



Phillips Lytle LLP

Via NYSCEF

May 24, 2022

Hon. Patrick F. McAllister
Acting New York State Supreme Court Justice
Steuben County Supreme Court
3 East Pulteney Square
Bath, New York 14810

Re: *Matter of Harkenrider v. Hochul* (Steuben County Index No. E2022-0116CV)

Dear Justice McAllister:

As co-counsel with Graubard Miller to New York State Assembly Speaker Carl Heastie (the "Speaker"), we oppose the motions to intervene filed by Tyrrell Ben-Avi (the "Ben-Avi Motion") (Dkt. Nos. 673 & 675).

The Ben-Avi Motion is brought by both order to show cause (Dkt. No. 673) and notice of motion (Dkt. No. 75) at the same time. If Mr. Ben-Avi is allowed to intervene, he would request a declaration that the Congressional map enacted by the Legislature in February 2022 is unconstitutional (*id.* at p. 2). This is odd, because the Court of Appeals already struck down that map on April 27. Mr. Ben-Avi also seeks to "adjourn the primary election date for the New York Assembly from June 28, 2022 to August 23, 2022" (*id.*). In an accompanying affidavit, Mr. Ben-Avi states that he is a New York resident and voter, but he otherwise does not explain his interest in this special proceeding (Dkt. No. 674).

The Motion should be denied as untimely, and the Speaker reiterates the timeliness arguments he made in opposition to the three motions to intervene filed by Gavin Wax, Gary Greenberg, Benjamin Carlisle, and others from May 1 through 3, 2022 (Dkt. Nos. 325, 326, 360). This Court denied those motions as untimely (Dkt. No. 520), and the result should be no different here. Specifically, as this Court recognized, "[i]ntervention under CPLR §§ 1012 or 1013 requires a timely motion to intervene" (*id.* at p. 3). Further, "[t]o permit intervention [at] this time would create total confusion" (*id.* at p. 4).

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Two additional, independent reasons also require dismissal of the Ben-Avi Motion.

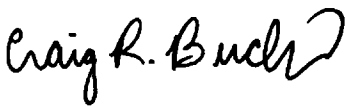
First, it was not timely served. The order to show cause states that it must be “served ... via NYSCEF, on or before May 18, 2022,” yet no such service was ever made. *See Matter of Sorli v. Coveney*, 51 N.Y.2d 713, 714 (1980) (Mem) (“Inasmuch as petitioner failed to follow the provisions for service specified in the order to show cause, the petition must be dismissed.”). The Speaker learned of the motion for the first time on May 23, 2022, when this Court uploaded the order to show cause (Dkt. No. 673) to NYSCEF.

Second, Mr. Ben-Avi has not provided the proposed intervention pleading required by CPLR 1014. *See Rozewicz v. Ciminelli*, 116 A.D.2d 990, 990 (4th Dep’t 1986) (“In the absence of a timely motion ... accompanied by a proposed pleading as required by CPLR 1014, it [is] error for Special Term to even entertain the request ... to intervene in this action.”).

For any or all of these three reasons – untimeliness of the motion, untimeliness of the motion’s service, and failure to provide a proposed pleading – the Ben-Avi Motion should be denied.

Respectfully,

Phillips Lytle LLP

by 

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