

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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DARREL J. AUBERTINE, in his official capacity as
Member of the New York State Senate,

Petitioner

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

- against -

THE NEW YORK STATE ASSEMBLY
LAURENE R. KRETZLER, in her official capacity as
Clerk of the New York State Assembly; and
BRUCE STRAIT, in his official capacity
as Index Clerk of the New York State Assembly.

Index No.

Assigned to Justice:

ARTICLE 78 PETITION

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INTRODUCTION

1. This Article 78 proceeding seeks a declaration that the Respondents are required to perform ministerial duties specified in New York Constitution, statute and rule with respect to critical, time-sensitive legislation that the New York State Senate passed on June 30, 2009, and/or seeks to compel them by mandamus to do so.

2. Senator Darrel J. Aubertine joined a majority of the New York State Senate to convene a session, with Senator Andrea Stewart-Cousins as Presiding Officer, on June 30, 2009, the Senate passed 122 bills that the Assembly also passed during the current legislative session. However, the Assembly and its Index Clerk have refused to receive these bills for enrollment and presentment to the Governor. This refusal violates the Constitution, the Legislative Law and the Assembly's own rules. As a result, Senator Aubertine brings this

proceeding to compel the Assembly and its Index Clerk, Bruce Strait, to do their ministerial duties to receive such bills from the Senate so that they can be presented to the Governor for executive action. In the alternative, Senator Aubertine brings this proceeding seeking a declaratory judgment that the Assembly and its Index Clerk have a legal duty to accept receipt of such bills.

PARTIES

3. Petitioner Darrel J. Aubertine is a New York State Senator representing the 48th Senatorial District in the upper house of the New York State Legislature. He maintains a legislative office in Room 903 of the Legislative Office Building, Albany, New York 12248. Senator Aubertine voted in favor of the bills that are the subject of this proceeding and therefore has standing to bring this Petition.

4. Respondent Laurene R. Kretzler is the Clerk of the New York State Assembly. Her principal place of business is located at Room 346 of the New York State Capitol in Albany, New York.

5. Respondent Bruce Strait is the Index Clerk of the New York State Assembly. His principal place of business is located at Room 323M of the New York State Capitol, Albany, New York.

6. Respondent New York State Assembly is the lower house of the New York State legislature. Its principal place of business is located at the New York State Capitol, Albany, New York.

VENUE

7. Venue is proper in Albany County pursuant to CPLR 506(b) and 7804(b) because Respondents there failed to perform the duties enjoined on them by law.

FACTS

8. On June 30, 2009, the Temporary President of the Senate, Malcolm A. Smith, called for the Senate to convene in regular session at noon. The Senate gavelled into regular session at 12:16 pm.

9. Under long-standing and well-established Senate rules and procedures, any Senator present in the Chamber at the time a session begins is recorded as “present” for purposes of obtaining a quorum.

10. Thirty-one Democratic members of the Senate were marked by Deputy Journal Clerk Lisa Copeland as being present in the Chamber at or after the start of Senate proceedings at the regular session at 12:16pm on June 30, 2009.

11. Senator Frank Padavan (R-Queens) was also in the Chamber at such time. Accordingly, observing Senate practice to record Members as being present upon entering the Senate Chamber, Ms. Copeland marked Senator Padavan as present. See Exhibit A (Official Senate Attendance Record for Tuesday, June 30, 2009)

12. Senators, Senate Staff and others also observed Senator Padavan in the Chamber at this time. See Exhibit B (Affidavits of Staff and Senators); Exhibit C (Affidavit of Barbara Bartoletti).

13. Accordingly, 32 Senators – a majority of the members elected – were present in the Chamber. A quorum was thus obtained and the Senate could proceed to enact legislation. New York State Constitution art. III § 9; Senate Rule IX, § 2(a).

14. Once the Senate establishes quorum in a Session day, it cannot be challenged except by a motion for a quorum call, which is in order at any time. Senate Rule IX, §2(f).

15. No Senator made a motion for a quorum call on June 30, 2009.

16. A quorum being obtained, the Senate took up for consideration 47 bills that were on the “Active List” — a list of bills previously designated for Senate action. See Exhibit D (Active List for June 30, 2009 session).

17. All of these bills had previously passed the Assembly.

18. The 47 pieces of legislation were considered by use of the “fast roll call” vote under Senate Rule VIII, § 6(b). In a “fast roll call,” a bill can be passed in the Senate after the Journal Clerk calls the names of five Senators. Senators that are present are presumed to vote in the affirmative, unless they indicate to the Journal Clerk that they oppose the bill. The bill is considered passed when the number of Senators marked as present, less the number of negative votes, is at least 32 (a majority of Senators elected to the house).

