

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 25

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CAMPAIGN FOR FISCAL EQUITY, INC., et al.,	:	
	:	Index No. 111070/93
Plaintiffs,	:	
	:	Hon. Leland DeGrasse
- against -	:	
THE STATE OF NEW YORK, et al.,	:	Panel of Special Referees:
	:	John Feerick
Defendants.	:	E. Leo Milonas
	:	William Thompson

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DEFENDANTS' MEMORANDUM OF LAW

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Dated: New York, New York
October 29, 2004

School System. The referees shall also identify the areas, if any, in which such compliance is lacking.” Order of Hon. Leland DeGrasse, dated August 3, 2004.

In addition, the trial court asked that the Panel’s report address how the measures taken by the defendants will ensure improved “inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning.” *Id.*

II. Barriers to Ordering Implementation of a Remedy

The Panel's September 22, 2004 order asked the parties to address the matter of “[w]hether there is any legal or factual barrier to the Court ordering the State of New York” to take certain actions to implement a remedy. Amended Order ¶ 5. Such orders seem to the defendants to be beyond the authority of the Panel, as the scope of its inquiry was defined by Justice DeGrasse in his order of August 3, 2004. Nowhere does Justice DeGrasse ask the Panel to consider the Court’s ultimate authority, an issue that he correctly reserved for himself after he receives the Panel's report and recommendation.

It is well settled that a referee’s authority is derived from the order of reference. CPLR § 4311; *Matter of Eagle Ins. Co. v. Suleymanova*, 289 A.D.2d 404 (2d Dep’t 2001); *Al Moynee Holdings, Ltd. v. Deutsch*, 254 A.D.2d 443, 444 (2d Dep’t 1998). Thus, “[a] referee who attempts to resolve a matter beyond the scope of the reference acts in excess of his or her jurisdiction,” *Chang v. Chang*, 190 A.D.2d 311, 319 (1st Dep’t 1993), and any determination arising therefrom “must be considered a nullity.” *Semigran Enterprises, Inc. v. Noren*, 285 A.D.2d 409 (1st Dep’t 2001); *see also* 8 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 4311.03. Consequently, the matter of any “barrier to the Court” is not properly before the Panel.

However, as the Panel has asked the parties to address this issue, the defendants, while maintaining their position, discuss below some critical restraints that are fundamental to our tripartite system of government. The Panel asks specifically about barriers to ordering the State to assure the City both operating and capital funding to meet the constitutional requirements applicable to the education of its school children.

That there are limits to the powers of the courts is unarguable. See *Saxton v. Carey*, 44 N.Y.2d 545 (1978), where the Court of Appeals said (at 549):

Our State government, like Federal Government, is a tripartite institution, with power variously distributed between three coequal branches (see NY Const, Art III, § 1; art IV, § 1; art VI). It comprises a system of checks and balances intended to ensure “the preservation of liberty itself which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others” (*People ex rel. Burby v. Howland*, 155 NY 270, 282; see, also, *People ex rel. Broderick v Morton*, 156 NY 136). The power of the judiciary is as subject to such limitations as is that of its co-ordinate branches of government, for the spectre of judicial tyranny is no more palatable to a free people than is the threat of an uncontrolled executive or legislative branch.¹

Were the Court to consider ordering monetary relief in this case, the most critical “barrier” presented would be Article VII, Section 7 of the State Constitution. It provides, in language that is “clear and uncomplicated” (*Anderson v. Regan*, 53 N.Y.2d 356, at 359):

“No money shall ever be paid out of the state treasury or any of its funds, or any funds under its management, except in pursuance of an appropriation by law ...”

¹See also, *Klosterman v. Cuomo*, 61 N.Y. 2d 525, 538,541 (1984), noting a “paramount concern” that the judiciary not undertake tasks such as acquiring data and applying expert advice to formulate broad programs entailing selecting among competing meritorious proposals because such policy making is better left to the legislative and executive branches.

The State of New York utilizes an executive budget system which vests substantial authority over the state budget with the Governor. Constitution, Article VII, §§ 1-6. The Governor is responsible not only to submit a budget detailing expenditures, but to provide estimates, recommendations and such additional information as he deems appropriate. Art. VII, § 2. Agencies play only an indirect role in this process by furnishing the Governor estimates and information in the form that he requires. Art. VII, § 1.

