SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
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MALCOLM A. SMITH,

Plaintiff, INDEX # 4912/09

- against – MEMORANDUM OF LAW

PEDRO ESPADA JR.,

Defendant
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MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE DEFENDANT TO DISMISS OF THE DEFENDANT AND OTHER AND FURTHER RELIEF

Preliminary Statement

Pedro Espada, Jr., the defendant, moves to dismiss the verified complaint in the instant matter.

Statement of Facts

The Senate leadership positions are chosen by the members of the Senate by the vote of the house. N.Y. CONST. Article III § 9. Malcolm A. Smith was selected Temporary President and majority leader by a vote of 32 members. This majority supported Senator Smith until June 8, 2009.

On that day, Senator Libous, after being recognized by the Presiding Officer, offered a privileged resolution. Senator Breslin, as Presiding Officer, in both parties' certified transcripts, acknowledged it as a privileged resolution. Senator Breslin then ruled the privileged resolution out of order. Senator Breslin's ruling that the privileged resolution was out of order

was appealed by Senator Libous. At that point it became clear that the will of the house was represented by a 32 member majority. That majority overruled the Presiding Officer's attempt to prevent the will of the majority to select a new Temporary President and a new Majority Leader. At this point, Senator Klein moved to adjourn the session, thus taking precedence over all other business.

No vote on the motion to adjourn was taken by the Presiding Officer. Instead, despite the call for a vote by Senator Libous, it claimed that Senator Breslin declared the session adjourned. The transcript reflects that Senator Breslin left the podium without calling the roll as directed, nor even repeating the adjournment requested by Senator Klein, as he and other members of the Democratic, now minority group abandoned the Senate Chamber.

Senator Libous moved to have Senator Winner act as presiding officer so that the business of the Senate would continue. He then called for a vote on the still-pending motion to adjourn which was defeated.

Senator Winner called the roll to determine that a quorum was present-- the new 32 member majority was present along with Senators Diaz and Carl Kruger who remained on the floor and participated in the quorum call. Senator Libous now moved again to have the will of the 32 members recognized, and asked that the resolution be read in its entirety and that it be taken up and adopted by the majority of 32 members. The resolution's adoption elected Senators Espada and Skelos to the newly divided positions of Temporary President and Majority Leader. After their election, both Senators filed their oaths of office with the Secretary of the Senate.

During the period of session continuing after Senator Breslin abandoned the podium; the lights in the Chamber were turned off for a short period. The transmission via internet and television of the Senate's proceedings was abruptly cut off and replaced with a

notice to “stand by” even as the Senate remained in session. The microphones in the Chamber were also turned off.

In the days that followed, the Secretary of the Senate, acting presumably at the direction of Senator Smith, kept the doors to the Senate chamber sealed and locked, preventing members of the body from their work. The doors to the house remained locked on Wednesday despite the fact that session was called. This act was in specific violation of Article III Section 10 of the State Constitution that requires the doors to the house to be open. Senator Smith maintained that despite the vote of the house, he was still the majority leader and Temporary President.

On June 11, 2009, Senators Skelos and Espada having obtained a key to the chambers opened the Senate doors for business. Even still, bill jackets and other necessities for the conduct of business were locked away under the control of the Secretary of the Senate, which prevented 32 members from transacting any business other than advancing bills on the calendar and adopting the Journal of Monday June 8, 2009.

POINT I
THE INSTANT MATTER IS NOT JUSTICIABLE IN THAT IT IS A POLITICAL QUESTION THAT PREVENTS THE INTRUSION INTO THE PROCEDURES AND PRACTICES OF THE SENATE AS A SEPARATE AND COORDINATE BRANCH OF GOVERNMENT

The doctrine of the separation of powers is grounded on the principle that each of the three branches of government-- executive, legislative, and judicial-- possess "distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches." Each "is confined to its own functions and can neither encroach upon nor be made subordinate to those of another." (Matter of Davies, 168 N.Y. 89, 101, 102 (1901)).

