SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
----------x

MALCOLM A. SMITH,

Plaintiff,

INDEX # 4912/09
McNamara, J.
AFFIRMATION

- against –

PEDRO ESPADA JR.,

Defendant
----------x

JOHN CIAMPOLI, an attorney duly admitted to the practice of Law before the Courts of the State of New York, does hereby affirm under the penalties of perjury, and respectfully moves this Court as follows:

1. He is the attorney for the Defendant in this action, Senator Pedro Espada, Jr., the Temporary President of the New York State Senate.
2. This affirmation, and the accompanying papers, are offered in support of the instant motion to dismiss Plaintiff Smith's Complaint, and in reply to the affirmations and memoranda submitted in opposition to Defendant's motion.
3. The Plaintiff resists the motion to dismiss on several grounds including:

- Contentions that this matter presents the Court with issues that are justiciable, and outside the doctrine of Separation of Powers, and Judicial Abstention from Political Questions and the intervention into internal affairs of the Legislature,
- Arguments that the Libous resolution was out of order,
- An assertion that all necessary parties have been named and served,
- Contentions that removal of the internal officers of the New York State Senate is subject to provisions of the Public Officers Law,
- An assertion that Plaintiff Smith does not serve at the will of the majority of the members of the New York State Senate,
- Maintaining that a single Senator can declare the Senate to be adjourned without a vote, and,
- Contentions that the actions of the Majority of the State Senate, taken on June 8, 2009, and evidenced in the approved journal of the State Senate are invalid because one senator had “gaveled out” the Senate.

4. It is beyond dispute that the New York State Senate acted to replace its leadership on June 8, 2008.
5. This Court has before it the documentary evidence of the adoption of the relevant resolutions and rules, and actions taken by the Senate and its leadership on June 8, 2009.
6. This Court should, under the doctrine of Separation of Powers and Abstention from adjudicating internal Political Questions, inquire no further than the roll calls and the Journal.
7. Should the Court's inquiry take it beyond this point and into the internal operations of the Senate, Plaintiff's complaint still fails and must be denied and dismissed.
8. It is respectfully contended that the Temporary President, an internal officer of the Senate is subject to replacement by the Senate at the will of the majority of the Senators, see Cornell v. Steve, 7 Misc.3d 1029A, 2005 NY Slip Opinion 50816U (Sup. Ct., Cortland Co.) [the relevant provisions of the County Law parallel the applicable provisions of law in the case at bar].
9. Moreover, the applicable Parliamentary Guide for the New York State Senate, Mason's Manual, indicates that Plaintiff serves "at the pleasure of the body", Mason's, Sec. 581.2 & 586.1.
10. Even if the process of installing new leadership is found to be a legislative act that is irregular or inconsistent with the terms of its own rules, this Court is still bound to uphold it, Mason's, Sec. 3.7,

see also, St. of Connecticut v. Savings Bank of New London, 79 Conn. 141 (1906), and, Schieffelin & Co. v. Dept. of Liquor Control, 194 Conn. 165 (1984).

11. In Schieffelin, supra, it was held, “This authority may be abused, but when the House has acted in a matter clearly within its power, it would be an unwarranted invasion of the legislative department for the court to set aside such action as void because it may think that the House has misconstrued or departed from its own rules of procedure…”, Schiefflin, supra, p. 185.
12. The Plaintiff’s Complaint should be dismissed merely on the claims that the replacement of Smith with Espada is illegal and unconstitutional, 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)
13. This Court is urged to abstain from crossing the divide established by the framers of the Constitution between the branches of Government, however, if that divide is crossed, the result must be the same under the rules of procedure governing the Senate and the

applicable body of law requiring that legislative acts should not be reviewed.

