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## Appropriations

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*N.Y. CONST. art. VII, § 4:*

*The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or the judiciary.*

**SUPREME COURT, APPELLATE DIVISION**

**THIRD DEPARTMENT**

Schulz v. Silver<sup>1</sup>  
(decided July 13, 1995)

Plaintiffs claimed that the New York State Constitution<sup>2</sup> requires the New York State Legislature to enact the New York State budget by April 1, 1995 and absent the passage of the budget or an emergency situation, any expenditures made by the legislature after April 1, 1995 would be unconstitutional.<sup>3</sup> The Appellate Division, Third Department affirmed the lower court's decision rejecting plaintiffs' claim, holding that although the State Constitution decrees that the legislature review and approve/disapprove the governor's proposed budget and expenditures,<sup>4</sup> the New York State Constitution sets forth no

1. 212 A.D.2d 293, 629 N.Y.S.2d 316 (3d Dep't 1995).

2. N.Y. CONST. art. VII, § 4. This provision provides in pertinent part: The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or judiciary.

*Id.*

3. *Schulz*, 212 A.D.2d at 295-96, 629 N.Y.S.2d at 318.

4. N.Y. CONST. art. VII, § 4. *See supra* note 2.

specific time frame within which to perform that task.<sup>5</sup> Further, the court held that the role of a New York State Assembly member in the budget process did not constitute a ministerial activity.<sup>6</sup>

Plaintiffs commenced this suit in response to the legislature's failure to adopt a budget on or before the commencement of the state's fiscal year.<sup>7</sup> Anticipating another failure, plaintiffs brought this action to direct the members of the New York State Assembly and Senate to act upon "one full set of budget appropriation bills submitted by respondent Governor"<sup>8</sup> and to declare that, absent passage of bills and "an emergency situation in the State, all expenditures of state funds subsequent to April 1, 1995 are unconstitutional."<sup>9</sup>

Defendant moved to dismiss "on the grounds that the case [was] non-justiciable, that the petitioner lack[ed] standing, and that the complaint fail[ed] to state a cause of action . . . ."<sup>10</sup> The trial court granted the motion to dismiss and plaintiffs appealed.<sup>11</sup>

Considering the claim, the appellate division first addressed the issue of justiciability. The court determined that the critical question was whether the New York State Constitution sets forth a specific standard that the legislature must comply with or whether the matter should be left to the discretion of the legislature.<sup>12</sup> The court stated that when the New York State

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5. *Schulz*, 212 A.D.2d at 296, 629 N.Y.S.2d at 318 (stating that "while the framers of the [New York State] Constitution have mandated that the Legislature review the proposed budget and approve or disapprove the various expenditures proposed by the Governor, they have established no specific time frame in which to accomplish that task").

6. *Id.*

7. *Id.* at 294, 629 N.Y.S.2d at 317.

8. *Id.*

9. *Id.*

10. *Id.* at 295, 629 N.Y.S.2d at 317-18.

11. *Id.* at 295, 629 N.Y.S.2d at 318.

12. *Id.* The court stated:

A justiciable controversy is one solvable by a court rather than some other forum and . . . it has to do with whether a matter is resolvable by the judicial branch of government by way of interpreting or enforcing a

Constitution sets forth a standard, the judiciary may compel compliance.<sup>13</sup>

In *King v. Cuomo*,<sup>14</sup> the court held that the judicial branch may review the constitutionality of the bicameral “recall” practice because the New York State Constitution sets forth how a bill becomes law.<sup>15</sup> Thus, when the courts are ruling to enforce a clear and unambiguous constitutional requirement, there is no trespass upon the legislature’s authority and separation of powers is preserved.<sup>16</sup> Further, the court stated that “[o]ur precedents are firm that the ‘courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government.’”<sup>17</sup>

Similarly, in *Jiggetts v. Grinker*,<sup>18</sup> judicial review was held constitutional where a statute, rather than the constitution, set forth a clear and unambiguous standard.<sup>19</sup> The court reasoned that the statute’s requirements call for a finding of justiciability because “the courts may compel obedience to a statutory demand.”<sup>20</sup>

In contrast, the *Schulz* court held the issue to be non-justiciable because the Constitution does not set forth a specific time frame within which the legislature must perform its task and, therefore, it is “not the subject of judicial review.”<sup>21</sup> The court relied on

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statutory mandate or by the executive and/or legislative branches in the exercise of their purely political function.

