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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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COUNTY OF NASSAU, NASSAU COUNTY BOARD OF ELECTIONS, JOHN A. DEGRACE, in his official capacity as Nassau County Republican Commissioner of Elections, and WILLIAM T. BIAMONTE, in his official capacity as Nassau County Democratic Commissioner of Elections,

Plaintiffs,

-against-

STATE OF NEW YORK, NEW YORK STATE BOARD OF ELECTIONS, and JAMES A. WALSH, DOUGLAS A. KELLNER, EVELYN J. AQUILA, GREGORY P. PETERSON as Commissioners constituting the Board,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 5821/10
Motion Seq. Nos.: 03, 05, 06 & 08

DECISION AND ORDER

Papers Read on these Motions:

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In motion sequence number three, the attorneys for defendant State of New York move for an order changing the venue of this action from Nassau County to Albany

County. In motion sequence numbers five and six, the defendants move for an order dismissing this action pursuant to CPLR §3211 (a), (3), (7) and (10). In motion sequence number eight, the attorneys for the plaintiffs move for an order transferring the plaintiffs' sixth cause of action (based on CPLR Article 78) to Albany County.

Plaintiff Nassau County Board of Elections (NCBOE), one of 58 local election boards of elections in New York State, is responsible for carrying out the elections in Nassau County. Plaintiff John A. DeGrace brings the within action in his official capacity as Republican Election Commissioner. Plaintiff William T. Biamonte brings this action in his official capacity as the Nassau County Democratic Election Commissioner. Defendants New York State Board of Elections (SBOE) is an Executive Department of the State of New York and responsible for taking official action on behalf of the State to comply with the State election laws and Federal laws as they affect elections in New York State. Defendants James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, Gregory P. Peterson, constitute the Commissioners of the SBOE pursuant to the provisions of the Election Law. Rather than refer to "proceeding-action," "Petition-Complaint," "Petitioners-Plaintiffs," and "Respondents-Defendants" the court will use the words "action," "Complaint," "plaintiff" and "defendant", respectively instead.

Nassau County purchased its first lever voting machines in the late 19th century. The lever voting machines were used until 2009. In the within action the plaintiffs

allege that the NCBOE and the voters trust the lever machines and have grave concerns about replacing them with electronic optical scan voting systems that they assert are vulnerable to hardware problems, software mistakes, malfunctions, system crashes, computer hacking and the rudimentary techniques for committing fraud that occurred in the 19th century when the use of paper ballots was prevalent.

Following the problems identified during the 2000 presidential election, Congress, in 2002, enacted the Help America Vote Act, 42 U.S.C. §§ 15301-15545 (HAVA). In order to implement HAVA, the New York State Legislature passed the Election Reform and Modernization Act L. 2005, ch. 181, and amended it in 2007 (L. 2007, ch. 506) (collectively, ERMA). The Memorandum in Support, New York State Senate, Bill 55877, l. 2005, ch. 181 states that "the bill contains an appropriation of $190 million in federal funds available to New York State via the Help American Vote Act of 2002." It is not refuted that the aforesaid money was received by the State of New York to be used by the State to become compliant with HAVA. Once received, the failure of the State to use the funds as provided by HAVA may result in the forfeiture of the federal money and other penalties. To be in compliance with HAVA, the State of New York enacted "ERMA."

The complaint has six causes of action: The first through fifth seek declaratory relief predicated on alleged violations of the New York State Constitution. The sixth is

an Article 78 proceeding.

> first cause of action: because ERMA requires electronic voting technology, it violates Article 1 §1 of the State Constitution because such technology enables disenfranchisement.
>
> second cause of action: ERMA violates Article 2 §8 because it prevents the bipartisan counting and recording of votes.
>
> third cause of action: ERMA violates Article 2 §8 because it requires delegation of the local boards of election's election-supervisory duties to private parties.
>
> fourth cause of action: EMRA violates Article 2 §7 because electronic voting systems do not assure secrecy in voting.
>
> fifth cause of action: electronic voting systems do not prevent under- or over-voting (i.e., where a voter inadequately completes a ballot, but the inadequacy is neither detected nor brought to anyone's attention, so the ballot is not counted), in violation of an SBOE regulation (6 NYCRR §6210.13(A)(3).
>
> sixth cause of action: the County challenges the SBOE's December 2009 certification of certain electronic voting systems as arbitrary, capricious, an abuse of discretion, and contrary to law.

In a Federal action that has been pending for over four years in the U.S. District Court for the Northern District of New York entitled, *United States of American v New York State, New York State Board of Elections, et al* (the Federal action) wherein NCBOE and Nassau County Legislature are intervenors the complaint alleges that the State of New York and the New York State Board of Elections have not complied with a Federal statute (the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301-15545) that

mandates certain uniform and nondiscriminatory election technology and administration requirements.

On March 23, 2006, the Federal court found the SBOE to be in non-compliance with HAVA and in June 2006 issued a Remedial Order setting forth various deadlines by which HAVA compliance was to be attained.

In January 2008, the Federal court issued a Supplemental Remedial Order. This order emphasized that "noncompliance with HAVA is not an option for defendants and, to the extent that State law and procedure stands in conflict with full compliance with HAVA's federal law mandates, such State law and procedure must give way to federal law requirements."

In June 2009, the Federal court issued an order extending the remedial timeline for full HAVA-compliant voting system implementation throughout New York in time for the fall 2010 primary and general elections.

