

<b>Harkenrider v Hochul</b>
2022 NY Slip Op 32196(U)
May 11, 2022
Supreme Court, Steuben County
Docket Number: Index No. E2022-0116CV
Judge: Patrick F. McAllister
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT,  
LAWRENCE CANNING, PATRICIA CLARINO,  
GEORGE DOOHER, JR., STEVEN EVANS, LINDA  
FANTON, JERRY FISHMAN, JAY FRANTZ,  
LAWRENCE GARVEY, ALAN NEWPHEW,  
SUSAN ROWLEY, JOSEPHINE THOMAS, and  
MARIANNE VOLANTE,

Index No. E2022-0116CV

Petitioners,

-against-

DECISION and ORDER

GOVERNOR KATHY HOCHUL, LIEUTENANT  
GOVERNOR AND PRESIDENT OF THE SENATE  
BRIAN A. BENJAMIN, SENATE MAJORITY LEADER  
AND PRESIDENT PRO TEMPORE OF THE SENATE  
ANDREA STEWART-COUSINS, SPEAKER OF THE  
ASSEMBLY CARL HEASTIE, NEW YORK STATE  
BOARD OF ELECTIONS, and THE NEW YORK STATE  
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC  
RESEARCH AND REAPPORTIONMENT,

Respondents.

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PRESENT: Hon. Patrick F. McAllister  
Acting Supreme Court Justice

The court heard oral argument brought on by Order to Show Cause and Motion by separate putative intervenors to intervene in this action. Putative intervenor, Gary Greenberg, was represented by Jim Walden, Esq. James Ostrowski, Esq. represented putative intervenors Benjamin Carlisle, Emin Eddie Egriu, Michael Rakebrandt, Jonathan Howe and Howard Rabin. Putative Intervenor, Gavin Wax, was represented by Aaron Foldenauer, Esq. The court heard oral argument from Attorneys Foldenauer, Ostrowski and Walden. In opposition to the motions to intervene the court heard oral argument from George Winner, Esq. as representative for the Petitioners; Assistant Attorney General Heather McKay for the Respondents, Governor Hochul and the former Lieutenant Governor Brian Benjamin; Eric Hecker, Esq. represented Senate Majority Leader, Andrea Stewart-Cousins; Craig Bucki, Esq. represented Speaker of the Assembly, Carl Heastie; and Brian Quail, Esq. appeared on behalf of the Board of Elections. After hearing oral argument the court reserved decision.

Both Gavin Wax and Gary Greenberg seek to intervene so they can challenge the Assembly District maps. The other putative intervenors represented by James Ostrowski, Esq. are candidates, or potential candidates, for political office and seek to intervene so they will have some say in the process going forward with regard to new deadlines for gathering signatures, etc.

A motion to intervene is governed by CPLR §1012 and CPLR § 1013. Under those sections a person can bring a motion to be included in an action. CPLR §1012 deals with intervenors as of right and §1013 are for those people that the court grants permission to be intervenors because they have a similar interest to the parties currently involved in the litigation..

The court will deal with putative intervenors, Gary Greenberg and Gavin Wax together as they have similar claims. Both wish to intervene so that they can challenge the State Assembly District maps as being unconstitutional. Indeed this court previously ruled on March 31, 2022 that the process used by the legislature to enact their own maps (Congressional, Senate, and Assembly) failed to follow the constitutional process and were therefore void and unconstitutional. From the time the Petitioners filed their Amended Petition in early to mid-February it was clear that the Petitioners were not specifically challenging the Assembly maps. On appeal to the Appellate Division the Petitioners indicated that they had not challenged the Assembly maps. Thus when the Court of Appeals ruled April 27, 2021 that the process used was unconstitutional the Court of Appeals struck down the Congressional and the State Senate maps, but did not order new Assembly maps to be drawn since those maps had not been challenged in this action. Greenberg and Wax wish to intervene so that now those maps may now be challenged in this action.