*Id.*

13. *Id.*

14. 81 N.Y.2d 247, 613 N.E.2d 950, 597 N.Y.S.2d 918 (1993).

15. *Id.* at 251, 613 N.E.2d at 951-52, 597 N.Y.S.2d at 920.

16. *Id.*

17. *Id.* (quoting *Saxton v. Carey*, 44 N.Y.2d 545, 551, 378 N.E.2d 95, 99, 406 N.Y.S.2d 732, 735 (1978)).

18. 75 N.Y.2d 411, 553 N.E.2d 570, 554 N.Y.S.2d 92 (1990).

19. *Id.* at 415, 553 N.E.2d at 572, 554 N.Y.S.2d at 94 (stating that “the statute is not simply a guide for the Commissioner when exercising his discretion on the subject but establishes a standard of care which executive officers must meet unless or until the Legislature changes it”).

20. *Id.*

21. *Schulz*, 212 A.D.2d at 296, 629 N.Y.S.2d at 318.

*Saxton v. Carey*,<sup>22</sup> where Governor Carey had allegedly failed to submit a proper budget.<sup>23</sup> The court refused to find justiciability because a necessary element of judicial review was missing, namely, budget itemization.<sup>24</sup> However, the court did reserve the power of judicial review for other budget cases by stating “[w]e do not suggest . . . that the budgetary process is per se always beyond the realm of judicial consideration.”<sup>25</sup> Thus, once the governor submits a budget to the legislature, the extent to which the latter may act upon another bill before acting upon the first bill is an issue certainly within the scope of judicial authority.<sup>26</sup>

Further, the *Schulz* court reasoned that the legislature’s responsibility requires “the exercise of considerable judgment and discretion.”<sup>27</sup> In *Klostermann v. Cuomo*,<sup>28</sup> the court stated that “[t]he long-established law is that ‘while a mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion.’”<sup>29</sup>

In addition, the court noted that a citizen taxpayer had standing to assert this claim. The court stated that “State Finance Law section 123(b)(1) confers standing upon any citizen taxpayer to maintain an action against a State officer who ‘has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds.’”<sup>30</sup>

Although the court conferred standing and reserved the power of judicial review, it held that the legislature may approve an

22. 44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 (1978).

23. *Id.* at 548, 378 N.E.2d at 97, 406 N.Y.S.2d at 733.

24. *Id.* at 549, 378 N.E.2d at 97, 406 N.Y.S.2d at 734.

25. *Id.* at 551, 378 N.E.2d at 99, 406 N.Y.S.2d at 735.

26. *Id.*

27. *Schulz*, 212 A.D.2d at 296, 629 N.Y.S.2d at 318.

28. 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984).

29. *Id.* at 539, 463 N.E.2d at 595, 475 N.Y.S.2d at 254 (quoting *Gimprich v. Board of Educ.*, 306 N.Y. 401, 406, 118 N.E.2d 578, 580 (1954)).

30. *Schulz*, 212 A.D.2d at 296, 629 N.Y.S.2d at 318.

appropriation bill after commencement of the fiscal year in the absence of an emergency.<sup>31</sup> The court reasoned that the New York State Constitution establishes, through the 1938 amendments, that there is no need for an emergency for the legislature to adopt an interim appropriation bill, and, therefore, the plaintiff's claim was not supported by a fair interpretation of the New York State Constitution.<sup>32</sup>

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31. *Id.* at 297, 629 N.Y.S.2d at 319.

32. *Id.*

