

At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of March 2008

P R E S E N T:
HON. ARTHUR M. SCHACK
Justice

~~J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION, AS PURCHASER OF THE NOTE AND MORTGAGE (AS DEFINED HEREIN) AND CERTAIN OTHER ASSETS OF WASHINGTON MUTUAL BANK, FORMERLY KNOWN AS WASHINGTON MUTUAL BANK, FA, FROM THE FEDERAL DEPOSIT INSURANCE CORPORATION ACTING AS RECEIVER,~~

~~Plaintiff,~~

~~against -~~

~~BERGEN PLAZA, LLC, et. al.,~~

~~Defendants.~~

DECISION & ORDER

Index No. 126/09

In this real estate action, plaintiff moves to appoint a Receiver, pursuant to RPL § 254 (10) and RPAPL § 1325. However, I must recuse myself to avoid any appearance of impropriety. In December 2006, I joined two other judges in an Article 78 proceeding, to obtain long overdue judicial pay raises. Two of the captioned-respondents in our Article 78 proceeding are the New York State Senate and the New York State Assembly.

In February 2007, Craig M. Johnson, Esq., who is of counsel to plaintiff's law firm, Jaspan Schlesinger LLP, was elected to the New York State Senate in a special election. Not only is the Hon. Craig M. Johnson a member of the State Senate, but when a judicial pay raise bill, 2007 NY Senate S 5513, came up for a rollcall vote in the State Senate on April 30, 2007, he voted against it. Further, the Hon. Marc. S. Alessi, who represents the

1st Assembly District, on the North Shore and North Fork of Long Island, became of counsel to Jaspan Schlesinger LLP in late 2007.

While a judge does not have to give a reason or reasons for his or her recusal, I believe it is necessary to explain my reasons.

In late December 2006, I became a petitioner in a Nassau County Supreme Court Article 78 proceeding, *EDWARD A. MARON, ARTHUR SCHACK, and JOSEPH DE MARO v SHELDON SILVER, as Speaker of the New York State Assembly, NEW YORK STATE ASSEMBLY, JOSEPH BRUNO, as the Temporary President of the New York State Senate, NEW YORK STATE SENATE, GEORGE PATAKI, as Governor of the State of New York, "JOHN DOE" as the Acting Comptroller of the Sate of New York, and the OFFICE OF COURT ADMINISTRATION*, Index Number 21984/06. The venue of this action was *subsequently* transferred to Albany County Supreme Court, Index Number 4108/07. The caption has been amended to replaced "GEORGE PATAKI, as Governor of the State of New York" with "ELIOT SPITZER, as Governor of the State of New York," and "'John Doe' as the Acting Comptroller of the State of New York" with "THOMAS DI NAPOLI as the Comptroller of the State of New York." This action seeks, among other things, a determination that: the Legislatures's 2006-07 appropriation for judicial pay raises were final and complete; judges' compensation has been unconstitutionally diminished in violation of Article VI, § 25(a) of the New York State Constitution; and respondents' improper linkage of judicial salary increases with unrelated legislative initiatives, among other factors, violates the equal protection clause of Article I § 11 of the New York State Constitution.

Justice Thomas J. McNamara, Supreme Court, Albany County, reserved decision on a variety of motions in the action, on September 7, 2007. In his decision, entered on December 7, 2007, he partially granted certain portions of respondents' motion to dismiss the petition.

Both sides appealed to the Appellate Division, Third Department. Oral argument was heard on September 3, 2008, and the Court issued its 4-1 decision on November 13, 2008. While the majority decision of Justice Mercure dismissed the petition, the majority held that "New York judges deserve a pay raise - it is undisputed that they do." Justice Peters, in her partial dissent, would have allowed the separation of powers claim to proceed.

My co-petitioners and I have appealed the Third Department's decision to the Court of Appeals.

In February 2007, Craig M. Johnson, Esq., a Democrat, became the Hon. Craig M. Johnson, by winning in a special election to fill a vacancy in the 7th Senate District, in Nassau County. Senator Johnson, unlike myself and my fellow New York State judges, is not precluded from earning additional income. Mr. Johnson, according to the Office of Court Administration's Attorney Registry, lists Jaspan Schlesinger Hoffman LLP's Garden City, New York office as his "business address." Jaspan Schlesinger Hoffman, LLP's website, www.jshllp.com, on the page for Mr. Johnson, states that "Mr. Johnson has been actively involved in numerous matters on behalf of the firm's clients."