19. Petitioner voted in favor of the bills, and they passed by vote of 32-0.

20. After the Senate passed these bills, the Senate Journal Clerk’s office began the customary process of preparing the bills for signature by the Presiding Officer of the Senate.

21. At all times during the regular session of June 30, 2009, the Presiding Officer of the Senate was Senator Stewart-Cousins. (She was also the Presiding Officer of the Senate at two separate Extraordinary Sessions of the Senate called by the Governor on June 30, 2009 at 10:00 am and at 7:00 pm).

22. In her capacity as the Presiding Officer of the Senate at the regular session on June 30, 2009, Senator Stewart-Cousins certified by her signature on each bill jacket that each bill was duly passed by the Senate.

23. The bill jackets were then taken to the Senate Journal Clerk's office located in room 323M in the State Capitol for data processing and entry.

24. As the data entry process was undertaken by the Journal Clerk's office, the Senate Committee on Rules ("Rules Committee") took up 73 additional bills in the rear of the Chamber. Because these bills had not been part of the Active List, they could only be considered by the full Senate after being reported to the floor by the Rules Committee.

25. The Rules Committee issued such a report (a "Rules Report"), which was adopted by the Senate. By adopting this report, the Senate enabled the 73 bills to be considered for passage. The Senate then passed 72 of these 73 bills by fast roll call. See Exhibit E (List of 72 Bills reported by Senate Rules Committee and passed by the Senate at the June 30, 2009 session).

26. All of these bills had previously passed the Assembly.

27. Petitioner voted in favor of all 73 bills. The 72 bills that passed did so by vote of 32-0. One bill was voted down 19-13.

28. In her capacity as the Presiding Officer of the Senate at the regular session on June 30, 2009, Senator Stewart-Cousins certified by her signature on each bill jacket that each of the 72 bills had been duly passed by the Senate.

29. Simultaneous to the Rules Report being taken up and voted on in the Chamber, Sheillah Dare, Executive Secretary to the Senate Journal Clerk, proceeded to deliver

and return the first 47 Senate-passed bills to the Assembly Index Clerk's office. (Affidavit attached).

30. When the bills were officially delivered and returned to Respondent Strait, the Assembly Index Clerk, he refused to accept them. He stated that no bills from the Senate's proceedings of the day would be accepted. No further explanation was given for his refusal to accept the bills.

31. Dare then returned to the Senate Journal Clerk's Office, with the bills, and informed Journal Clerk staff that the Assembly Index Clerk was not accepting any bills passed at the Senate's June 30, 2009 regular session.

32. Upon conclusion of the Senate's business for the day, the Senate Journal Clerk's office sent Daniel Ruggles, Assistant Supervisor to Senate Desk Operations, on two additional and separate occasions to the Assembly Index Clerk to return and deliver the additional bills that had passed the Senate on June 30, 2009.

33. On the first occasion, Ruggles attempted to return and deliver 38 of the 72 bills that had been reported to floor by the Rules Committee and passed by the Senate. On the second occasion, he attempted to deliver the other 37 bills that had been reported to floor by the Rules Committee and passed by the Senate. On both occasions, Ruggles was informed that these bills would not be accepted.

34. Upon return to the Journal Clerk's office, Ruggles notified the Journal Clerk staff that the Assembly was still refusing to accept the bills.

35. To date, the Assembly Index Clerk has not formally accepted any bills that were passed on June 30, 2009. No reason has been given for this refusal.

MANDATORY LAWS AND THE CONSEQUENCES OF THEIR DISREGARD

36. Article IV, section 7 of the New York State Constitution states: “Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the Governor.” N.Y. Const. art. IV, §7.

37. The Constitution does not provide for bills passed by both houses of the legislature to be withheld from the Governor. “Every” such bill must be presented to the Governor, who may then choose to sign, not sign or veto the bill. Id.

38. If the Assembly does not allow the Senate to return the bills in question, then those bills cannot be presented to the Governor. The Governor may decide not to sign a bill into law if he believes its passage by either house was legally defective.