Each department should be free from interference, in the discharge of its own functions and peculiar duties, by either of the others. (Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635 (1971), *aff'd* 30 N.Y.2d 807 (1972), *cert. den*. 409 U.S. 1008 (1972)). Since " '[i]t is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself.'" (New York State Bankers Ass'n. v. Wetzler, 81 N.Y.2d 98, 105 (1993), *quoting* People ex rel. Burby v. Howland, 155 N.Y. 270, 282, (1898)). For those reasons, courts are particularly instructed not to "'direct the legislature how to do its work' " (New York Pub. Interest Research Group v. Steingut, 40 N.Y.2d 250, 257, (1976), *quoting* People ex rel. Hatch v. Reardon, 184 N.Y. 431, 442 (1906)). Particularly when the internal practices of the Legislature are involved (*See*, Matter of Gottlieb, 38 A.D.2d at 635).

Thus, taking cognizance of the separation of powers doctrine, the courts have refused to intrude upon such "wholly internal affairs of the Legislature" as:

1) the propriety of a roll call vote in the Senate (*See* Heimbach v. State, 59 N.Y.2d 891 (1983), *app. dismissed,* 464 U.S. 956 (1983));

2) the permissible scope of duties performed by legislative employees (*See*, People v. Ohrenstein, 153 A.D.2d 342 (1989), *aff'd on other grounds,* 77 N.Y.2d 38 (1990));

3) the accuracy of Senate Journal entries (Matter of Ohrenstein v. Thompson, 82 A.D.2d 670 (1981) *app. dismissed* 56 N.Y.2d 644 (1982)); and

4) the Assembly Speaker's refusal to permit the use of state funds to mail an Assemblyman's letter to his constituents deemed "too political" (S*ee* Matter of Gottlieb, 38 A.D.2d at 634; Pataki v. Urban Justice Center, 38 A.D.3d 20, 27-28 (1st Dept. 2006) app. den. sub nom Urban Justice Ctr. v. Spitzer, 8 N.Y.3d 958 (2007).

Under the separation of powers doctrine, the Constitution restricts each branch from acting outside its particular sphere of power granted to it by the People of the state through the Constitution. "The State Constitution provides for a distribution of powers among the three branches of government (See, N.Y. CONST., Art. III, § 1 ("(t) he legislative power of this state shall be vested in the senate and assembly"); Art. IV, § 3 (the Governor "shall take care that the laws are faithfully executed"). It is an arrangement that serves to prevent an excessive concentration of power in any one branch or in any one person (S*ee*, Rapp v. Carey, 44 N.Y.2d 157, 162 (1978); *see also*, Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 355 (1985); Rudder v. Pataki, 246 A.D.2d 183, 190 (3d Dept. 1998). Concomitant with the power is the fact that each sphere is in itself insulated from the interference by the other.

A court may not step into disputes that are intra branch such as the instant matter regarding the selection of officers. Although it has been portrayed as a chaotic situation, it is a matter for the House to settle its own internal dispute. That settlement is determined by a majority of the elected members of the house and not by a court due to the restrictions that bar courts from interceding, which is only reiterated in Article III § 9, when the Constitution clearly states that the Senate shall " determine the rules of its own proceedings…[and] shall choose its own officers."

The Courts of this State have made it clear that invitations by legal challenges which would cause the judiciary to intervene in the internal workings of its coordinate branches of government are to be declined. N.Y. Public Interest Group v. Steingut, 40 N.Y.2d 250, 357 (1976); Matter of Gottlieb v. Duryea, 38 A.D. 2d 634 (3d Dept. 1971), *aff'd.* 30 N.Y. 2d 807 (1972). This Department has further made clear that any action by the court intruding into the