In May 2010, the Federal court issued an order under the All Writs Act (28 U.S.C. §1651), enjoining the plaintiffs in this action not only "from taking further action interfering with implementation of the previous Remedial Orders of ths Court in this case," but also enjoined them "to take the actions set forth in the attached schedule consistent with the timeline set forth therein and to take such other and further steps as the State Board of Elections deems necessary to implement the new HAVA-compliant

voting systems throughout Nassau County for the Fall 2010 elections."

None of the Federal Remedial Orders are subject to appeal. The All Writs Act Order which specifically orders Nassau to use the new voting system during the 2010 election season is on appeal and has not been stayed by the Second Circuit, despite Nassau's application for a stay pending appeal.

Before the Court can reach the issues of standing, capacity and whether ERMA, New York State's Election and Modernization Act violates, the New York State constitution, the threshold issue of venue must be decided.

The plaintiffs now acknowledge that only Albany County is the proper venue for the sixth cause of action. CPLR §506(b) provides that an Article 78 proceeding against a "body or officer" shall be venued "in the county within the judicial district where the respondent made the determination complained of or refused to preform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located . . ."

The threshold question to be decided is whether this Court should sever the Article 78 proceeding-sixth cause of action and transfer it to Albany County Supreme Court and keep the Declaratory Judgment causes of actions in Nassau County, or in the

alternative, transfer the entire action to Albany County.

Plaintiffs argue that were venue for the entire action moved to Albany County, the delay associated with such a change would eliminate any possibility of a hearing on the merits prior to the September 14, 2010 primary elections. Not only have the primaries already been held, but more importantly, plaintiffs now seek to have this Court countermand three (3) Remedial Orders of a U.S. District Court that has retained jurisdiction in this matter including, the All Writs Act Order that directed the County to take delivery of the replacement voting machines forthwith. Moreover, plaintiffs argue that while there are common defendants and "some common facts," the factual inquiry necessary to determine whether the selection of the ES&S voting machines were arbitrary and capricious is separate from the inquiry into whether ERMA violates the State Constitution. This Court agrees with defendants that to allow Nassau to litigate essentially the same issues in two separate counties are a waste of judicial resources and an undue burden on the resources of the SBOE.

Plaintiffs' argument that potentially different results cannot in and of itself be a reason to consolidate and transfer venue is misplaced. Plaintiffs seek to split this action into two, running the risk of inconsistent rulings in what started as a single state court proceeding attacking electronic voting machines. The plaintiffs' focus in both the Article 78 claim and the declaratory judgment claims is similar: there allegedly are

technological problems with electronic voting systems. Even where severance is not sought in order to support a change of venue motion, a court's discretion to grant a severance: "should be exercised sparingly" (*Shanley v Callanan Indus.*, 54 NY2d 52, [1981]). Severance should not be ordered where "there are common factual and [legal] issues involved in the claims . . ., and the interests of judicial economy and consistency will be served by having a single trial" (*Lelekakis v Kamamis,* 41 AD3d 662, [2d Dept 3007]).

Plaintiffs' reliance on *Skelos v Paterson*, 25 Misc3d 347 (NY. Sup., 2009) *aff'd.* 65 AD3d 339 (2d Dept 2009) *rev'd. on other grounds* 13 NY3d 141 (2009) is misplaced. In *Skelos* the plaintiff never conceded that any of the causes of action standing by themselves could be the basis of a distinct and separate Article 78 proceeding. The argument in *Skelos v Paterson, supra*, was not that it was a "hybrid proceeding," but rather "primarily" a declaratory judgment action. Also in *Skelos v Paterson, supra*, the plaintiffs never acknowledged as the plaintiffs do in the within action that the Article 78 causes of action must be severed and venued in Albany County. Nor is there one iota of evidence in the voluminous submissions before this Court to support the plaintiffs' argument that it is "obvious" that the State defendants "are committed to obstructing the examination of the voting machines that are at the root of these proceedings and preventing an adjudication of the machine's performance

as set against the standards imposed by the New York State's Constitution." The plaintiffs have failed to demonstrate how a change of venue without severance would prejudice a substantial right of the plaintiffs (CPLR §603). *See Zupich v Flushing Hosp. and Medical Center*, 156 AD2d 677 (2d Dept 1989), or disenfranchise the voters of Nassau County.

Had Nassau County challenged ERMA under state law grounds when the statute became effective on July 12, 2005, the plaintiffs' concerns would have been addressed by the Judiciary in a timely fashion and the matter set down for a preliminary injunction hearing in the state court five (5) years ago.

Motion (seq. no 3) to change the venue of the entire action to Albany County is **granted**.

Motion (seq. no. 8) to sever the Article 78 cause of action and keep the Declaratory Judgment causes of action in Nassau County is **denied**.

In light of the above, this Court need not reach the issues of capacity, standing and the constitutional validity of the New York State Election Laws: (*see County of Suffolk v New York State,* 2007 Misc. Lexis 3855, Albany County Sup. Ct. May 3, 2007, Index No. 6833-06, Justice Hard). Motion (seq. no. 5 and 6) are referred to the Supreme Court Justice in Albany County assigned to this action.

Upon the transfer of the entire action to Supreme Court Albany County, there is

nothing to preclude the plaintiff from proceeding to seek an expeditious resolution of the remaining substantive issues prior to the Fall 2011 election cycle.

The Nassau County Clerk is directed to forthwith transfer the entire file of the within action bearing Index No. 005821/10 to the Supreme Court Albany County.

This decision is the order of the Court and terminates all proceedings under Index No. 5821/10 in the Supreme Court Nassau County.

This constitutes the Decision and Order of the Court.

DATED: October 13, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

ENTERED

OCT 14 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

H:\County of Nassau v State of NY Mot Seq 3,5,6,8.wpd