With respect to Assemblyman Alessi, it was reported in the November 27, 2007 *New York Law Journal's* "Personal Notes of Lawyers," that Mr. Alessi "has joined Jaspan Schelsinger Hoffman as of counsel." Similar to Senator Johnson, Assemblyman Alessi has the right to earn additional income, unlike judges. Jaspan Schlesinger LLP's website, www.jshllp.com, on the page for Mr. Alessi, states that "Mr. Alessi is proud of the work he has done within the Labor Movement." Mr. Alessi should realize that the approximately 1300 New York State judges are working people who deserve their first pay raise in a decade. However, according to the Office of Court Administration's Attorney Registry, Assemblyman Alessi, unlike Senator Johnson, does not list Jaspan Schlesinger LLP's Garden City, New York office as his "business address." He lists his Assembly District Office, 6144 Route 25A, Building A, Suite 5, Wading River, NY

11792, as his business address. Thus, it appears that Assemblyman Alessi might be in violation of 22 NYCRR § 118.1 (f), which requires an attorney who changes his office address “to file an amended statement [the new office address] within 30 days of such change.”

Both Senator Johnson and Assemblyman Alessi have the right to earn additional income, unlike judges. Glenn Blain, in the January 4, 2009 *New York Daily News*, wrote an article, “Many New York politicians moonlight as lifeguards or real estate agents,” noting that “[m]ore than 110 of the 212 Senate and Assembly members make at least some extra income from outside jobs or business interests.” Further, Mr. Blain quotes the Hon. Martin Golden [who voted for judicial pay raises], “State Sen. Martin Golden, a Brooklyn Republican, said side jobs are necessary. ‘We struggle to put our kids through school and pay our bills just like everybody else,’ said Golden, who owns or co-owns rental properties.” It is high time for both Senator Johnson and Assemblyman Alessi to realize that the approximately 1300 New York State judges are working people who deserve their first pay raise in more than a decade. Senator Golden could have been talking about judges when stating that “[w]e struggle to put our kids through school and pay our bills just like everybody else.”

It would be improper for me, as a petitioner in a separate action against the New York State Senate and the New York State Assembly, to adjudicate the instant matter because of the status of both Senator Johnson and Assemblyman Alessi as members of two of the respondents in my lawsuit, and working for the firm representing the plaintiff, J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION, AS PURCHASER OF THE NOTE AND MORTGAGE (AS DEFINED HEREIN) AND CERTAIN OTHER ASSETS OF WASHINGTON MUTUAL BANK, FORMERLY KNOWN AS WASHINGTON MUTUAL BANK, FA, FROM THE FEDERAL DEPOSIT INSURANCE CORPORATION ACTING AS RECEIVER.

To further support my decision to recuse, it is important to present the events of late April 2007. Senator John De Francisco, Chairman of the Judiciary Committee, introduced 2007 NY Senate Bill S 5313 on April 25, 2007. Originally, all 62 members of the State Senate were sponsors, including Mr. Johnson. Then, the pay raise bill, as reported by Joel Stashenko, in his May 1, 2007 *New York Law Journal* article, "Senate Passes Raise for Judges But Future of Bill Is in Doubt," was in the words of former Chief Judge Judith S. Kaye, "caught, trapped and ensnared in the jaws of Albany politics." Mr. Stashenko reported that

All but one Senate Democrats, who had all agreed to sponsor the pay raise bill when it was introduced last week, abruptly pulled their names off the bill yesterday morning. Senate Minority Leader Malcolm Smith said the Senate has approved some reforms but can do more, including the adoption of a campaign finance reform bill that Democratic Governor Eliot Spitzer has been promoting.

While the Senate had enough votes to pass the bill yesterday, 34-24, its abandonment by Senate Democrats put the fate of the measure in doubt nevertheless. Mr. Spitzer's spokesman Darren Dopp said following the vote that the governor would veto the bill if it reaches his desk, and the 33 Senate Republicans are nine votes shy of the 42 votes necessary to override a veto. Few, if any, of the 29 Democrats are considered likely to join Republicans in voting to override a veto by the Democratic governor.

Senator Craig M. Johnson, the attorney affiliated with Jaspan Schlesinger LLP, where he earns additional income beyond his Senate salary, was one of the 24 Senators to vote "nay" on S 5313. Further in his May 1, 2007 article, Mr. Stashenko reports:

The pullout of Senate Democrats from sponsoring the bill came as more than 100 judges gathered in front of the Court of Appeals for

the annual observance of Law Day.

Chief Judge Kaye asked the judges, members of the 13 organizations representing judges in the state court system, to attend the ceremony in a show of solidarity with her and to demonstrate how crucial the judiciary believes the pay increase is.

In her speech, she said judges were "shocked and dismayed" when the state Legislature completed adopting the 2007-08 state budget on April 1 without including a judicial pay increase.