14. Similarly, the Court is urged to avoid engaging in a political question – which is entirely appropriate for legislators but not for our Judiciary.
15. The Plaintiff began this action with a request for a TRO in which it was requested that the Court substitute itself for the Senate and its elected leadership and designate a Senator to gavel the house in and out between session days.
16. Defendant continues to resist the Plaintiff's attempt to engage the Court in the internal workings of the house. However, should the Court enter this territory, it is the Plaintiff and his designee who end up on the short end of proper procedures – which were rebuffed and corrected by the majority on June 8th.
17. The rules of procedure are clear, the house may not recess or adjourn without a vote. The record demonstrates conclusively that when Senator Klein moved to adjourn several Senators called for a vote on adjournment.
18. On June 8th, Senator Breslin never fulfilled his duties as the acting presiding officer. He did not conduct the required vote before he abandoned the podium.
19. The body of available law points up that a failure to adjourn or recess pursuant to a valid vote of the membership leaves the body

in session, and, with a quorum present, capable of continuing its business.

20. Ultimately, a roll call was taken on adjournment after a quorum was established. The motion to adjourn failed and the Libous resolution was then passed. The Senate then continued to do business.
21. The Democratic Members of the Senate who left the chamber voted with their feet. They abdicated their duty to attend to the business at hand.
22. In fact, these Senators, including Plaintiff, never entered an objection on the floor to the proceedings that followed. Accordingly, Plaintiff should not be heard now to protest what he (or his appointee, Senator Breslin) utterly failed to object to.
23. The base and childish acts of turning out the lights, unplugging the public address system, and turning off the TV cameras so that the public could not view what occurred, simply underscores the equities that clearly balance in Defendant Espada's favour.
24. The resolution offered by Senator Libous was privileged, was in order and was actually sent to the floor by Plaintiff when Senator Breslin ordered its reading.
25. Subsequent to its reading the Senate determined that Senator Breslin's determination that the resolution was out of order was in

error and overrode it. The majority of the house determines such procedural matters.

26. The affirmation of Frank Gluchowski, Esq., who has years of experience administering the affairs of the Senate, demonstrates that the resolution was properly presented and considered by the Senate. It is adopted herein by reference.
27. The Gluchowski affirmation reflects years of direct knowledge, as opposed to the several weeks that Plaintiffs employees speak to.
28. Mason's defines 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).
29. The Plaintiff's position is that the Temporary President's authority permits Plaintiff to prevent a resolution, albeit privileged, to come to the floor, if it seeks his removal and he objects to his removal.
30. In other words, Malcolm Smith contends that he must consent to his own removal.
31. 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.

32. The Senate, after a number of Senators abandoned the chamber, properly adopted the Libous resolution. Adoption comports with the strictures of Mason's Manual as detailed in the accompanying memorandum of law.
33. The Journal of the Senate demonstrates conclusively that the resolution, No. 2475, passed with 32 votes.
34. Plaintiff's critique that the positions of Majority Leader and Temporary President could not be split is without merit. The text of the election resolution makes the split contingent upon the passage of new Senate rules (Journal, EXHIBIT A to Ciampoli Affirmation).
35. The contention that the office of Temporary President of the Senate is subject to the Public Officers Law is without merit.
36. The office of Temporary President is internally chosen by the Senate. While the office has certain "external" components, filling the office is exclusively within the prevue of the members of the Senate.
37. 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."

38. The final proposition that the plaintiff remains in office because he has not been lawfully removed pursuant to the Public Officers Law fails.
39. Here the oaths of office filed by Senators Espada and Skelos are filed with the Secretary of the Senate, not the Secretary of State, see Exhibit B to Ciampoli Affirmation in support of motion.
40. 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.
41. Plaintiff has removed committee chairmen and moved other Senators to these positions in his short tenure.
42. One of those stripped of a committee post was Senator Monserrate.

43. Plaintiff Smith can not tell the Court that he has engaged in the procedures of the Public Officers Law that he now seeks to hide behind.

44. Moreover, recent caselaw points to the conclusion 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 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).

45. Here the Court should similarly decline to enter into an interpretation of Senate Rules and its Parliamentary Procedures. Should the Court look further, however, it should sustain the will of the majority of the Senators.

WHEREFORE, it is respectfully prayed that this Court grant the Defendant's motion, dismiss the Complaint, and deny the relief requested therein, together

with such other, further and different relief as this Court may find to be just and proper in the premises.

DATED: June 15, 2009

John Ciampoli, Esq.

677 Broadway, Suite 202
Albany, New York 12207
Cell 518 522 3548