SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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MALCOLM A SMITH
Plaintiff

Index # 4912/09

v.

PEDRO ESPADA, JR.,
Defendant

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REPLY MEMORADUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS

Preliminary Statement

The defendant, Pedro Espada, Jr., respectfully submits the instant reply memorandum of law to that filed by the plaintiffs. The verified complaint should be dismissed, any restraining order should be lifted and the matter be left to the Legislative Body involved to work out its internal governance by the actions of the members qualified to act and elected by the People of the State of New York. Democracy itself is a messy business at times, not to be neatened up by the Judiciary, governed by the press or to be the express will of a single State Senator who has lost the political support that placed him into a position when the same political process removes him from a position of power. The unseemly clinging to power after what was in effect a vote of no confidence undermines basic fundamental democracy within the Senate.

The plaintiff, bolstered by his Secretary of the Senate, Angelo Aponte, has prevented the Senate from fulfilling its constitutional duties and conducting legislative business by refusing to recognize the fact that any 32 votes constitutes a majority in this

Senate. The resort to judicial intervention is a further attempt to subvert governmental operations for his own purposes.

The body rejected one Temporary President and installed another. The Constitution, Law and Rules permit this act, and the process was in all respects proper and beyond the jurisdiction and justiciability of the Judicial Branch.

STATEMENT OF FACTS

The facts relevant to the action are set out in the affirmations in the earlier pleadings principally that of John Casey, Jr., in the motion to dismiss, and Frank Gluchowski, in this reply.

POINT I

OFFICERS OF THE GOVERNMENT MAY SERVE MULTIPLE ROLES IN A TRIPARTITE SYSTEM BUT THE BARRIER OF SEPARATION OF POWERS MUST BE RESPECTED BY THE COURT RENDERING THIS MATTER NON-JUSTICIABLE

It is fundamental that in order to establish a cause of action for a declaratory judgment, a plaintiff must present a justiciable controversy. CPLR § 3001. The plaintiff presents a controversy that is not justiciable because it violates the separation of powers doctrine and the political question doctrine by inviting the judiciary to force its way into the inner workings of the Senate in the selection of its officers and leaders. Separation of powers principles generally preclude courts from "intrud[ing] upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" Campaign for Fiscal Equity, Inc. v. State of New

York, 8 N.Y.3d 14, 28 (2006). The political question doctrine for example prohibits the court from exceeding its constitutional authority and requires the court to determine justiciability on a case-by-case basis. Baker v. Carr, 369 U.S. 186, 217 (1962).[1]

Principally plaintiff claims that de-selecting Senator Smith as Temporary President is both illegal and unconstitutional. Ordinarily the matter should be dismissed merely on those claims alone based upon the immunity afforded the Legislature in the Constitution for its legislative acts. "[B]ecause judgments of legality or constitutionality obviously involve `questioning' of legislative acts, courts may not strip acts taken in the legislative process of their constitutional immunity by finding that the acts are substantively illegal or unconstitutional." Matter of Straniere v. Silver, 218 A.D.2d 80, 84 (2d Dept. 1996). But, were the court to proceed beyond legislative immunity in its analysis, the declaratory judgment complaint should be dismissed

Much of the law cited by the plaintiff in support of the judicial intervention fails to come to grips with the functional prohibitions of separation of powers restraint and the equally prohibitive "cousin," the political question doctrine.[2] The only time that the separation of powers doctrine may be violated and the legislative sphere may be invaded is when an act of legislature impairs the independence of either

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[1] A six-point test, as set forth in Baker, *Id*. at 217 is applied when deciding the political question doctrine. Each prong stands on its own, and each may preclude justiciability. (Id.) The elements are whether: (1) there exists a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) there are judicially discoverable and manageable standards for resolving the issue; (3) a nonjudicial discretionary policy determination must be made in order to resolve the issue; (4) the court's undertaking independent resolution of the issue would express a lack of respect due to a coordinate branch of government; (5) there is an unusual need for unquestioning adherence to a political decision already made; and (6) there exists the potential for embarrassment were the court to rule differently from another political department on the issue. (Baker, *Id.* at 217. On each prong, the plaintiff's application for a declaratory judgment fails.

[2] In Matter of Davies, 168 N.Y. 89, 101-102 (1901) the Court wrote that "Free government consists of three departments, each with distinct and independent powers. Each department is confined to its own functions, and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principal of a republican form of government *Id.* at 101-102

the judiciary or interferes in the functioning of the Executive Branch. *See*, Larabee v. Governor, 2009 NY Slip. Op. 04296 (1st Dept. June 2, 2009) (pay raises); Silver v. Pataki, 96 N.Y.2d 532, 542 (2001) (state budget process). In Larabee, the court stated only 13 days ago that it would be inappropriate for a court to sit in review of the Legislature's wholly internal affairs or practices, or, conversely, of the Governor's limited, though exclusive, quasi-legislative constitutional prerogatives. *Citing*, Urban Justice Ctr. V. Pataki, 38 A.D.3d 20 (2006), lv. den. 8 N.Y.3d 958 (2007).

