SUPREME COURT OF THE STATE OF NEW YORK
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 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

MEMORANDUM OF LAW IN OPPOSITION TO MOTION, VIA ORDER TO SHOW CAUSE, FOR DISQUALIFICATION, REARGUMENT, RENEWAL, VACATUR, AND LITIGATION COSTS

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PRELIMINARY STATEMENT

Defendants, Governor Andrew M. Cuomo, the New York State Senate, the New York State Assembly, John J. Flanagan, Carl E. Heastie, Eric T. Schneiderman, Thomas DiNapoli, and Janet M. DiFiore, respectfully submit this memorandum of law in opposition to the motion, brought via Order to Show Cause signed by the Court on February 21, 2017, by Plaintiff, pro se, Elena Ruth Sassower, for an order (i) disqualifying the Honorable Denise A. Hartman, Acting Supreme Court Justice; (ii) granting re-argument and renewal of Defendants' motion to dismiss, pursuant to Rule 2221 of the New York Civil Practice Law and Rules; (iii) vacating the Court's Decision and Order dated December 21, 2016 on Defendants' motion to dismiss, for "fraud" and lack of jurisdiction; and (iv) litigation costs.

In her motion, Plaintiff fails to submit any reason why Judge Hartman should be disqualified from adjudicating this case. Plaintiff also fails to submit any substantive argument for reargument of her opposition to Defendants' motion to dismiss, and she fails to identify any new fact that was unavailable to her that could justify renewal. And, because her argument for vacatur rests solely on the faulty premise that the Court lacked jurisdiction over this case because of fraud and bias, there is no basis to vacate the judgment. Finally, Plaintiff fails to provide the Court with any reason why she should be awarded motion costs.

Plaintiff's motion should be denied its entirety.

SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

A. Causes of Action Asserted in Complaint

In a Complaint filed September 2, 2016, Plaintiffs Elena Ruth Sassower and the Center for Judicial Accountability ("CJA") asserted ten causes of action, as citizen-taxpayers, challenging the Governor's Legislative/Judiciary Bill S.6401/A.9001, and the amended bill

S.6401-a/A.9001-a. Specifically, Plaintiffs alleged that: (1) the Legislature's proposed budget for Fiscal Year 2016-2017 is unconstitutional, Compl. ¶¶ 24-33; (2) the Judiciary's proposed budget for 2016-2017 is unconstitutional, Compl. ¶¶ 35-39; (3) budget bill S.6401-a/A.9001-a is unconstitutional over and beyond the legislative and judiciary budgets it embodies, "without revision," Compl. ¶¶ 41-47; (4) the process by which the State budget for Fiscal Year 2016-2017 violated its own rules, and "nothing lawful or constitutional" can emerge therefrom, Comp. ¶¶ 49-53; (5) the process by which the State budget for Fiscal Year 2016-2017 was enacted violated Article VII, §§ 4, 5, and 6 of the New York State Constitution, Compl. ¶¶ 55-58; (6) Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, as written, for five separate reasons, including unconstitutional delegation, and the judicial salary increase recommendations by the Commission on Legislative, Judicial and Executive Compensation (the "Commission") are null and void, Compl. ¶¶ 60-68; (7) Chapter 60, Part E of the Laws of 2015 is unconstitutional, as applied, Compl. ¶¶ 70-76; (8) the Commission's violations of its express statutory requirements of Chapter 60, Part E, of the Laws of 2015 render its judicial salary recommendations null and void, Compl. ¶¶ 78-80; (9) the "three-men-in-a-room" budget deal-making process is unconstitutional, Compl. ¶¶ 82-84; and (10) the appropriation item entitled "For grants to counties for district attorney salaries in bill S.6403-d/A.9003-d does not authorize disbursements for Fiscal Year 2016-2017 and is unconstitutional, Compl. ¶¶ 86-110. Plaintiffs seek declaratory and injunctive relief.

B. Similar Citizen-Taxpayer Action Commenced in 2014

In the Complaint, Plaintiffs expressly state that the first, second, third, fourth, sixth, seventh, eighth, and ninth of their asserted causes of action are duplicative of causes of action asserted in a previous citizen-taxpayer suit, commenced in 2014 (the "2014 Action"). See

Compl. ¶¶ 24, 35, 41, 49, 60, 70, 78, and 82, respectively. The Court further identified Plaintiffs' fifth cause of action in the Complaint as partially duplicative of two causes of action in the 2014 Action. Decision & Order at 3.

