

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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MALCOLM A. SMITH,

Plaintiff,

- against -

INDEX # 4912/09

AFFIRMATION OF
JOHN T. CASEY,
JR., ESQ. IN SUPPORT OF
THE MOTION TO DISMISS
THE COMPLAINT OF THE
PLAINTIFF AND FOR
SUCH AND OTHER AND
FURTHER RELIEF

PEDRO ESPADA JR.,

Defendant

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JOHN T. CASEY, JR., an attorney duly admitted to practice in this State, under penalties of perjury, deposes and affirms as follows:

1. My name is John T. Casey, Jr., and I reside in the City of Troy, New York. I make this affirmation in support of the motion by the defendant to dismiss the complaint of the plaintiff and thereby deny the relief requested and a dissolution of 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 may be deemed proper by this Court.
2. I am attorney in good standing, licensed to practice law in the State of New York.
3. I have been continuously employed by the State Senate, part time, since 1997, and have had the titles of Parliamentarian and Assistant Counsel to the Majority.
4. My appointing authority is Senator Dean G. Skelos.

5. I am familiar with the current and past Rules of the Senate as well as Mason's *Manual of Legislative Procedure*, Nat'l Conf. of State Legislatures (2000 Ed.) having served as the Senate Parliamentarian from 1997 to 2008.
6. I was present in the Senate Chamber on June 8, 2009 during the entirety of the session.
7. Pursuant to the Rules of the Senate then in force, the Order of Business was followed.
8. On June 8, 2009 Senate Minority Floor Counsel, Adam Richardson handed to Senate Majority Floor Counsel, Michael Fallon, an employee of Plaintiff, Malcolm Smith, two copies of the privileged resolution sponsored by Senators Libous, Monserrate, Espada and Maziarz. Mr. Fallon showed the copies to Majority Floor Leader, Jeffrey Klein.
9. I myself handed up four copies of the privileged resolution to the desk (at the front of the Senate Chamber) pursuant to the Senate Rules. It was introduced in quadruplicate, providing copies to the desk, the Majority Leader through his counsel; and the Minority Leader, through his counsel.
10. Senate Rules then in force under Rule VI § 9 (e) provided for the fact that certain resolutions are privileged. The Rules treat privileged resolutions in two places, Rule VI § 9 (e) as well as Rule V § 9 (a). In Rule V, the motions recalling bills or resolutions from the Assembly are specifically designated as privileged resolutions.
11. Mason's Manual of Legislative Procedure, a generally accepted guide for state legislatures around the country, defines privileged motions¹ as a variety of procedural motions, or privileges of the house, including its organization, the expulsion or censure of a member or the assessment of a member's capacity to serve, disorderly conduct of members, etc. See, Mason's Manual § 187, § 220 et. seq. The Senate Rules do not preclude other resolutions

¹ In the Senate, these motions are properly brought as resolutions. Therefore, we use the term resolution when referring to the actions at issue in this proceeding, rather than Mason's terminology.

from being considered privileged, they simply enumerate those which are not commonly treated as privileged under generally accepted parliamentary procedure. Where privileged resolutions are mentioned in Rule VI § 9 (e) they are treated differently than ordinary resolutions in that they need not be moved through committee prior to being addressed by the house.

12. When in the order of business “motions and resolutions” were called by the Secretary, Senator Libous stood, was recognized and announced that his privileged resolution was at the desk.
13. Senator Libous then asked that the resolution be read in its entirety and the Senate move to adopt it.
14. The Presiding Officer ordered the Secretary to read the resolution, which would *de jure* and *de facto* the matter before the house.
15. The Secretary read the title of the resolution, and this did place the matter before the entire Senate.
16. The transcript of the events reflects that Senator Klein addressed the presiding officer and moved that the Senate “stand at ease”. A motion to stand at ease is not addressed in the Senate Rules. It is a custom in the Senate that the motion to stand at ease – in essence to take a brief recess - is done upon unanimous consent. A vote, in most instances is not recorded. However, when a member of the Senate objects to the body standing at ease, the Senate would be required to decide the motion by a majority voice vote, or a show of hands should there be a close division within the house.

17. A motion to stand at ease takes no precedence over a pending resolution. Mason's Legislative Manual §216 (1) recites that a motion to recess cannot be made while another has the floor or during voting or the verification of a vote.
18. Senator Libous stated that he had the floor and stated that the Senate cannot stand at ease.
19. Senator Libous, addressing the Acting President, called for an immediate vote by a show of hands on the motion to stand at ease.
20. The Acting President, rather than counting the raised hands before him, was dilatory and finally stated, "Senator Libous, we are discussing what the motion was, whether it was privileged or not."
21. Upon information and belief, the Acting President was referring to the privileged resolution electing Senator Espada as the Temporary President of the Senate, when he referred to "the motion" in ¶ 20.
22. The Acting President finally ruled that "the privileged motion" (the resolution) was out of order. Whereupon Senator Libous immediately appealed the ruling of the Chair. Senator Klein, who was conducting floor operations for the then-Majority, acquiesced and directed the Acting President to put the question to the members.
23. Nowhere in the Senate Rules does it state that privileged resolutions must receive consent from the Temporary President or his or her designee prior to action on the floor. Nor do the Senate Rules specify a length of time in the requirement that there be notice given to the Leaders. Therefore, any reasonable notice is appropriate. Reasonableness must relate to the content of the resolution in that it should afford members enough time to read the resolution and understand its contents. In this case, the resolution was quite brief, and therefore a brief notice was appropriate.