It further stated that the judicial system is at its best when it stands above and apart from the political interactions that more typically characterize the other two branches of government. "A foundation of free government is imperiled when any one of the coordinate branches . . . interferes with another.[3] The intrusion of the court into the business of Senate leadership will impair it in the performance of the constitutional duty of selecting its own officers. Matter of County of Oneida v Berle, 49 N.Y.2d 515, 522 (1980). The interaction *within* the single house of a discreet branch of government should not engage the judiciary in the political struggles and questions of leadership of the Senate.[4]

The officers of the Senate set the agenda. A determination to change leadership by 32 Senators is a democratic determination that the legislative agenda as it were, must be altered. Courts have recognized that "the manner by which the State addresses complex societal and government issues is a subject left to the discretion of the political branches of government." Matter of New York State Inspection, Sec. & Law

[3] "The separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." Loving v. United States, 517 U.S. 748, 757 (1996).

[4] The use of the courts to cling to power after rejection by a majority of the members of the Senate is an attempt to use the Courts not to protect the public's interests, but to protect one individual who seeks to occupy an office of which the democratic process has properly deprived him.

Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 240 (1984). Therefore, it is proper for the courts to invoke their disinclination to be perceived as overseeing the discretionary affairs of the political branches of government. *See*, Matter of Abrams v. New York City Tr. Auth., 39 N.Y.2d 990, 992 (1976).

The First Department in Larabee also looked to the Supreme Court to define its prudential limitations. In Plaut v Spendthrift Farm, Inc., 514 U.S. 211, 239 [1995]), "separation of powers" was defined as a prophylactic device, establishing high walls and clear distinctions. The need is such because, wrote the Court, low walls and vague distinctions will not be judicially defensible in the heat of inter-branch conflict. The matter is even less defensible in matters of *intra*-branch conflict. To the extent that the plaintiffs have cobbled together an inter-branch conflict on the issue of gubernatorial succession and a casting vote, the matter is similarly not for judicial resolution. This case in all its aspects brings the Judiciary closer to the world of politics than is tolerable for the disinterested functioning of a court system that must act for "the benefit of the whole people." O'Donoghue v. United States , 289 U.S. 516, 533 (1933)

Were the Senate leadership determination to be made in any fashion by the courts, it would make the Senate unduly dependent on the judicial branch to solve disputes, weaken the legislative branch and thereby upset the delicate balance of power. People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898). The Court of Appeals has afforded a continuing vitality to the doctrine as applied to *intra*-governmental disputes. Under 21, Catholic Home Bur. for Dependent Children v. City of New York, 65 N.Y.2d 344, 355-356 (1985). In a similar context, a challenge was made to the discretionary decision making of the Attorney General in the matter of indemnity in Santora v. Silver,

20 Misc.3d 836 (2008). The Supreme Court turned away that challenge on separation of powers grounds finding that the proposition advanced by plaintiff — that the Supreme Court possesses the authority to superintend the litigation decisions of the Attorney General, after the fact — is an impermissible violation of the separation of powers doctrine. Similarly the remedy for errors of judgment claims, the remedy lies not before the Supreme Court, but at the polls. People v. Ballard, 134 N.Y. 269, 293 (1892). Therefore as is true with elected officers, if the Senate abuses the great power entrusted to it, a remedy may be found in removal from office, or in the election of a successor worthy of the high position. *See,* Gerson v. New York State Attorney General, 139 A.D.2d 617 (2d Dept. 1988). In the case at bar, any defect in the acts of the members of the Senate is resolvable only at the polls.

While the courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government, they are not and should not be available to resolve the dispute that is wholly committed to the authority of the Senate by the Constitution. *See,* Article III, § 9. The issue of the casting vote accorded to the Temporary President in the absence of any Lieutenant Governor is not a dispute as to the authority of the Temporary President vis à vis the other branches of government. Silver v. Pataki, 96 N.Y.2d 532, 542 (2001); Pataki v. New York State Assembly, 4 N.Y.3d 75, 96 (2004); Saxton v. Carey, 44 N.Y.2d 545, 551 (1978).

Courts may not intrude upon discretionary determinations that are reserved to the other branches of government (see e.g. Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 28-29 (2006). The selection of its officers, even when

endowing them with rights of casting votes and gubernatorial succession is still a purely discretionary determination reserved by the Constitution to the Senate as another branch of government.

The separation of powers doctrine does not divide the branches into watertight compartments, and the lines of demarcation for the legislative and executive branches cannot be easily drawn. Bourquin v. Cuomo, 85 N.Y.2d 781, 784 (1995). The courts have recognized the necessity of some overlap among the branches of government. Article IV § 6 of the Constitution demonstrates the necessity of overlap but not a cause for judicial intervention. The right of the Temporary President to act in the absence of a Lieutenant Governor is not in dispute. Plaintiff has no problem with the constitutional grant of authority, but he wants to be the only one who exercises it-- a matter committed not to him, or to the judiciary but to the majority of the members elected to the Senate, at present 32 members.