In a rare show of bipartisan agreement the Petitioners and the Respondents all oppose intervenors Greenberg and Wax. The first three words in both CPLR §§1012(a)(2) & 1013 are "Upon timely motion". The attorneys for the Petitioners and the Respondents all contend that the motions by Greenberg and Wax are not timely. According to Professor Seigel even intervenors of right under CPLR §1012 are sometimes denied the right to intervene by the courts because of an issue of timeliness.

Under CPLR §1013 the court must ask (1) will admitting the intervenor unduly delay the determination of the current matter; (2) will there be prejudice of a substantial right of an existing party; and (3) if denied can the intervenor bring a separate action.

It was clear from the Petition and Amended Petition that the Assembly Districts were not being challenged. Although this court's ruling on March 31, 2022 *sua sponta* threw out the Assembly maps there was nothing in the proceedings leading up to the court's decision that would have led these putative intervenors to think that the Assembly District maps were being included in this action. In fact it was precisely for that reason that the Court of Appeals did not strike down the Assembly maps.

This action by law requires expedited proceedings. The court had just 60 days from the commencement of the action (February 3, 2022) to render a decision. Now three months after the commencement of the action these intervenors seek to join in this action to add a challenge to the Assembly maps.

Intervention under CPLR §§1012 or 1013 requires a timely motion to intervene. Rutherford Chemicals, LLC v. Assessor of Town of Woodbury, 115 AD3d 960 (Second Dept. 2014); In re HSBC Bank U.S.A., 135 AD3d 534 (2016). “[I]ntervention . . . will not be allowed merely to permit the intervenor to accomplish now what it could have done as of right but . . . omitted to do earlier.” Darlington v. City of Ithaca Bd. of Zoning Appeals, 202 AD2d 831 at 834 (Third Dept. 1994). A party seeking equity must do equity. Pecorella v. Greater Buffalo Press, Inc., 107 AD2d 1064 (Fourth Dpt. 1985)

In the response to these motions Attorney Bucki, representing the Respondent Speaker of the Assembly, Carl Heastie, demonstrated that both Greenberg and Wax were aware of this pending action shortly after it was commenced in February, 2022. Hence, it cannot be said the putative intervenors did not know about the action or the potential impact it could have on them. Yet they chose to do nothing at that time.

This court agrees with the potential intervenors Greenberg and Wax that the Assembly maps were unconstitutional in the manner in which they were enacted. However, the question is whether or not permitting intervention at this time in this action is timely. At least one of the intervenor’s counsel conceded that a separate action could be brought to challenge the Assembly maps. Under §1012 (a) (1) a person can intervene when a statute specifically confers an absolute right to intervene; (a)(2) when the current representation seems inadequate to represent the potential intervenor; or (a)(3) when the potential intervenors rights such as (property, money, etc.) may be affected by the decision. The court agrees that the current petitions and Petitioners do not adequately represent the interests of Greenberg and Wax when it comes to challenging the Assembly District maps. However, if a separate action can be maintained then the intervenors rights are not affected by a decision in this case. On the other hand permitting intervention could substantially affect the rights of the Petitioners in that it could and likely would result in new maps not being enacted in time for a primary this year. Such a result would impact the Congressional and State Senate maps that should be in place by May 20<sup>th</sup>. Since the court has received no potential maps with regard to new Assembly District lines it would almost assuredly mean that new maps could not be in place by May 20<sup>th</sup>.

Not only do intervenors, Greenberg and Wax, want new Assembly maps, but they are asking the court to invalidate all the signatures previously gathered, create new time periods for gathering signatures after new maps are enacted, change the signature requirements for both primary and independent petitions, etc. Overseas primary ballots for the June 28, 2022 primary are scheduled to be mailed out this week on May 13<sup>th</sup>. These items of requested relief in Greenberg and Wax’s application are in direct contradiction to the other putative intervenors represented by James Ostrowski, Esq. He represents candidates or prospective candidates who

have already gathered signatures and submitted application to be on the ballot.

