

AT AN IAS TERM OF THE SUPREME  
COURT HELD IN AND FOR THE COUNTY OF  
ALBANY, AT THE COURTHOUSE  
THEREOF, ON THE 12<sup>TH</sup> DAY OF JUNE 2009

PRESENT: Hon. Thomas J. McNamara, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

\_\_\_\_\_ X  
In the matter of

Malcolm Smith,  
Plaintiff,

-against-

Pedro Espada, Jr.  
Defendant.

Index No. 4912/2009

ORDER TO SHOW CAUSE

\_\_\_\_\_ X

Upon the affirmation of John Ciampoli, Esq. , and the papers submitted therewith, and upon all of the papers and proceedings heretofore had herein, it is

ORDERED, that the Plaintiff herein, Malcolm Smith, SHOW CAUSE BEFORE THIS COURT, Hon. Thomas J. McNamara, J.S.C., on June \_\_\_\_\_, 2009, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day or as soon thereafter as counsel might be heard, why an order of this Court should not issue:

1. Dismissing the within Complaint of the plaintiff pursuant to CPLR 3211 [a] (1), (2), (7), and (10).
2. Awarding to the Defendant such other, further and different relief as may be just and proper in the premises, and it is

ORDERED, that A copy of the Order to show cause and the papers upon which it is granted be served upon the plaintiff by delivering a true copy of same upon his counsel of

record in this matter either by personal delivery to counsel or to counsel's law offices, Express Mail or by electronic transmission, or by facsimile transmission, on or before June \_\_\_\_, 2009, and that such service shall be good and sufficient service thereof.

ENTER:

DATED: June \_\_\_\_, 2009

ALBANY, NEW YORK

\_\_\_\_\_ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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Index No. 4912/2009  
**Motion to Dismiss**

\_\_\_\_\_ 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. Defendant moves to dismiss under the provisions of CPLR 3211[a] (1), (2), (7), and (10), as more fully set forth herein.
3. The most important facts to the resolution of this matter are those which the Plaintiff has willfully sought to hide from the Court and the exhibits that he has NOT attached to his complaint.
4. Plaintiff believes that by ordering the lights in the chamber shut, disconnecting the public address system, and turning off the TV cameras which allow the public to view the legislative sessions that he can squelch the voice of the majority and stop the Senate Session.

5. After the Smith group abandoned the podium and the chamber, session continued.
6. The Roll call on adjournment was held and the motion defeated.
7. Senator Winner, now presiding took up a quorum call. Thirty four Senators were recorded as present. In this sixty two member body, thirty four constitutes a quorum.
8. Subsequently, the Senate chose new leadership and adopted new rules.
9. Senator Espada was elected the Temporary President of the Senate, and Senator Skelos was elected Majority Leader.
10. The evidence of these actions is contained in the Senate Journal, annexed hereto and made a part hereof as Exhibit A.
11. Further, the Affidavit of John T. Casey, Jr., annexed hereto and made a part hereof as Exhibit B, demonstrates that the rules and procedures of the Senate, and applicable laws were followed during the proceedings of June 8, 2009.
12. Once the Court has a copy of the Journal, the conclusive evidence of the Legislature's actions, the inquiry stops.
13. To go behind the Journal, the Roll Call votes evidenced therein, and even to question the rulings of the Senate on procedural motions, as the plaintiff suggests, would only serve to inject the Court into the internal affairs of the Senate.
14. In short, the intra-Senate nature of this dispute makes the matter non-justiciable.

15. The Senate has chosen to change its leadership and officers. The Courts may not second guess the legislative act supported by a quorum being present and a majority of the membership of the house voting in support.
16. Accordingly this Court should dismiss the Complaint and deny the relief requested for failure to state a justiciable cause of action under the law.

IN AND AS FOR A SECOND MOTION TO DISMISS

17. Defendant respectfully repeats and re-alleges each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.
18. Taken to its logical ends, a legislative body will never again be able to have a majority of its members change leadership.
19. This is simply absurd.
20. Where a majority changes during the tenure of a legislature, Plaintiff would have the new majority throttled by a person who no longer enjoyed the support of a majority in that house of the legislature.
21. In the instance where members' affiliations are changed by a special election, or members switch parties, or, as here, where a bi-partisan coalition steps forward to replace the dysfunctional leadership of the house, Plaintiff, to make the temporary president's position his own sinecure, would have this court thwart the will of the majority.
22. The majority of the Senate has spoken. Their acts are supported by a quorum of the body being present, a majority vote of the house, as recorded in the Journal.