While the defendant has characterized this matter as an *intra*-branch dispute discreet to the conduct of the house and its selection of officers, the plaintiff has raised the issue of Article IV § 6 of the State Constitution with regard to the line of gubernatorial succession.[5]

Lastly, the acts of a majority of the Senate selecting their officers are beyond the reach of the Courts in the same fashion as the propriety of the governor's issuance of a message of necessity and the particular language required in the message. Maybee v. State of New York, 4 N.Y.3d 415 (2005). There the Court held that there was

[5] Within that provision, there is the provision that provides the Temporary President of the Senate with a casting vote to break procedural ties in the absence of a Lieutenant Governor. We believe that any action by Justice Peters now contingent upon the acts of this Court cannot and should not relate to the voting acts within the Senate on procedural matters as this is an intrusion directly into the voting and workings of the Senate by the Judiciary.

no particular language to effectuate a message of necessity. It was a document indicative of a discretionary judgment committed to the Governor and not subject to judicial interference or intervention.

Any intrusion into the legislative selection of officers that is wholly committed to the body by the Constitution in Article III, § 9 violates the basic tenet of the separation of powers doctrine by its failure to promote and maintain the independence and stability of the legislative branch of government.[6]

POINT II

THE PROCEDURE BY WHICH THE SENATE ENACTED PRIVIELGED RESOLUTION # 2475 FULLY COMPORTED WITH THE RULES OF THE SENATE AND WITH MASON'S MANUAL OF LEGISLATIVE PROCEDURE

The plaintiff argues that entitlement to the office of Temporary President rests upon four propositions. (Plaintiff's Memorandum of Law at 5). Only the first one of the four is correct. The first proposition states that the plaintiff was duly elected to the office of Temporary President for the "years 2009-2010." This bare fact is correct.

The subsequent three propositions are incorrect, based upon selective quotes from Mason's Manual of Legislative Procedure[7] which are no more than the product of faulty assertions of minor propositions in and of themselves demonstrate the error of the plaintiff's conclusion.

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[6] Stability in the political process must tolerate changes of leadership and some form of change. Even if one were to conclude that there was political instability in the current conduct of the Senate, there would be no basis for the court to step in and select its leaders, which in turn selects the political agenda of the house. Democratic dissension should not be misconstrued as instability.

[7] Mason's Manual of Legislative Procedure (NCSL 2000 ed.) (hereinafter "Mason's").

The plaintiffs contend "no majority of the Senate to date has passed a resolution removing Senator Smith from the post of Temporary President." Plaintiff's memo at 5. On June 8, 2009, 32 members of the State Senate in the Senate chamber took up a privileged resolution. It sought the election of the defendant as Temporary President. It was not a resolution seeking that he *share* the position with Senator Smith, but rather that he *replace* him. To claim that a resolution replacing one officer of the body with another person is not a specific removal defies basic logic, and would in and of itself violate the custom and practice of the legislature, which has been historically to simply offer a new resolution. The vote of the 32 members demonstrated the manifested will of the majority of the body that Pedro Espada and not Malcolm A Smith be the Temporary President. To suggest otherwise is to replace the sense of the body and the enacted resolution with the quiddities that animate legalisms. The plaintiff's position is that the removal of Smith can only be in verbiage that they demand. This seeks to thwart the will of the body with no rational basis in the law.

The third argument resorts to a similar tactic by selective reading and deliberate elision of the text of Mason's upon which they rely. Citing to Mason's Manual § 581(1), they claim that it provides that the presiding officer "must be 'removed'" by a simple majority before a new presiding officer may be installed. (Emphasis added). However the full text of Mason's § 581 reads completely differently. It specifically reads "A presiding officer who has been elected by the house may be removed by the house upon a majority vote of all the members elected, a new presiding officer pro tempore elected and qualified." (Emphasis added). Further to the point at issue in Mason's and clearly not cited to the court by the plaintiff is the second paragraph of Mason's § 581

which reads in full “When there is no fixed term of office, an officer holds office at the pleasure of the body or until a successor is elected and qualified.”

Here, the plaintiff selected for the “years 2009-2010” had no fixed term by the State Constitution, the statutes or Rules of the Senate. The terms of the resolution are implied that it is for these years, as long as it is not altered by the body in the interim. The reference to the period 2009-2010 is commonly used ot identify a particular legislature. The Senate can choose to bind itself to a term-- it did so for certain Senate employees in the Legislative Law (§ 6). If the Senate had desired to create a binding term for the Temporary President, it has had numerous opportunity to do so, instead it has always been stated only in the resolution, which can be changed at any time by the will of the majority. Thus Mason’s, in conjunction with the resolution selecting the plaintiff, demonstrate that the election to the office is an election to an office with no fixed term and the plaintiff simply serves at the pleasure and will of the majority of the body. When the body’s pleasure and will alters, it is expressed in the selection of a different person as Temporary President and thus the Temporary President is thereby removed.