39. Assembly Rule III, § 9, states that, “*All Assembly bills passed by the Assembly and sent to the Senate for action shall, upon passage and return by the Senate to the Assembly, be transmitted by the Index Clerk to the Governor within ten legislative days after receipt from the Senate, except that any bill returned for transmittal to the Assembly after the first of May and before the first of June shall be transmitted to the Governor within thirty days of such receipt, and any bill returned for transmittal to the Assembly on or after the first of June shall be transmitted to the Governor within forty-five days of such receipt.*” Assembly Rule III, § 9 (emphasis added).

40. Assembly Rule III, § 9 was not suspended on June 30, 2009, and remains in effect. If, then, the Senate in June passed an identical bill to one previously passed by the Assembly (a so-called “same as” bill), the Assembly must accept the “return” of that bill so that it can send the bill to the Governor. The Assembly’s own rule states without exception that the Assembly “shall” transmit such a bill to the Governor within 45 days. Assembly Rule III, § 9.

41. There is no authority by law or rule that that empowers the Assembly or any of its officers to refuse to accept return of a bill that — having passed the Assembly — was passed by the Senate, certified by the Presiding Officer of the Senate in accordance with section 40 of the legislative law, and delivered to the Assembly by the Senate.

42. The signature of the Presiding Officer of the Senate on a bill jacket is “conclusive evidence” that a bill has passed the Senate. Legislative Law § 40.

43. There is no authority by law or rule that empowers the Assembly or any of its officers to challenge the qualifications of the Presiding Officer of the Senate.

44. To allow one legislative body to make a substantive determination as to the qualifications of the Presiding Officer of the other legislative body, who presided over a session where quorum was obtained and business conducted, would violate the New York Constitution, art. III, § 9, and disrupt the legislative process.

45. The power to challenge whether someone lawfully holds or exercises a public office is vested in the Attorney General, who may bring a *quo warranto* action. Executive Law § 63-b.

46. The Constitution is clear that “[e]ach house shall determine the rules of its own proceedings.” N.Y. Const., art. III, § 9.

47. There is no authority by law or rule that empowers the Assembly, or any of its officers, to question the Senate’s rules or proceedings.

48. To allow one legislative body to make a substantive determination as to the procedural regularity of a session convened by the other body where a quorum was obtained and business was conducted would violate the New York Constitution, art. III, § 9, and disrupt the legislative process.

49. The consequence of Respondents' refusal has been to prevent the Governor from acting favorably on, and in turn preventing the public from receiving the benefit of, important legislative enactments intended to advance public well-being.

**AS AND FOR A FIRST CAUSE OF ACTION
(Mandamus)**

50. Petitioner repeats and re-alleges each and every allegation in the preceding paragraphs as if set forth herein in full.

51. Respondents have failed to perform a duty enjoined upon them by law to accept return of Senate bills passed at the June 30, 2009 Senate session.

52. Respondents have acted in excess of their authority by refusing return of Senate bills passed at the June 30, 2009 Senate session.

53. Respondents have acted in a manner that is arbitrary and capricious by refusing — without explanation — to accept return of the Senate bills passed at the June 30, 2009 Senate session.

**AS AND FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)**

54. Petitioner repeats and re-alleges each and every allegation in the preceding paragraphs as if set forth herein in full.

55. Petitioner, upon the facts above, seeks a judgment declaring that Respondents must accept the return of the Senate bills that were passed at the June 30, 2009 Senate session.

56. Petitioner, upon the facts above, seeks a judgment declaring that Respondents must present the Senate bills to Governor Paterson on August 13, 2009 (45 days

after the Senate first attempted to return the bills to the Assembly); or, in the alternative, 45 days after the Court orders Respondents to accept the bills for return.

57. Relief is sought here by order to show cause to resolve an ongoing and otherwise recurring constitutional crisis between the two houses of the legislature.

58. Relief is sought here by order to show cause so that one house cannot frustrate a constitutional commandment to present bills to the governor by arbitrarily ignoring its own rules and procedures.

59. Relief is sought here by order to show cause so that critical and urgent bills that have passed both houses of the legislature can be presented to the Governor and become law.

60. No prior application has been made for the same or similar relief.

61. WHEREFORE, Petitioner requests issuance of a writ of mandamus and a declaratory judgment against Respondents Petitioner declaring that:

- a. Respondents must accept the return of the Senate bills that were passed at the June 30, 2009 Senate session; and
- b. Respondents must present the Senate bills to Governor Paterson on August 13, 2009 (45 days after the Senate first attempted to return the bills to the Assembly); or, in the alternative, 45 days after the Court orders the Respondents to accept the bills for return.

Dated: New York, New York

Sworn to before me this __ day
Of July, 2009

By: _____

Notary Public