"No raises for the judges, no retroactivity, not even cost-of-living increases for no reason that is related to us, or to the merit of our cause and absolutely nothing that is within our power to change," the chief judge told a wind-blown gathering of more than 300 people, double the normal turnout for Law Day in Albany. "Tell me, does anyone wonder why we are upset? Could there be any question as to why the judges of the New York state courts are upset, distressed, angered?"

With respect to both Senator Johnson and Assemblyman Alessi, I hope that they, as well as their Jaspan Schlesinger LLP and legislative colleagues are cognizant of the plight of the New York State judiciary. Former Chief Judge Judith Kaye (*State of the Judiciary? Pay Crisis is Taking its Toll*, NYLJ, Jan. 28, 2008, at 11, col 1) commented on the lack of action by both counsels for Jaspan Schlesinger LLP, the Hon. Craig M. Johnson and the Hon. Marc S. Alessi, and their legislative colleagues:

Now in the 10th year with no adjustment whatsoever, New York has dropped from 48th to 49th among the nation's state judiciaries in compensation (adjusted for cost of living) . . . No judge anywhere has gone as long as we have at absolutely frozen compensation. Not even a cost-of-living increase, as the cost of living soars.

The literature these days is filled with articles on judicial independence. The Judiciary's independence of the other political branches is a strength of our democracy. Yet here we are, once again begging and pleading before the Executive and Legislature, on bended knee, hat in hand, no seat at the negotiating table, nothing to trade or barter with them. Is this the posture of judicial independence? I think not.

All of our partners in government favor the proposed judicial salary increases, to the penny, yet nothing happens. And the only explanation is a process that holds our compensation hostage to other, entirely unrelated measures. So we remain locked in the jaws of Albany politics . . .

. . . We are thoroughly demoralized, frustrated, angry . . .

What has hit the New York State Judiciary so especially hard is the disdain with which we are treated.

Judge Bellacosa, for a unanimous Court of Appeals (*People v Moreno*, 70 NY2d 403, 405 [1987]) instructed that “[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal.” The Court, in *Schwartzberg v Kingsbridge Heights Care Center, Inc.*, 28 AD2d 465, 466 (2d Dept 2006), held that “[i]n the absence of a legal disqualification under Judiciary Law § 14, a trial judge is the sole arbiter of the need for recusal, and his or her decision is a matter of discretion and personal conscience (see *People v Moreno*, 70 NY2d 403, 405).” In *Poli v Gara*, 117 AD2d 786, 788-789 (2d Dept 1986), the Court stated that “[t]he question of whether a Judge should recuse himself to avoid an appearance of impropriety is a matter left to the personal conscience of the court (e.g., *Matter of Johnson v. Hornbliss*, 93 AD2d 732 [1d Dept 1983]; *Casterella v. Casterella*, 65 AD2d 614 [2d Dept 1978]).” (See *People v Fischer*, 143 AD2d 1036 [2d Dept 1988]; *People v Gallagher*, 158 AD2d 469 [2d Dept 1990]; *Warm v State*, 265

AD2d 546 [2d Dept 1999]; *In re Jimmy H.*, 274 AD2d 430 [2d Dept 2000]; *People ex rel. Smulczeski, ex rel. Smulczeski v Smulczeski*, 18 AD3d 785 [2d Dept 2005]; *Tornheim v Tornheim*, 28 AD3d 534 [2d Dept 2006]; *Montesdeoca v Montesdeoca*, 38 AD3d 666 [2d Dept 2007]; *Kupersmith v Winged Foot Gold Club, Inc.*, 38 AD3d 847 [2d Dept 2007]).

To avoid any potential appearance of impropriety in the instant case, since both Senator Craig M. Johnson and Assembly Member Marc S. Alessi are both of counsel to Jaspan Schelsinger Hoffman LLP, plaintiff's counsel, I must recuse myself from this matter. If I were to deny the instant application for an order of reference it could be construed as retaliation against the Legislature by an aggrieved judge. Conversely, if I were to grant the instant application for an order of reference, it could be perceived as an attempt to curry favor with Mr. Johnson, Mr. Alessi, and their 210 colleagues in the New York State Assembly and Senate. I can be fair and impartial in deciding the instant application the appointment of a receiver, however, in the exercise of discretion and good conscience, and to avoid any speculation as to the rationale for my ruling, I must recuse myself from this case.

I hope that Mr. Johnson and Mr. Alessi would allow the judges of this state to receive their first pay raise in this century. Thanks to our legislators, including both Senator Johnson and Assemblyman Alessi, our New York State judges are the "Rodney Dangerfields" of government. A pay raise would help to give us a little respect, instead of, as recently said by Chief Judge Kaye, "the disdain with which we are treated."

Conclusion

Accordingly, it is

ORDERED, that I recuse myself forthwith from the instant action.

This constitutes the Decision and Order of the Court.

E N T E R

HON. ARTHUR M. SCHACK, J. S. C.