Mason’s provides that the authority of legislative officers expires with the authority of those from whom the authority was derived. In the Senate, the presiding officer derives his authority by the selection of a majority. Mason’s § 586 (3). Significantly, the plaintiff omits any reference to the key portion of Mason’s :

> [Legislative bodies] can select their officers in the manner they choose and remove them at any time without notice or hearing
> Masons § 586 (1) sentence 2.

Therefore the final proposition that the plaintiff remains in office because he has not been lawfully removed fails as it rests on four propositions that are modest and

wrong. Once these four propositions fail, each in turn, then the plaintiffs case collapses like the house of cards it is.

Plaintiffs claim that the defendant likewise failed to address certain claims made by the plaintiff. These claims set out again on pp18- 22 require no response other than the affirmation of John Casey, Jr. However, to make it clear that they are still as specious as before, they are discussed in turn. First, they claim that the Resolution illegally purported to divide the duties of Temporary President and Majority leader. Thus the selection of Pedro Espada as Temporary President is claimed to be improper because it also names someone else to be Majority Leader. In the case at bar the Temporary President is an officer of the house. The majority leader is with no legal status, merely political status. In effect the Rule only provides that the Temporary President is elected and shall be the majority leader. The text of the Rule specifically does not provide for the selection by the Senate of a Majority Leader. Indeed, the body may select its own officers.

The claim that the Rules have been violated demands that the resolution be declared null and void is easily met. Mason's particularly addresses this issue. In § 3 it explains that each house determines the rules of its own proceedings, and further in subsection 7 :

> The fact that a house of the legislature acted in violation of its own rules or in violation of parliamentary law in a matter clearly within its power does not make its action subject to review by the courts" *Citing*, State of Connecticut v. Savings Bank of New London, 79 Conn. 141; 64 A. 5 (1906).

If the Rules were violated, the majority remedied any issue by the enactment of new Rules by a majority of the members elected to split the duties of the officers, immediately thereafter, curing any possible defect. The Rules are not

enforceable against the body by the Court, especially in an area which is Constitutionally delegated solely to the Legislature in Article III § 9. Indeed, the only remedy would be a declaration that Espada is the Temporary President since he commanded a majority of the house's votes. The selection of the Majority Leader need not be by a vote of the house. Indeed the Minority Leader is not by election of the house—rather he is by default selected after losing the resolution to declare him the Majority Leader. By no stretch of the legal imagination can the consequence of the vote invalidate the will of the Majority of the Senators and force upon them both a Temporary President and a Majority Leader who cannot commandeer of a majority of votes and has been rejected as a leader.

Were the Court to accept this argument then it will select the officers not only of the Senate but also of a party leader. If the second half of the resolution was faulty, simple severability rules allow the election of the defendant to stand. The subsequent enactment of new rules by the 32 member majority which divided the responsibilities of the Temporary President between himself and Dean Skelos as Majority Leader cured any specious defect. Thus the Libous resolution was not illegal and not a nullity.

The second contention is that the Libous resolution was not properly on the Senate floor. In this regard the plaintiff is wholly incorrect. The plaintiff claims that Senators are not free to introduce resolutions on the floor at will. *Citing* Senate Rule VI § 9(a) they properly assert that there is a method for the introduction of a resolution. As demonstrated in the affirmation of John Casey, the resolution was handed up to the desk in quadruplicate. No resolution may be introduced unless copies thereof first shall have been furnished to the Temporary President and Minority Leader. The Rules do not

specify a time frame.Copies were furnished to the Temporary President's agents on the floor prior to the introduction and reading of the resolution, and were already noticed to the Minority Leader.

The plaintiff claims incorrectly that every resolution is referred to a committee upon introduction or alternatively, the resolution must be reviewed by the Temporary President before it can be introduced. (Plaintiff's Memorandum p. 20). Privileged resolutions are not treated in that fashion. They specifically are not referred to a committee. Nothing in the Rules themselves or in Mason's requires that the Temporary President must have the opportunity to review privileged resolutions. Non-privileged resolutions are reviewed in order that there be a determination as to which committee they are to be referred to, but privileged resolutions are designed to be presented to the body in the first instance.

In fact, often the opposite was true, that resolutions introduced as not privileged, would then be deemed privileged by the Temporary President in order that they may bypass the Committee process and be reported directly to the floor. However, the affirmation of Francis Gluchowski demonstrates that there was no formal process of pre-approval by the Temporary President or his designee of resolutions already labeled as privileged by the member introducing them. The practice as cited by Plaintiff in the Fallon and St. John affidavits is clearly impractical, especially when the "review" is based upon protecting the Temporary President's own self-interest. Any privileged resolution is in order if handed upon in quadruplicate, served on the Temporary President.