wholly internal affairs of Legislature is a violation of separation of powers. Heimbach v. State of New York, 59 N.Y. 2d 891, 893 (3d Dept. 1983). This is not a dispute concerning the authority of the branch to intrude on matters committed to the other constitutional branches, this is wholly an internal dispute. *See*, Saxton v. Carey, 44 N.Y. 2d 545, 551; N.Y. State Banker's Ass'n. v. Wetzler, 81 N.Y. 2d 98, 102 (1993). Where the language of the Constitution requires the Senate to choose a Temporary President is plain and unambiguous and full effect should be given to the intention of the Framers as indicated by the language employed and approved by the People. Settle v. Van Evrea, 49 N.Y. 280, 281 (1872). There is no justification for departing from the literal language of the constitutional provisions.

The State Constitution allocates power exclusively to the legislative branch to make certain determinations and decisions. Article III Section 9 provides that each house shall determine the rules of its own proceedings and shall choose its own officers. The Constitution further requires that one such officer shall be the Temporary President. It does not grant the Temporary President a term or even an election but a choosing. It is clear that the provision does not prevent the choosing of additional officers at any time. A Temporary President could be chosen multiple times within a Legislative Session, as long as one is chosen.

It is not the province of the courts to direct the legislature how to do its work. Judicial review of every internal dispute between members of the legislature would frustrate the legislative process and violate the constitutional principles of separation of powers. Matter of Anderson v. Krupsak, 40 N.Y.2d 397, 403. Here, where the dispute is among members in the same house as to who holds an internal office of the body, a wholly internal, procedural aspect of the legislative process, courts have no power to intrude on the legislative process. Board of Education v. City of New York, 41 N.Y. 2d 535, 538 (1977). Even if the court concludes it is

within its power, then it should exercise the prudential restraint and deference owed to the coordinate branch. Any deliberative body is the final arbiter of its own procedures unless they directly violate a specific constitutional prohibition, which is clearly not the case here.

The reasoning is clear. The Senate may for any reason by a majority vote change its leadership and its officers. It may do so at the disposition of a majority of members. It may do so for any reason without being challenged. The purpose of officers is to represent the majority of its members. When the majority of members decide that they should be led or managed by another person, they may select their own officers and leaders as they deign, without the interference of a court. As the Court in Board of Education wrote in a similar context, for a court without a vote to write in support of the resolution being out of order or a vote to adjourn, then the court interferes with the actions of the Senate's 32 person majority in selecting a new Temporary President. Such a decision would impose upon the State Senate a parliamentary rule not adopted by the body for conduct of its internal affairs, which could should be classified as judicial usurpation of the will of the Senate's majority. *See,* Board of Education at 41 N.Y.2d at 542.

POINT II

ACCEPTING THE PLAINTIFF'S ARGUMENT RESULTS IN THE INABILITY OF A 32 MEMBER MAJORITY OF THE SENATE, TO CHANGE LEADERSHIP OF THE BODY

That the law does not seek to impose an absurd result is a fixed axiom of law. In the case at bar, to accept the argument that once selected the Temporary President may not be de-selected is an absurd result. Principally, the party holding office holds it at the will of the body. The Constitution merely permits a selection. It does not set a term of office and in fact the

Temporary President and the Speaker are the only constitutional officers who are not afforded a term as a fixed condition of the office.

Senator Breslin's act, in abandoning the podium, and attempting to adjourn in the face of a house which did not wish to adjourn violates the right of the Senate to do business by its lawful majority. To hold otherwise would sanction a practice that would allow one member or a minority group of members-- including the failed leader of a house of the legislature—to nullify the express vote and the expressed will of the 32 person majority representing the People of the state.