Article VII of the Constitution provides the mechanism for appropriating State funds. It defines the role of both the Governor and the Legislature. The Governor submits “a budget containing a complete plan of expenditures...” to the Legislature (§2) along with a bill or bills containing the proposed appropriations (§3). The Legislature may then make certain limited modifications to the Governor’s bills. Upon passage by both houses, the bills become law without further action by the Governor except with respect to additions made by the Legislature, which are subject to his approval (§4). Notably, the judicial branch has no role in the appropriation process.

The fundamental nature of the prohibition on any expenditure being made without an appropriation adopted pursuant to the constitutional process was made clear in *Anderson v. Regan, supra*, where the Court of Appeals considered the question of whether federal funds coming to the State had to be appropriated by the legislature in order to be lawfully disbursed. The Court held that an appropriation was necessary and said at 359-60:

Initially, we note that the wording of the constitutional provision governing the expenditure of State funds is clear and uncomplicated. Section 7 of article VII of the State Constitution, quite simply, requires that there be a specific legislative appropriation each time that moneys in the State treasury are spent. The constitutional provision does not differentiate among funds on the basis of their source, and there is thus no logical justification for excluding Federal funds from its ambit on the theory that they are derived from Federal taxation programs and are

given to the States to promote national goals. So long as the funds are placed within the State treasury, the clear language of the Constitution prevents their removal without legislative authorization.

The limitations of the judiciary were starkly demonstrated in *Association of Retarded Children v. Carey*, 631 F.2d 162 (2d Cir., 1980). There, the Second Circuit reversed a finding of contempt against the Governor, who had, in his Executive Budget, proposed funding for a review panel that had been mandated by a prior consent decree. The contempt proceeding was brought because the Legislature, exercising its authority, struck the funding of the panel from the budget. The Court noted that the appellees had argued that the District Judge “can order Governor Carey to expend funds for the Review Panel, or face contempt, even if New York law forbids Governor Carey from expending funds for that purpose.” They based their arguments on the proposition that “state action, or inaction, cannot defeat a constitutional or federally created right.” The Court rejected this argument in reversing the District Court’s holding the Governor in contempt.

III. The Panel's Report to Justice DeGrasse

After receiving the Panel’s report and recommendations, Justice DeGrasse will be faced with the question of formulating appropriate relief. Defendants submit that at that juncture declaratory relief would seem best suited to resolving the significant issues in the case. The Court of Appeals has noted that such relief is appropriate in constitutional cases. In *Brown v. State*, 89 N.Y.2d 172 (1996), that Court held that a constitutional tort claim was available to a plaintiff with no other remedy for a constitutional violation. In *Martinez v. City of Schenectady*, 98 N.Y.2d 78 (2001) the Court of Appeals limited the availability of an action for a constitutional tort by noting that in *Brown*, “neither declaratory nor injunctive relief was available to the plaintiffs....” The Court of Appeals thus recognized that declaratory relief is appropriate in constitutional cases. This Court has

previously found such relief appropriate in a case where it held that a tax was unconstitutional. *Igoe v. Pataki*, 182 Misc. 2d 298 (1999). Declaratory relief best fits this case, as it avoids the Court acting in excess of its authority.

Conclusion

The Defendants recognize that Supreme Court has a responsibility to address the constitutional violation that has been found. But its action must be within the confines of its authority. Justice DeGrasse understood this delicate balance when he issued his order creating this Panel and assigning to it its task. That order directed the Panel to report to him on “what measures defendants have taken to... bring the funding mechanism into constitutional compliance” following the Court of Appeals decision of June 26, 2003, and to “identify the areas, if any, in which compliance is lacking.” This directive correctly authorizes the Panel to speak to steps appropriate to curing the current constitutional deficiencies without exercising powers that would be beyond the Court’s authority. By keeping within this directive, the Panel will not only well serve Justice DeGrasse, but also assure that the Court not tread into functional areas reserved for the executive and legislative branches of State government.

Dated: New York, New York
October 29, 2004

Respectfully submitted,

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