Brian Quail, Esq. of the Board of Elections stated that the State Board of Elections and the New York City Board of Elections have already certified the ballots. To permit intervention that this time would create total confusion.

In Matter of Fink v. Salerno, 105 AD2d 489 (Third Dept. 1984) a proceeding to challenge a candidate appearing on the ballot was commenced October 3<sup>rd</sup>. The court had set a return date of October 9<sup>th</sup>. A putative intervenor sought intervention on October 8<sup>th</sup>. The court denied the motion as untimely. The Appellate Division affirmed the court's denial of intervention citing an expedited process for election matters.

The court is mindful that a change in the Assembly Districts would impact several other elected officials. This would include delegates to the State Supreme Court judicial nominating conventions, representatives to county party committees, and the New York State Democratic Committee. In the case of the judicial nominating conventions they are normally held in early August which would be well before the August 23<sup>rd</sup> primary. So the judicial nominating conventions would have to be pushed back until some time in September making it difficult, if not impossible, for their work to be completed so candidates could be placed on the November ballot. The overseas ballots for the November election must be mailed in September to meet Federal election requirements.

Respondents further challenge putative intervenors Greenberg and Wax claiming they lack standing because they are not candidates, chairpersons or someone that has filed objections. Further, they contend that Greenberg and Wax failed to serve the Respondents as required by law.

For the reason stated above the court finds the motions to intervene by Greenberg and Wax to be untimely and to permit them to intervene at this time would be extremely burdensome to the court and the existing parties. Therefore, their motion to intervene is denied. Nothing in this Decision and order is meant to prevent either or both from pursuing a separate action to challenge the Assembly maps.

The court will now turn to the motion to intervene brought by Attorney Ostrowski who represents several putative intervenors. This motion does not seek to add a new action (Assembly maps) to this current action. These putative intervenors merely seek to have input in how the August 23, 2022 primary will play out. These putative intervenors are candidates or potential candidates so the lack of standing argument does not apply. However, the court still finds their intervention at this late stage to be untimely. For the same reason Justice Lindley of the Appellate Division Fourth Department on April 14, 2022 denied proposed intervenors from joining this suit in April, this court is denying these candidates' or potential candidates' motion to intervene now, nearly a month later. Justice Lindley was considering a motion to intervene by congressional members and candidates for office. They would seem to be similarly

positioned as these putative intervenors are. The motion for intervention by putative intervenors Benjamin Carlisle, Emin Eddie Egriu, Michael Rakebrandt, Jonathan Howe and Howard Rabin is also denied as untimely. The court is confident that the existing parties will be able to adequately represent the interests of these people going forward.

The court is well aware of the frustration that potential candidates throughout this state face with regard to the uncertainty of district boundaries, signature requirements, filing deadlines, etc. This court is working with the Board of Elections to create as quickly as possible a roadmap for the August 23<sup>rd</sup> primary. The court is considering a variety of alternatives, but everything is dependant on new Congressional and State Senate maps being in place on or before May 20<sup>th</sup>. This court is now aware that Federal District Court Judge Sharpe has ruled by Summary Order dated May 10, 2022 that an August 23<sup>rd</sup> primary is appropriate provided the Uniformed and Overseas Citizens Absentee Voting Act is complied with under federal law.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is


**ORDERED, ADJUDGED, and DECREED** that the motion to intervene by Gavin Wax be, and hereby is denied; and it is further

**ORDERED, ADJUDGED, and DECREED** that the motion to intervene by Benjamin Carlisle, Emin Eddie Egriu, Michael Rakebrandt, Jonathan Howe and Howard Rabin be, and hereby is denied; and it is further

**ORDERED, ADJUDGED, and DECREED** that the motion to intervene by Gary Greenberg be, and hereby is denied.

Dated: May 11, 2022

ENTER

  
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Hon. Patrick F. McAllister  
Acting Supreme Court Justice