In the 2014 Action, Plaintiffs served and filed a supplemental complaint adding four new causes of action that mirrored the first four asserted therein. Decision & Order at 3. In a decision issued in April 2016, the Court in the 2014 Action dismissed the supplemental complaint and issued certain declarations validating the challenged budgets. See Decision & Order at 3. Plaintiffs then moved to file a second supplemental complaint in the 2014 Action to add eight new causes of action, four of which were duplicative of the first four causes of action, but the court denied the motion because the four duplicative causes of action lacked merit and the remaining four causes of action arose out of materially different facts and legal theories. See Decision & Order at 3, 5.

C. Decision and Order Dated December 21, 2016

In the Decision and Order, the Court dismissed all causes of action in the Complaint except the sixth. The first four causes of action in the Complaint were duplicative of causes of action in the 2014 Action that were dismissed, as devoid of merit. Decision & Order at 5. The fifth cause of action was dismissed because it merely re-stated arguments that were rejected by the court in the 2014 Action. Decision & Order at 5.

The seventh and eighth causes of action were dismissed because they challenged actions by the Commission, which is not a party to this litigation. Decision & Order at 5.

The ninth cause of action, which challenged the "three-men-in-a-room" budget process, was dismissed as moot, because the 2016-2017 budget had been passed, and even if an exception

to the mootness doctrine were applicable, Plaintiffs did not state a cognizable claim. Decision & Order at 5-6. The tenth cause of action was dismissed as non-justiciable. Decision & Order at 6.

The Court held that the sixth cause of action states a cognizable claim. Decision & Order at 7. The sixth cause of action asserts that the 2015 legislation that created the Commission is unconstitutional, because, among other things, it violates the separation of powers doctrine and improperly delegates legislative function to the Commission.

The Court also dismissed CJA as a party because it is a corporation, and corporations are required, by C.P.L.R. 321(a), to appear by an attorney. Plaintiff Ruth Sassower is not an attorney. Decision & Order at 4.

Defendants submitted their Verified Answer on January 30, 2017.

ARGUMENT

POINT I

PLAINTIFF DOES NOT IDENTIFY ANY VALID GROUND TO DISQUALIFY JUDGE HARTMAN FROM ADJUDICATING THIS LITIGATION

Plaintiff argues that disqualification of Judge Hartman is required by Judiciary Law § 14 and by section 100.3E of the Chief Administrator's Rules Governing Judicial Conduct, see 22 N.Y.C.R.R. § 100.3(E). Judiciary Law § 14 provides, in pertinent part:

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. . . .

Judiciary Law ¶ 14.

The relevant subsections of 22 N.Y.C.R.R. § 100.3(E) appear to be:

> (E) Disqualification.
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

> (a) (i) the judge has a personal bias or prejudice concerning a party; or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
> . . .
> (c) the judge knows that he or she . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;
> (d) the judge knows that the judge . . .
> . . .
> (iii) has an interest that could be substantially affected by the proceeding.

22 N.Y.C.R.R. § 100.3(E).

Plaintiff's argument for disqualification appears to be that Judge Hartman is "interested" in the litigation. This appears to be based on Judge Hartman's prior employment with Office of the New York Attorney General, as well as her position employment as a judge.

"Interest" in Judiciary Law § 14 means a direct pecuniary interest in the outcome of a case. See Ralis v Ralis, Index No. 2014-9800, 2017 N.Y. App. Div. LEXIS 203, at *6 (2d Dep't Jan. 11, 2017). In 22 N.Y.C.R.R. § 100.3(E), interest is expressly defined as "an economic interest" in the subject matter at issue in the litigation. 22 N.Y.R.R.R. §100.3(e)(1)(c).