The plaintiff now claims that the resolution was not privileged and that Senator Libous "deemed for himself" that the resolution was privileged. However, in the Senate Chamber, the presiding officer Senator Breslin first stated that the delay in the proceedings was because "We are discussing what the motion was, whether it was privileged or not" and then he states in his ruling "—the privileged motion is out of order." Both statements appear in the official stenographic record of the Senate and in the re creation by a court reporter from a DVD presented by the plaintiffs (p. 9). The Presiding Officer at the time recognized and labeled the resolution as privileged. Nothing was said to the contrary during the remainder of the procedure.

Even if it were not "privileged" Senate action on it would cure the defect. The fact remains that a majority of the members overruled the opinion of the Chair and directed that the motion be taken up. (*See*, Plaintiff's Tr. P. 9 l.23-24 (Breslin ruling the privileged "motion" out of order); P.10 l. 3-4 (Libous appealing the ruling of the chair); *See also* Breslin Aff. Para. 16-18.)

Plaintiff falls back upon what he claims to be custom of the house. The support for this assertion is affirmation of the Senate parliamentarian who has served in that position by the appointment of the plaintiff and then, only for the last few months. While he claims that the Temporary President is the only one who can permit a privileged resolution to come to the floor, he cites no rule or practice. This is because he cannot. Under the plaintiff's interpretation, he decides if the body can oust him by a majority vote. The Senate decides whether a resolution is privileged.The member introduces the resolution. The presiding officer decides in the first instance if it is privileged. If he states that it is privileged, it is. If he rules that it is not privileged, then any Senator may seek to

overturn the ruling of the chair. In the instant case Senator Breslin said that the resolution was privileged but out of order. This statement should be binding upon the plaintiff. Plaintiff remains silent on this issue.

Plaintiff claims that Senate Rules and Mason's do not define what a privileged resolution is. Relying on Mason's they claim that Senate precedents and customs govern when they are long standing and well settled. As demonstrated by the affirmation of long-time Senate Legislative counsel Frank Gluchowski, as opposed to plaintiff's employee, privileged resolutions are not necessarily subject to determination by the Temporary President. While virtually all resolutions are reviewed by an agent of the Temporary President of the Senate prior to action on the floor, from time to time resolutions would be handed up at the commencement of session, and could-- but were not required to be-- acted on that day.

Further, the Clerk's Manual, a publication of the houses on their rules and customs, together with Mason's does define a list of resolutions that are properly considered privileged. (Mason's Chapter 18 sets out a list of privileged motions.) Section 5 of that list sets out "questions of privilege" dividing them into privilege of the house and personal privilege. Under the listing of privileges of the house is the organization of the house. Mason's Manual §187(5)(a)(2). See also Sec 221 (A).

To follow the logic of the plaintiff to the sought conclusion, one must believe that the Temporary President's authority permits that officer to prevent a resolution, albeit privileged, to come to the floor, if it seeks his removal and he objects to his removal. By the terms of the argument the Temporary President must consent to his own removal. This appears to ask too much of "custom and practice." It is essential to the

operation of a house that it may select its own leaders. Such is the preeminent custom and practice. Mason's itself provides that the presiding officer may not act in his own interest through a variety of ways. There is no requirement in the Rules that the Temporary President must consent to the presentation of a privileged resolution. Any claim that custom prevents a member from offering a privileged resolution is refuted by resort to Mason.

The plaintiff claims that there must be a vote as to whether the resolution was privileged. The complaint and the memorandum of law are wholly incorrect. The Presiding Officer after ordering it to be read ruled that the privileged motion was out of order. Therefore the presiding officer adopted the motion as privileged but ruled it out of order. Thereafter the session transcript reflects a vote to overrule the chair's determination that the "privileged motion is out of order." The majority of members ruled the "privileged motion" in order based on the fact that the chair called for a vote as to whether the decision shall stand as the judgment of the Senate. Breslin Aff. Para. 18. Despite the plaintiff's attempt to "package" the events by the presentation of a transcript taken from a DVD by a stenographer not present at the Session-- the official Senate stenographic record previously submitted demonstrates that the Senate overruled the Chair's ruling that the privileged resolution was out of order and thereby rendered the privileged resolution in order and before the house.

The third contention is that the Libous resolution was out of order and thus could not be voted upon. The transcript of the events demonstrates that the Acting president, Senator Breslin denominated and referred to the resolution as a "privileged" motion. He ruled it out of order. Senator Libous appealed that ruling of the Chair. The

vote, 32-30 overturned the ruling of the chair. Even if some how the resolution was out of order, the body overruled that single member's determination by a majority vote and adopted the resolution.