The Senate rules and customs are a reasonable and practical interpretation of the constitutional requirements imposed upon them. The reasonable and practical interpretation of the process is that a Senator selected as Temporary President may be de-selected. Of crucial significance is the fact that the title accorded is that of Temporary President, on its face it is not anything other than a provisional status. As is the case with the Assembly's officer, the Speaker, the office is not a sinecure but merely held at the will of the majority of the voting members of the body. A temporary president has no tenure or permanence. The literal meaning of the Constitution is that the officer serves at the pleasure of a majority of its membership. Certainly the Temporary President cannot claim a term or a permanence when the Constitution by is very terms denies such fixed and immutable status. Even if, as Plaintiff claims, a term was contained in the resolution, it is now claimed to require that the Temporary President, having lost the support of a majority of the body, is still required by law to serve out the entire legislative session of two years. The legislature must be governed by the Constitution, which sets no term or binding obligation. The interpretation of the plaintiff is a self serving additive and not contained

within the Constitutional elements of office. *See,* People ex rel. Bolton v. Albertson, 55 N.Y. 50, 55.

Settle v. Van Eyvra, *supra*, stated that it would be dangerous in the extreme to extend the operation and effect of a written constitution by construction beyond the fair scope of its terms. To simply deign that a restricted or a literal interpretation may now be found to be inconvenient or impolitic, would basically establish a new constitution and do for the people what they themselves have not done. Settle, at 281. The plain language of the Constitution states that the Senate shall select a temporary president. By its terms it can do it more than once in a legislative session and can do so in an unrestricted fashion. The imaginary parade of horrors of an ever changing Temporary President is one of the possibilities that the Constitution tolerates.

POINT III
THE RESOLUTION ELECTING MALCOLM SMITH DOES NOT SET A TERM

The resolution electing Malcolm Smith sets a period of service but not a binding term. It articulates the period of the legislature indicating that a member serves a two-year term as a Senator but not a term as an officer or leader. Unlike the Secretary of the Senate, the majority leader and Temporary President do not have a statutory term. Legislative Law Section 6 sets a specific term of his election i.e. for the term of the Senate. Legislative Law § 6 (1). It states that the Secretary of the Senate may be chosen and if he is chosen it is for a term. The majority leader and Temporary President do not have terms fixed in law by either the statute or the Constitution. Even the Senate Rules are silent as to the manner or selection or term of office of the Temporary President. Therefore, where the body has not acted to extend a term in any sort of fixed fashion, either via statute or Rules, it should not be imputed simply because of ambiguous language contained in the resolution. Selection of the Temporary President of the Senate by

resolution vests no form of tenure in the officer selected. The body by its majority selected him. A similar majority, the same majority, or a wholly reconstituted majority may select another at any time.

General principles of statutory construction as contained in McKinney's Statutes § 393 deals with implied repeals. This general rule of construction notes that while "it is not the usual practice to pass a repealing act at the same session of the Legislature." The court will decree a repeal by implication only where the conflicting statutes cannot possibly be harmonized. *Citing,* Gould v. Bennett, 153 Misc 818 (1935). In such a case it is generally accepted that the later act, being the last expression of the legislative will, is the one that will prevail. Even if it were required, as erroneously claimed by the Plaintiff, that Senator Smith be formally de-selected prior to a new selection, the principle of implied repeal would govern to deem the later act of selecting a new Temporary President to be the valid act. *See* McKinney's Statutes § 393 et. seq.

POINT IV

THE PUBLIC OFFICERS LAW DOES NOT APPLY TO THE SELECTION OR DE-SELECTION OF A PRESIDING OFFICER OF THE SENATE

The Senate is the arbiter of its own officers pursuant to the Constitution Article III § 9. In the case of a majority vote of the body to select a different Temporary President, the Public Officers law is inapplicable. The Temporary President does not hold the same status for purposes of his removal as that of a Senator. Indeed, a Senator may be removed by the body itself without regard to or recourse to the Public Officers Law.

The sole section concerning removal *by* the Senate of public officers, Public Officers Law Section 32, is not mentioned by the plaintiffs because it is clear that the officers

removable by the Senate under this, the most specific law to this situation, do not include members of the house serving in any capacity.

