supplemental appropriation of \$27 million sought by court administrators to pay for the raises.

The raises will hike the salaries of Supreme Court justices from \$174,000 to \$193,000 in the first year, and those of all other state-paid judges by comparable proportions.

Judges' increases will be limited to cost-of-living raises for the year beginning April 1, 2017, and then salaries will go up by an additional 5 percent on April 1, 2018, under the commission's recommendations (NYLJ, Dec. 28, 2015).

The recommendation came after the mandated Dec. 1 deadline for submission of the Judiciary's budget, so the budget did not include additional money for raises.

Gov. Andrew Cuomo's budget proposal recommended that the Judiciary pay for the raises out of its initial \$1.89 billion budget request.

Chief Administrative Judge Lawrence Marks said Friday he would not discuss a new budget until it is adopted by the Legislature and signed by Cuomo. Governors have the authority to make line-item vetoes in the spending plan, a prerogative that usually takes two or three days to implement.

Judges Get Raises, Leaving OCA to Decide How to Pay for Them

The Judiciary is legally obligated to provide the judges' salary increases, so its only recourse is to make cuts in other areas of the 2016-17 spending plan.

When Marks appeared at a joint Assembly-Senate budget hearing in February, Senate Judiciary Committee Chairman John Bonacic, R-Mount Hope, suggested that the courts should shelve the proposed \$15 million increase in civil legal services spending and apply it toward the judicial raises ([NYLLJ, Feb. 5](#)).

Overall court spending in the Judiciary's budget was 2.4 percent higher than in 2015-16 budget, or 0.4 percent higher than Cuomo said he supported for direct entities under his control.

In an area of the budget outside of the Judiciary's spending plan, the Legislature provided \$99.4 million to the Office of Indigent Legal Services, an increase of \$12.4 million over last fiscal year.

The bulk of the increase-\$10.4 million-will go to reduce the caseloads of lawyers providing counsel to indigent criminal clients in the five counties covered by the settlement in *Hurrell-Harring v. State of New York*.

Neither the Assembly nor the Senate followed through on language in their preliminary budget resolutions that hinted at the state providing broader support for defending indigent defendants.

"We tried very hard to obtain additional funding for the counties that are left out of the [*Hurrell-Harring*] settlement, not because they are superior or their systems are legally compliant, but just because they didn't happen to have gotten sued," William Leahy, director of the Indigent Legal Services Office said Friday. "There is no question we are making progress and there is no question the progress is uneven and incomplete."

Load-Date: April 2, 2016