Finally in an attempt to ignore the facts and the loss of office, the plaintiff claims that the Senate "adjourned" before anyone voted on the Libous resolution.[8] The plaintiff desperately believes that the fact that a single senator, the presiding officer, struck the gavel thus adjourning the session is enough to adjourn the house. All practice tradition and parliamentary procedure including Mason's is specifically to the contrary.

Senator Klein moved to adjourn. Senator Libous and others demanded a vote on the motion to adjourn. No motion to adjourn is granted upon the vote of the presiding officer alone. No voice vote was taken and the demanded roll call was not taken. Instead the presiding officer abandoned the podium. The plaintiff rightly points out that a motion to adjourn takes precedence of all other motions and that shall be decided without debate and shall always be in order. What they omit is the fact that the rules require a vote on the motion. The key fact is that the presiding officer, Senator Breslin, as presiding officer abandoned the podium after failing and then refusing to permit a vote of the body on the motion to adjourn. And with good reason. The record reveals that 32 members, the ones remaining, after the presiding officer and some 28 of his colleagues abandoned the chamber, voted to deny any adjournment.

A single senator, even the one presiding, must put the motion to a vote and not merely bang the gavel on his own initiative. Mason's specifically states that a

[8] The Journal Entry contains a copy of the resolution 2475 s stamped "Adopted in Senate Jun- 8 2009" See Casey exhibit

presiding officer cannot arbitrarily adjourn a meeting. Mason's 204(2).[9] The presiding officer cannot prevent the transaction of business by leaving the chair or leaving the meeting. Mason's § 576 (3). Further Mason's instructs that if a member properly questions the presiding officers ruling on a motion to adjourn, it is the presiding officer's duty to resolve the question. Banging the gavel and abandoning the chamber is not a resolution. A vote is the means by which legislative officers properly resolve motions before the body.

None of the four claims of parliamentary objections claimed by the plaintiff is valid. The rules of procedure are adopted by a house for its own convenience, as Mason's points out in § 15 (4), under a constitutional provision declaring that each house of the legislature shall determine the rules of its own proceedings, the fact that the house acted in violation of its own rules or in violation of parliamentary law in a matter clearly within its power does not make its actions subject to the review by the courts. Thus even Mason's sees the issues raised by the plaintiff as non justiciable.

POINT III

PUBLIC OFFICERS LAW IS INAPPLICABLE

The Public Officer's Law applies to members of the Senate in their capacity as members elected to the Senate. It is, however, an impermissible reading of the language to intuit that any committee chairmanship, leadership position-- Majority Whip, Minority Whip, Chairman of the Majority Conference, Co-Chair of the Senate Committee on Rules Reform, etc. is in and of itself a separate "public office" under the terms of the Public Officer's Law from which one must be removed. It is undisputed that

[9] Similarly the abandoning of the podium

if the Senate were to remove Senator Smith from his representative capacity for the 9th Senate District that certain notice requirements would need to be met, such as those outlined in Public Officer's Law Section 35. However, a leadership position is not in and of itself a separate public office.

The reading of the definition "every officer" also requires that he or she be "authorized to exercise his [or her] official functions throughout the entire state, or without any limitation to any political subdivision of the state." It has never been, nor will it ever be, the practice of the Legislature to file changes in Temporary President or committee membership with the Secretary of State, or to vote on removal and serve it with the Committee Chair to be removed. Because if Plaintiff's reading is correct then every internal change, when a member relinquishes one committee and the internal hierarchy moves each member slightly further up the ladder, would result in a flurry of 60 resolutions, signed by a majority of members, signed and filed in duplicate with the Secretary of the State. There are no such papers on file with the Secretary of State.

Further, there is recent case law to demonstrate that there is no inherent right to a term simply because it is the custom and practice of the body. In a recent Supreme Court case in Cortland County, the Court refused to grant petitioner a judgment "interpreting" the County legislature's rules so as to grant him the position of majority leader. While in that case, like here, petitioner relied on the fact that normally such "appointments" have been made for a two-year period, and petitioner claimed that "mid-term replacement is not sanctioned or permitted by the Legislature's governing Rules." The Court refused to intervene, as there was no basis for concluding that the challenged

action violated any statute, law, ordinance, or constitutional right. *See,* Cornell v. Steve, 7 Misc. 3d 1029A (Sup. Ct., Cortland Co. 2005).

The constitutional right afforded to the Senate and Assembly to craft the rules of its own proceedings cannot be restricted by statute. Mason's § 2 (3). Plaintiff misplaced its reliance on Polokoff-Zakarin v. Boggess which interpreted Statute to require that Senate time sheets be open to freedom of information law requests. The Freedom of Information Law does not truly restrict the Senate proceedings in the same way that the selection of its own internal officers would—while it appears in the Senate Rules, it would be equally as binding if it appeared in statute alone since it does not truly restrict the Senate's proceedings in any way. There is no specific constitutional grant of authority to determine what records would be made available to the public—as there is conversely regarding the unfettered discretion in the selection of its officers. That is to say that while certain statutes may restrict the workings of the legislature in a way that is not constitutionally offensive, any statute which seeks to impinge on the selection of officers necessarily conflicts with the constitutional grant of authority.