To the extent Plaintiff argues that Judge Hartman has an interest in the litigation because the 2016-2017 budget contains items regarding the judiciary, including salary recommendations, her argument is meritless. Courts have held that disqualification is not appropriate in cases involving judicial salaries. See Pines v. State of New York, 115 A.D.3d 80, 84-85 (2d Dep't 2014) (explaining that Rule of Necessity required adjudication, by judges, of a question whether statutory provision increased judicial salaries[1]). If disqualification is not appropriate in a case directly involving judicial salaries, it is certainly not appropriate here, where Plaintiff challenges a budget that contains recommendations regarding judicial salaries. Plaintiff commenced this

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[1] Defendants do not suggest that the Rule of Necessity – which presumes a possibility of bias – applies here. Rather, the argument is that, even in cases directly involving, unlike here, judicial salaries, disqualification is not necessary or appropriate.

litigation. She cannot reasonably be surprised that the official adjudicating the case is a judge. Moreover, Plaintiff should not be permitted to, by leveling baseless accusation of fraud and bias, create an artificial controversy to be used as an argument for recusal. See Spremo v. Babchik, 155 Misc. 2d 796, 799 (Sup. Ct. N.Y. County 1992) ("A litigant cannot be allowed to create a sham controversy by suing a Judge without justification, and to then use that sham as a means for achieving the Judge's recusal.").

Nor does Judge Hartman's prior employment with the Office of the Attorney General constitute an interest in this litigation. Plaintiff fails to explain how Judge Hartman's former employment with the Office of the Attorney General constitutes a pecuniary interest in this litigation. To the extent Plaintiff suggests that some other provision of Judiciary Law §14 requires disqualification, Plaintiff is incorrect. Case law involving former district attorneys presiding over criminal cases is instructive. Courts have consistently held that recusal of such judges is not required as a general matter, even where the judge had previously been involved in prosecuting the defendant. See, e.g., People v. Call, 287 A.D.2d 877, 878-79 (3d Dep't 2001) (holding defendant was not denied a fair trial because judge had been a district attorney years earlier who successfully prosecuted defendant); People v. Miller, 194 A.D.2d 230, 231 (4th Dep't 1993) ("Defendant was not denied a fair trial by the failure of the Trial Judge to recuse himself on the ground that, several years earlier, the Trial Judge had served as District Attorney and he had prosecuted defendant on unrelated matters.").

And Plaintiff's general allegations of bias are not grounds for disqualification under 22 N.Y.C.R.R. § 100.3(E) or Judiciary Law § 14. Plaintiff is required to show proof that demonstrates bias or prejudice. See Modica v. Modica, 15 A.D.3d 635, 636 (2d Dep't 2005). Plaintiff offers nothing but her own circular reasoning and conclusory accusations. It is settled

law that, "[a]bsent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience." Galanti v Kraus, 98 A.D.3d 559, 559 (2d Dep't 2012); see also Spremo, 155 Misc. 2d 796 at 800 ("A motion for recusal is addressed to the conscience of the court and in the absence of ill will to a litigant, a Judge has an affirmative duty not to recuse himself, but to preside over the case.").

Plaintiff has demonstrated no basis for disqualifying Judge Hartman from adjudicating this litigation.

POINT II

PLAINTIFF FAILS TO SET FORTH GROUNDS TO REARGUE OR RENEW HER OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff appears to set forth her arguments supporting reargument and renewal in her "Analysis of the December 21, 2016, Decision & Order of Acting Supreme Court Justice Denise A. Hartman," which Plaintiff deems to be a "legal autopsy" of the Decision & Order. Pl.'s Ex. U. Plaintiff's "analysis" consists of flawed reasoning, unsupportable assertions, and a fundamental misunderstanding of what questions are examined by a court in the context of a motion to dismiss a pleading.

A. Plaintiff Fails to Show that She is Entitled to Reargue Her Opposition to Plaintiff's Motion to Dismiss

The requirements for a motion for leave to reargue a prior motion are set forth in C.P.L.R. 2221(e), which provides, in pertinent part, that such a motion "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." C.P.L.R. 2221(d)2). Plaintiff fails to identify any relevant fact or law that was purportedly overlooked or misapprehended by the Court.

Plaintiff suggests that the Court misapprehended the standard on a motion to dismiss. Plaintiff asserts that, on a motion to dismiss, "all allegations [must] be deemed true." Pl.'s Ex. U at 2. Plaintiff is only partly correct. On a motion to dismiss pursuant to C.P.L.R. 3211(a)(7), the reviewing court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007). However, "'conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.'" Rodriguez v. Jacoby & Meyers, LLP, 126 A.D.3d 1183, 1185 (3d Dep't 2015) (quoting Godfrey v. Spano, 13 N.Y.3d 358, 373 (2009)); see also Goel v. Ramachandran, 111 A.D.3d 783, 791 (2d Dep't 2013) ("[O]n a motion to dismiss pursuant to CPLR 3211 (a) (7), bare legal conclusions are not presumed to be true." (internal quotation marks omitted)).

