

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

IN THE MATTER OF MALCOLM SMITH, Temporary
President and Majority Leader of the New York State
Senate,

Plaintiff,

-against-

PEDRO ESPADA, JR., New York State Senator,

Defendant.

DECISION & ORDER

Index No.: 4912-09

RJI No.: 01-09-096982

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Emery Celli Brinckerhoff & Abady, LLP
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McNamara, J.

On January 7, 2009 plaintiff, Malcolm A. Smith, was elected Temporary President of the New York State Senate. On June 8, 2009, a resolution was presented in the Senate to nominate defendant, Pedro Espada, Jr., as Temporary President. Following a flurry of parliamentary maneuvering, the member presiding over the session purported to gavel an adjournment. The 32

members supporting the resolution, a majority of the 62 member body, then purported to resume the session and voted to place Espada in the office of Temporary President. Thereafter, Smith brought this proceeding seeking an order preliminarily enjoining Espada from exercising any of the powers of the office of Temporary President of the New York State Senate and declaring Smith the duly elected Temporary President of the New York State Senate. In turn, defendant has moved to dismiss the complaint arguing primarily that the matter is nonjusticiable.

Under N.Y. Const. Art. III, §9, each house of the Legislature is authorized to determine the rules of its own proceedings and to choose its own officers. In the case of the Senate, explicit direction is made to select a Temporary President. Plaintiff contends in his Complaint that the procedure employed to bring the June 8, 2009 resolution before the Senate, and to place defendant in the office of Temporary President, was submitted in violation of the rules of that body. Each party argues the correctness of its own parliamentary maneuvering on that day and both offer arguments on the issue of whether defendant could be placed in the office without first removing plaintiff.

As noted, the constitution provides that the Senate is to determine the rules of its own proceedings and in keeping with that idea, no provision is made in the constitution as to the procedure for choosing a Temporary President. Likewise, the Senate rules do not set out a procedure for filling this office. “There thus is applicable the principal set forth in *Matter of Anderson v Krupsak* (40 NY2d 397, 405) that when the Legislature has not adopted rules for a particular subject or purpose it ‘is governed by the generally accepted rules of parliamentary procedure which flow from general principals of common law.’” (*Matter of Board of Educ. v City of New York*, 41 NY2d 535 [1977]). In that regard, both parties have submitted affirmations by individuals who at some

time served in the role of Senate Parliamentarian. Both refer to Mason's Manual of Legislative Procedures, a generally accepted guide for state legislatures, as relied upon by the New York State Senate. A procedure for the removal of a presiding officer is found there (Mason's Manual section 581).¹

"[S]eparation of powers principles dictate that courts must accord due respect to the Legislature by exercising restraint whenever a litigant seeks judicial review of 'wholly internal' legislative affairs or prerogatives" (*People v Ohrenstein*, 153 AD2d 342, 343 [1989]). Clearly, the selection of a presiding officer, a constitutionally prescribed duty here, is a matter of internal legislative prerogative. And, while courts have intervened in internal legislative matters to determine whether the Legislature has complied with constitutional and statutory prescriptions as to legislative procedures (*Matter of Board of Educ. v City of New York*, supra at citations omitted; *People v Ohrenstein*, supra; see also *Matter of Anderson v Krupsak*, 40 NY2d 397 [1976]), no such question is presented here.

The Constitution leaves to the Senate the responsibility of selecting a Temporary President. The issues raised by the parliamentary maneuvering on the Senate floor and the issue of whether a new Temporary President may be chosen without first removing the incumbent should be answered by the Senate. The court is aware that the inability of the Senate to resolve these issues has had, and may well continue to have, a profound affect on the ability of the government to address many

¹ Removal of Presiding Officer

1. 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 and a new presiding officer *pro tempore* elected and qualified. 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.

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issues which are of vital importance to the citizens of the State. Courts may well be suited to analyzing such a question and providing a reasoned objective conclusion. Nonetheless, a judicially imposed resolution would be an improvident intrusion into the internal workings of a co-equal branch of government. The practical effect of having a court decide this issue would be that its decision, if only by perception, would have an influence on the internal workings of the Senate including the setting of the Senate agenda. To have a court do so would be improper. In the present context, the question calls for a solution by the members of the State Senate, utilizing the art of negotiation and compromise. The failure of the Senate to resolve this issue in an appropriate manner will make them answerable to the electorate. Absent circumstances, not shown to exist here, a court should not impose a legal solution. Accordingly, the motion is granted and the complaint is dismissed.

All papers including this Decision and Order are returned to defendant's attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

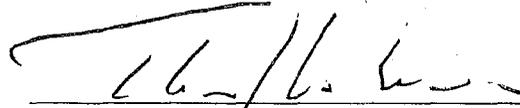
This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
June 16, 2009

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Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

- 1) Order to Show Cause dated June 11, 2009;
- 2) Verified Complaint with Exhibits;
- 3) Affirmation of Keith C. St. John, Esq., dated June 10, 2009;
- 4) Memorandum of Law in Support of Motion for Preliminary Injunction and Declaratory Relief;
- 5) Order to Show Cause;
- 6) Affirmation of John Ciampoli, Esq. with Exhibits dated June 12, 2009;
- 7) Memorandum of Law in Opposition to Defendant, Pedro Espada, Jr.'s, Motion to Dismiss dated June 14, 2009;
- 8) Affirmation of Michael Fallon, Esq. dated June 14, 2009;
- 9) Affirmation of David Evan Markus, Esq., dated June 14, 2009;
- 10) Affirmation of Francis Gluchowski, Esq., dated June 14, 2009;
- 11) Reply Memorandum of Law in Support of Motion to Dismiss;
- 12) Affirmation of John Ciampoli, Esq., dated June 15, 2009.