POINT IV

PLAINTIFF HAS FAILED TO MEET THE TEST FOR TEMPORARY OR PRELIMINARY RELIEF

Introduction

It is well settled that in order to obtain a preliminary injunction, a party must demonstrate (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that the equities are

balanced in his favor. S*ee,* McLaughlin, Piven, Vogel v. Nolan & Co., 114 A.D.2d 165, 172, lv. den. 67 N.Y.2d 606 (1986).

A. Even If A Justicable Question Is Presented Plaintiff's Case Fails

The Plaintiff has failed to meet any branch of the non-justiciability test. As is explained herein, and in Defendant's other submissions, this matter is clearly not justiciable as it involves an intra branch dispute and the discharge of the Senate's own functions and duties. Gottlieb v. Duryea, 38 A.D.2d 634, *aff'd*, 30 N.Y.2d 807. Even should this Court venture beyond the barrier of non-justiciablity, the Plaintiff's case still fails. The documentary evidence in the Senate Journal demonstrates conclusively that the Senate Session of June 8, 2009 continued, with a quorum present after Senator Breslin abandoned the chair and some, but clearly not all, Democrats abandoned the Senate Chamber. *See,* quorum call, Senate Journal, Exhibit A to Ciampoli Affirmation; *see, also,* Senate Resolution 2475 by Senators Libous, Monserrate, Maziarz, noted as Adopted in Senate, and accompanied by a roll call showing a 32 – 0 vote, EXHIBIT A to Ciampoli Affirmation in support of motion). The official transcript indicates that Senator Klein made a motion to adjourn after Senator Libous' motion to appeal the ruling of the chair was successfully carried. There was no vote taken on this motion by acting President Breslin. "The presiding officer cannot arbitrarily adjourn a meeting," Mason's, § 204 (2). Further, it is never in order for a dilatory purpose such as frustrating a vote on the resolution Senator Libous had offered. *See*, Mason's, § 202 (1) (d).

Ultimately, there was a vote taken and the Libous Resolution was adopted by a majority vote of the house. The Journal is conclusive documentary evidence that the resolution has been adopted. *See*, Heimbach v. State of New York, 59 N.Y. 2d 891 (1983). Here, the journal was ratified by a majority vote. Accordingly, dismissal is indicated, and a likelihood of success on the merits is precluded. Indeed, the courts have seen actions similar to those taken by Senator Breslin, and rebuffed them, in Essenberg v. Kresky, 265 A.D.2d 664 (3rd Dept. 1999), the Third Department rebuffed an attempt by a political party chairman to retain his hold on power by calling a meeting to order and then unilaterally "granting" a motion to dismiss in the face of a demand for a roll call. Where the record showed that a quorum remained, and a majority voted down the motion to adjourn, the Appellate Division upheld the actions of the majority who continued the meeting. More recently, the Second Department concurred, upholding the actions of a committee who remained after the presiding officer unilaterally declared a recess of a meeting to another location, and abandoned the chair. *See*, Aurrichio v. Natrella, 304 A.D.2d 660 (2nd Dept., 2003). The Second Department relied upon the holding of the Supreme Court, Rensselaer County, in McDonough v. Purcell, 44 Misc.2d 23 (Renss. Co. Sup. Ct., 1964) to determine that those who abandon a meeting have voted with their feet and have abandoned their rights to challenge the acts of a quorum of the membership of the body who remain and transact business. S*ee*, *also*, Dinowitz v. Rivera, 2008 NY Slip Opinion 5617U (Sup. Ct. Bronx, 2008, Seewald, J.). Not only did Breslin and the other senators abandoning the Senate Chamber lose their right to vote on the measures the Senate then took up, but they waived any right to object to the actions taken by the Senate before this Court (should

the Court inquire as to the internal procedures of the Senate), because they made no objection to these actions on the floor. *See*, Nicolai, et. al. v. Kelleher, et. al., 21 Misc3d 1140A, aff'd., 45 A.D.3d 964 (3rd Dept., 2007); McGuinnes v. DeSapio, 9 A.D.2d 65, p. 74 (1st Dept., 1959).