Plaintiff also fails to identify any misapprehension of the law or facts in the specific rulings in the Decision & Order. As to the dismissal of CJA as a party, it is an express procedural requirement that a corporation must appear by an attorney. C.P.L.R. 321(a) ("[A] corporation or voluntary association shall appear by attorney."). As is not disputed, no attorney has entered an appearance in this action on behalf of CJA. Therefore, CJA cannot appear as a party.

As to causes of action one through four, Plaintiff alleges that her briefing in opposition the Defendants' motion demonstrated that the judge in the 2014 Action was biased, and the Court in this action somehow "concealed" Plaintiff's analysis. Pl.'s Ex. U at 14. Plaintiff also complains the Court "concealed" causes of action one through four by not reciting them in their entirety the Decision & Order, and "concealed" Defendants arguments in their motion by not

also held that the ninth cause of action did not state a cognizable claim. Plaintiff's ninth cause of action contains nothing more than the conclusory heading that the "Three-Men-in-a-Room Budget Deal-Making is Unconstitutional, As Unwritten and As Applied" and refers to the sixteenth cause of action in the second supplemental complaint in the 2014 Action. See Compl. ¶¶ 81-84. The sixteenth cause of action in the 2014 Action alleges that the three-men-in-room meetings violated Article VII, §§ 3, 4, and 7 of the New York Constitution. See Kerwin Aff. Ex. A (Plaintiff's proposed second amended complaint in 2014 Action), ¶¶ 459-466. As Defendants argued in their Memorandum of Law, Plaintiff fails to identify any violation of Article VII, § 3, 4, or 7 because nothing in those sections prohibits the Governor from meeting with the leaders of the Senate or the Assembly to discuss the budget. Defs.' Mem. at 8-9. Plaintiff's motion to reargue does not identify any provision in Article VII, §§ 3, 4, or 7 that is violated by the Governor's meeting with leaders of the Legislature. Accordingly, Plaintiff fails to identify any law or fact that the Court purportedly overlooked or misapprehended.

Plaintiff fails to present any argument as to why the court purportedly erred by finding her tenth cause of action – regarding appropriations for district attorney salaries – was non-justiciable. The only specific provisions of law that Plaintiff alleges are violated by the appropriations provision are County Law §§700.10 and 700.11, and Judiciary Law ¶ 183-a. See Compl. ¶¶ 92 (a), 94-102. Plaintiff fails to identify, in the Complaint, or in her motion to reargue, any provision of County Law §§ 700.10 or 700.11, or Judiciary Law § 183-a, that was violated by the 2016-2017 budget bill. And, as set forth in the Complaint, the bill provides for the appropriations "[n]otwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary." See Compl. ¶ 89.

With respect to Plaintiff's motion for preliminary injunction, Plaintiff argues that the Court erred in finding that Plaintiff had not shown any likelihood of success on the merits because Plaintiff had demonstrated likely success in her Complaint, at oral argument, and in her memorandum of law in opposition to Defendants' motion to dismiss. Pl.'s Ex. U at 21. This reasoning can be most charitably described as circular. Plaintiff argues, in effect, that she has demonstrated likely success on the merits because she has demonstrated likely success on the merits. See Pl.'s Ex. U at 21.

Lastly, Plaintiff argues that the Decision & Order must be vacated because the Court did not set forth therein all of the papers relied upon, which is required by C.P.L.R. 2219(a). See Pl.'s Ex. U at 23-24. The Court's omission of the recital of the papers relied on did not affect a substantial right of any party. Accordingly, the only relief Plaintiff is entitled to is as a simple correction of the order. C.P.L.R. 5019(a) provides:

> A judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party. A trial or an appellate court may require the mistake, defect or irregularity to be cured.

C.P.L.R. 5019(a).

Courts generally deem such a correction as a "resettlement" of the recital paragraphs of the order. This is the only relief to which Plaintiff is entitled. See Rakhlev v. New York City Hous. Auth., 253 A.D.2d 526, 527 (2d Dep't 1998) (holding party "was entitled to resettlement of the recital paragraphs of the order . . . to reflect the fact that it submitted papers in opposition to the petitioners' application"); Carr v. Integon General Ins. Corp., 185 A.D.2d 831 (2d Dep't 1992) ("Assuming that the plaintiff is correct and that the recitals in the order are inaccurate or untrue, it was incumbent upon the plaintiff to seek resettlement of the order." (citing C.P.L.R. 5019(a); C.P.L.R. 2219(a))).