Public Officers Law Section 35 relates to the removal of a public officer from office with regard to officers who are appointed or elected. To demonstrate the inapplicability of the law, it requires that actions under the statute are to be delivered to the Secretary of State. The Secretary of State is not the officer to whom the Senate members and officers are responsible given that he is an officer of the Executive Branch. Senators and Senate officers and employees all do their filing with the Secretary of Senate and not that of the Secretary of State.

Any claim that there has to be a vacancy under Public Officers Law Section 30 is likewise misplaced. To rule otherwise would require that the will of the 32 member majority must await "a vacancy" misunderstands the simple term used n the Constitution of the selection of a Temporary President. It is not an appointment or an election. Only legislative leaders hold office by virtue of selection. In the case of Malcolm A Smith a majority of his colleagues voted to de select him. Because the Constitution provides only that the Temporary President is selected, it must be the rule of law that such an officer may be de-selected by a similar will of the majority. Therefore the sections of the Public Officers Law regarding terms and removal of officers are not applicable to the Senate in its selection of its own officers.

POINT V

THE CONCERNS REGARDING ARTICLE IV OF THE CONSTITUTION REGARDING THE SUCCESSION OF THE TEMPORARY PRESIDENT AS ACTING GOVERNOR IS NOT A JUSTICIABLE MATTER

The concern that Senator Espada is next in the line of succession to the office of the Governor is a matter beyond the court's authority to judge. The 32 person majority of the

Senate must be presumed to know what it was doing when it specifically selected Senator Espada to be the Temporary President. If the majority is empowered to select as it wishes then it is empowered to select as it wishes. The Governor's decision to simply remain in the state would solve any claim of the Plaintiff. Counsel for the plaintiff raised the issue of what if the Governor accidently died. This imaginary hypothetical, while appropriate for a law school examination, is in no way present in this matter. Should the Governor be ill or in extremis then the matter might properly be raised. Even if it were raised, then it would simply be the will of the people expressed in the Constitution which was given effect. Note that the Constitution, while clearly it is a rare situation, did in fact contemplate the possibility that there would be a vacancy in the office of the lieutenant governor, such that another would need to be designated to succeed to the Governorship. The Constitution in Article IV § 6 designated that this person should be the Temporary President. If this is deemed to be a "crisis" then the Governor just may have to remain within the confines of the state that he represents. Given the urgency of finishing up the people's business near the close of a legislative session with much unresolved, it would be expected that he remain close to the seat of government of which he is the Chief Executive. If Senator Espada's selection as Temporary President keeps the Governor here in his home state, then would seem to have a salutary effect and not be a matter of constitutional crisis.

POINT VI

THIS MATTER MUST BE DISMISSED FOR FAILURE TO NAME NECESSARY PARTIES

It is abundantly clear that the Senate took action after Senator Breslin and other Senators abandoned the chamber. Among those actions were the removal of several senators form committee chairmanships and leadership posts. Senator Skelos was elected majority leader.

Senator Espada is not the only target of the Plaintiff's attack. His pleadings essentially claim that all actions after Senator Breslin left the podium are null and void. This makes a host of other Senators stake holders in the outcome of this case.

Under the plain language of CPLR 1001 and 1003, they are necessary arties and the non joinder of such parties renders the complaint fatally defective.

The Complaint must therefore be dismissed.

POINT VII

THERE IS NO NOTICE OF THE CONSTITUTIONAL CLAIMS TO THE NEW YORK STATE ATTORNEY GENERAL

Pursuant to the provisions of CPLR 1012 and Executive Law Section 71 (3) the Court is prohibited from taking up any constitutional claims where no notice is given to the Attorney General. It is the plaintiff who claims that there is a constitutional crisis at hand. In fact the temporary relief Plaintiff did obtain from Justice Karen Peters of the Appellate Division relates directly to the Constitutional line of succession.

There is no notice to the Attorney General, therefore this Court may not consider the claim, and must vacate any temporary relief relating to the Constitutional Claims.

CONCLUSION

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, NY

Respectfully Submitted,

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