B. Necessary Parties Have Not Been Named In The Instant Action

There is the additional defect that necessary parties have not been named and served in these proceedings to invalidate a resolution choosing Senator Espada as Temporary President of the Senate and Senator Skelos as Temporary Vice President and Majority Leader. Senator Skelos himself is not a party to these proceedings. Similarly the Senate as an entity has not been named and served in this attempt to invalidate the rules of the house. Finally, the Plaintiff seeks to invalidate the new appointments of members of the Senate Rules Committee (S*ee*, official transcript, Ex. A, Ciampoli Affirmation). None of the senators appointed to the committee who are named in the transcript and Journal have been named and served. Moreover, none of the Senators who held committee chairmanships which were revoked by the new leadership appear as parties in these proceedings. All of these persons are necessary parties under the provisions of CPLR 1001(a). Clearly, the Plaintiff seeks to adjudicate their rights herein even though they may be "inequitably affected by a judgment in the action, " CPLR 1001(a), *see also*, Fulani v. Smith 181 A.D.2d 940, *app. den*. (3d Dept. 1992); 79 N.Y.2d 755; Mt. Pleasant Cottage School Union Free School Dist. v. Sobol, 163 A.D.2d 715 (1990, 3d Dept.), *app. gr*., 77 N.Y.2d 802 (1991), and *aff'd.* (1991) 78 N.Y.2d 935 (1991).

The roll calls and transcript in the Senate Journal are documentary evidence conclusively proving the election of Senators Espada and Skelos to their positions. Additionally, Senator Libous ordered all committee and leadership assignments revoked. The following senators had their chairmanships revoked:

Senator Diaz Aging

Senator Aubertine Agriculture

Senator Foley Banks

Senator Montgomery Children & Families

Senator Squadron Cities

Senator Savino Civil Service & Pensions

Senator Schneiderman Codes

Senator Stachowski Commerce

Senator Perkins Corporations

Senator Hassel-Thompson Crime Victims, Crime & Correction

Senator Serrano Cultural Affairs

Senator Oppenheimer Education

Senator Addabbo Elections

Senator Aubertine Energy

Senator Thompson Environmental Conservation

Senator Sampson Ethics

Senator K. Kruger Finance

Senator Duane Health

Senator Stavisky Higher Education

Senator Breslin Insurance

Senator C. Johnson Investigations

Senator Sampson Judiciary

Senator Onorato Labor

Senator Stewart Cousins Local Government

Senator Huntley Mental Health

Senator Adams Racing, Gaming & Wagering

Senator Montgomery Social Services

Senator Dilan Transportation

Senator Adams Veterans

Plaintiff wants this Court to reverse the actions revoking these appointments when he asks the Court to declare the proceedings of the Senate held after several Democratic Senators abandoned the Chamber to be a nullity. These Senators and Senator Skelos, and Senator Winner who had been designated to preside in Breslin's place are quite obviously affected by the court's decision in this matter. They are necessary parties who have not been served. Plaintiff has no chance of success; much less can he show a likelihood of success on the merits.

C. No Irreparable Injury Has Occurred To The Plaintiff

As for irreparable injury, none has been demonstrated by the Plaintiff. He is an at-will officer of the Senate. All bodies organized and operating under the rules of parliamentary procedure are subject to the same rule – that an officer whose term is not specified in the rules and bylaws serves as the will of the body. *See*, D'Angelo v. Executive Committee, 154 Misc. 2d 926, aff'd., 188 A.D.2d 649 (2nd Dept., 1992). In fact, here Mason's allows for the Smith to be ejected from his position and replaced "at the pleasure of the body," Mason's, § 581 (2). The applicable rule is the same as that set forth in the D'Angelo case, *supra*. Any redress, if such exists, is with the members of that house of the Legislature. The speculation of what might happen if the Governor were to die or be absent from the state is nothing more than a speculation. The Governor has proclaimed publicly that he will not absent himself from New York State as long as Espada is the Temporary President of the Senate. We are certain that no one wishes the Governor ill health, therefore the constitutional crises that Plaintiff alleges is imaginary.

Finally, we believe that our tradition of democracy requires that equities always favor the will of the majority. Here the confusion and alleged crisis are created by Smith himself and his appointee, the Secretary of the Senate, who has resorted to childish and base actions such as locking Senators out of the chamber, turning off lights during session, unplugging microphones, and threatening the employees of the Senate in order to prevent them from doing their job. Moreover, it now appears that Plaintiff Smith no longer enjoys the support of his own Democratic Conference. In other words, he could not be elected Temporary President of the Senate today--he does not have the votes. To convert the leadership of our State Senate into a sinecure for a few individuals who have lost the confidence of a bi-partisan majority of the house due to their own failures as leaders would be a miscarriage of justice.

Plaintiff Fails To Make Out The Requisite Three Part Test To Entitle Him To A Preliminary Injunction

Accordingly, the Plaintiff fails to meet the three-part test required to be entitled to a preliminary injunction. Plaintiff's arguments fail when weighed against the several positions advanced by Defendant Senator Pedro Espada, Jr. in support of the motion to dismiss the within complaint.

CONCLUSION

For the foregoing reasons, the motion by defendant to dismiss the complaint should be in all respects granted, and the Court thereby deny the relief requested and dissolve any temporary restraints by the action of this Court as provided in the order of Justice Karen Peters, and for such other and further relief as the Court may deem proper.

Dated: June 14, 2009
Albany, NY

Respectfully Submitted,

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