Plaintiff's motion to reargue fails to identify any law or facts overlooked or misapprehended by the Court, or any other error by the Court justifying reargument.

B. Plaintiff Fails to Show that She is Entitled to Renew Her Opposition to Defendants' Motion to Dismiss

The requirements for a motion for leave to renew a prior motion are set forth in C.P.L.R. 2221(e), which provides, in pertinent part, that such a motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," C.P.L.R. 2221(e)(2), and "shall contain reasonable justification for the failure to present such facts on the prior motion," C.P.L.R. 2221(e)(3).

Plaintiff does not claim any change in the law that would affect the Decision & Order. She alleges only new facts. See Sassower Aff. ¶¶ 8-14. The main "new fact[] not offered on the prior motion" by Plaintiff appears to be Judge Hartman's previous employment with the Office of the New York State Attorney General. See Sassower Aff ¶ 9-10. Plaintiff alleges that this fact was not available to her because she was awaiting a response to a FOIL request for this information. Sassower Aff. ¶ 8. But C.P.L.R. 2221(e)(3) requires Plaintiff to set forth a reasonable justification for her failure to present that fact. That Plaintiff was awaiting FOIL responses does not justify her delay, because that information was publicly available on the website of the New York State Unified Court System. See https://iapps.courts.state.ny.us/judicialdirectory/Bio?JUDGE_ID=YWjtpJ3pEVHh6/pQwYGgiw%3D%3D.

Plaintiff also states that she sought, via FOIL, records related to the Office of the Attorney General's guidelines regarding conflicts of interest, and statutory obligations related to representation of clients. Sassower Aff. ¶ 12. But guidelines are not facts. Nor are those

guidelines material to Defendants' motion. Plaintiff also identifies as a "new fact" the "Excellence Initiative" by Chief Judge Fiore, but the Excellence Initiative is not a fact, and is not material to Defendants' motion.

Plaintiff fails to identify any new fact that was unavailable to her prior to the issuance of the Decision & Order.

POINT III

PLAINTIFF FAILS TO ESTABLISH ANY BASIS TO VACATE THE DECISION AND ORDER

Plaintiff seeks an order vacate the Decision & Order pursuant to C.P.LR. 5015(a)(4), which provides that a court may relieve a party from a judgment or order where the court lacked subject matter jurisdiction to issue the judgment or order. Plaintiff's argument that the Court lacked subject matter jurisdiction is premised solely on Plaintiff's groundless claim for disqualification of Judge Hartman. Because there is no basis to disqualify Judge Hartman, the Court had and has subject matter jurisdiction over this action.

Plaintiff overlooks that if the Court lacks subject matter jurisdiction over this action, then the Court is without jurisdiction over the entire action. This means that the Court would not have jurisdiction to grant Plaintiff any of the other relief requested, even if those requests for relief had any merit. Cf. Hitchcock v. Pyramid Centers of Empire State Co., 151 A.D.2d 837, 839 (3d Dep't 1989) (explaining that if court vacates judgment for lack of subject matter jurisdiction, it may not impose conditions on the vacatur). Moreover, in the absence of subject matter jurisdiction, the entire action must be dismissed.

POINT IV

PLAINTIFF IS NOT ENTITLED TO COSTS

Plaintiff seeks costs of $100.00, pursuant to C.P.LR. 8202. Plaintiff is not entitled to costs. C.P.L.R. 8202 provides: "Costs awarded on a motion shall be in an amount fixed by the court, not exceeding one hundred dollars." C.P.L.R. 8202.

Motion costs are discretionary. See, e.g. Carp v. Marcus, 116 A.D.2d 854, 854 (3d Dep't 1986). Plaintiff submits no argument in support of her request for motion costs, and the Court should not exercise its discretion to grant such costs. Plaintiff filed an action with this Court in which nine of the ten causes of action she asserted had already been dismissed in prior litigation or were patently meritless. The Court properly dismissed those nine causes of action. See Decision & Order at 5-6. Plaintiff now files a groundless motion to disqualify the Judge and vacate the Decision & Order. Plaintiff should not be rewarded for filing a baseless and vexatious motion, in support of which she makes no substantive, reasoned argument.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's motion and requests for relief in all respects, and order such other and further relief as the Court shall seem just and equitable.

Dated: Albany, New York
March 22, 2017

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