23. This Court may not interfere in the internal workings of a legislative body where the majority has spoken.

24. Accordingly, the Complaint must be dismissed.

#### IN AND AS FOR A THIRD MOTION TO DISMISS

25. Defendant respectfully repeats and re-alleges each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.

26. Plaintiff claims to be elected to a term of office.

27. If there is to be a term of office for leadership chosen by the members of the Senate it would have to be set by the State Constitution or the Legislative Law.

28. Simply put, neither the Constitution nor the Legislative Law set the term of office for the leadership of either house. Indeed, the leaders serve at the will of the majority.

29. If the Legislature had intended to impose a term of office, it would have clearly stated so. In fact the Secretary of the Senate is elected for a term, see, Section Six Legislative Law. The Governor, for instance, “shall hold office for four years”, see Article IV Section 1, N.Y.S. Constitution.

30. Accordingly, the language “for the years 2009 – 2010” in the title of Resolution 1, which actually refers to the tenure of the legislative body, cannot trump the open ended language of the Constitution , “A majority of each house shall constitute a quorum to do business. \*\*\* Each house shall ... choose its own officers; and the Senate shall choose a Temporary

President and the Assembly shall choose a Speaker” Article III, Section 9  
N.Y.S. Constitution.

31. For the foregoing reasons the Complaint must be dismissed and the relief  
requested must be denied.

IN AND AS FOR A FOURTH MOTION TO DISMISS

32. Defendant respectfully repeats and re-alleges each and every allegation  
contained in the preceding paragraphs as if same were fully set forth  
herein.

33. The applicable law here is the Constitution, which provides the majority of  
each house of the legislature to choose its own leadership.

34. The only section of the Public Officers law mentioning the Senate is  
Section 32. This provision of law giving the public offices subject to  
Senate Removal does not include members of the Senate chosen to serve  
in special capacities, particularly the temporary president.

35. Section 35 Public officers’ law also does not apply. This section of law  
relates to elected officials and appointed officials responsible for filing  
with the Secretary of State. Internal officers of the Senate file their oaths  
of office with the Secretary of the Senate, not the Secretary of State.

36. There is no evidence that the Legislature ever intended this section of law  
to apply to the internal officers of the Legislature.

37. Finally, Plaintiff’s reliance upon section 32 Public Officers law is  
misplaced.

38. The position of Temporary president of the Senate is not appointed or the product of an election by the electors of the state. The members of the Senate, by majority vote choose the Temporary president.
39. The will of the majority of the Senators must not await a vacancy – this officer of the Senate serves at the will of the Senators.
40. Accordingly, the Complaint must be dismissed.

IN AND AS FOR A FIFTH MOTION TO DISMISS

41. The allegations that Senator Espada being in the line of succession to the Governorship somehow makes this a justiciable question is little more than a red herring.
42. There simply is no constitutional crisis here.
43. The Senate has an unfettered right to choose the individual member that it elevates to the position of Temporary President.
44. Arguments that the Governor will choose not to leave the state so as to prevent an individual from becoming an Acting Governor is of no moment.
45. In fact it is the prerogative of the Senate to choose just such a person in a premeditated effort to keep the Governor “at home”.
46. Again, because the majority of the Senate has acted in choosing a Temporary President, and that act is documented, the inquiry can go no further.
47. Accordingly, the complaint must be dismissed.

IN AND AS FOR A SIXTH CAUSE OF ACTION



48. Defendant respectfully repeats and re-alleges each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.
49. Plaintiff alleges and actually sought temporary relief on the basis of an alleged constitutional crisis relating to the line of succession, yet there is no evidence that the State of New York, specifically, the Attorney General have been served with notice pursuant to the Executive Law.
50. In the absence of notice to the Attorney general the Court may not proceed upon any constitutional claims.

WHEREFORE, Defendant, Senator Pedro Espada, Jr. respectfully requests an order of this Court dismissing the Complaint, and denying the relief requested therein, together with such other, further and different relief as may be just and proper in the premises.

DATED: June 12, 2009

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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