24. The Acting President asked “all those in favor of overruling the decision of the chair, please signify by raising your hands.”
25. There were a series of pauses, broken by Senator Libous’ call for the results of the vote.
Upon further delay, Senator Libous, after citing to the a legislative body’s right to remove a dilatory or non-responsive presiding officer (*see*, Mason’s Sect. 576 [2]), nominated Senator George Winner to take the Chair as Acting President and called for the body to vote on the question.
26. Thirty-two Senators voted in favor of the removal, and substitution. Senator Breslin continued to be unresponsive.
26. Senator Libous announced that Senator Breslin had been removed as Acting President, and announced that 32 votes for Senator George Winner to take the Chair were clearly cast.
27. Upon hearing this announcement by Senator Libous, Senator Breslin announced the result of the appeal to the Chair’s ruling by which the privileged motion was ruled out of order -- 32 votes in favor of overruling, and 30 against. Therefore, the initial privileged resolution was deemed to be in order by the majority of the members of the house with this issue resolved, the question then pending was whether or not to adopt the privileged resolution by Senator Libous.
28. Senator Klein then moved to adjourn. Senator Libous immediately called for a vote on the adjournment, and stated again, his resolution was pending. Multiple senators, including Senator Libous called for a roll call vote on the adjournment, at which time Senator Breslin banged the gavel twice. This is designated in the transcript as occurring at 3:38 p.m.
29. A motion to adjourn, of course, terminates all business of the Senate on a given legislative calendar day, and so requires a vote of the body if requested. Mason’s Manual § 204 states

that “The presiding officer cannot arbitrarily adjourn a meeting.” Further, it states that “The motion to adjourn is particularly subject to abuse and the presiding officer should refuse to entertain it when it appears to be made for obstructive purposes.” § 209 (5), citing N.Y. [Clerk’s] Manual p. 476 (1936, 1948-49 ed.)

30. At this point, the transcript attached to Plaintiff’s papers ends, and is certified by one David Mayo, Sr. Court Reporter. I know Mr. Mayo personally from years of his service in Rensselaer County, and he was not in the chamber that day. The only stenographer I witnessed that day recording the proceedings was Catherine Kirkland, our official Stenographer for the Senate.
31. The transcript available online, upon information and belief, a true and accurate account of the full proceedings on June 8, 2009 continues, but notes that members of the Democratic conference left the chamber, and the public address system was disconnected at 3:38.
(Exhibit A)
32. Senators Monserrate, Diaz, Kruger and Espada, did not, as the transcript indicates, leave with the Democrats at that time, and remained in the Chamber and were present when Senator Winner as Acting President called for the Secretary to call the roll to determine whether a quorum was still present.
33. After the Secretary recorded the Senators present, the Acting President announced that a quorum was present.
34. Senator Libous, noting that the motion to adjourn was never properly voted on, called for a vote on that motion by a show of hands. No hands were raised in support of the motion. Acting President Winner announced that the motion to adjourn had failed and the Senate remained in session.

35. At this time, Senator Libous again called for his privileged resolution to be read in its entirety and taken up for an immediate vote. The Secretary read the resolution in full and the question was put to the body. By a showing of hands there were 32 votes cast in favor of the resolution and it was adopted.
36. Senator DeFrancisco, an attorney and notary public licensed in the State of New York, then proceeded to administer the oath of office (see, Public Officers Law Sect. 10) to Senator Espada as Temporary President and then to Senator Skelos, as Vice President Pro Tempore and Majority Leader. Upon information and belief, written oaths of office were executed and filed with the office of the Secretary of the Senate. (Exhibit B and C)
37. Senator Espada then re-designated Senator Winner to serve as Acting President, and designated Senator Skelos to hand up the members appointed to a newly reconstituted Senate Rules Committee.
38. Senator Skelos handed up the new committee assignments and called for an immediate meeting of the Committee in the well of the Senate Chamber. A report of the Rules Committee was put forward encompassing new Senate Rules for the remainder of the 2009-2010 Senate Session. The question was put to the members whether to accept the report, by a voice vote, the report was adopted. The vote was then taken on the resolution itself offering new rules, and again by a voice vote the new Rules were adopted.
39. Senator Libous then requested that the remainder of the business before the house be laid aside for the day, which was so ordered by the Acting President. Senator Libous then handed up a statement to denote that all committee appointments, other than the new Rules Committee appointments and leadership appointments were revoked.

40. Senator Libous then moved that the Senate adjourn until Wednesday, June 10th at 3:00 p.m.

Hearing no objection, the Acting President announced that the Senate had adjourned.

41. The information herein is reflected in the Journal of the New York State Senate of June 8, 2009 as approved by the Senate on June 11, 2009.

WHEREFORE it is respectfully prayed that the motion by the defendant to dismiss the complaint of the plaintiff 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 be deem proper.

Dated: June 11, 2009
Albany N. Y.

John T. Casey, Jr., Esq.