

STATE OF NEW YORK
APPELLATE DIVISION THIRD DEPARTMENT

RICH AMEDURE, ROBERT SMULLEN, WILLIAM FITZPATRICK, NICK LANGWORTHY, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, CARL ZIELMAN THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, and ERIK HAIGHT,

Respondents-Petitioners/Plaintiffs,

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Appellants-Respondents/Defendants,

and,

MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents - Respondents.

MEMORANDUM OF LAW

Appellate Division Case No: 22-CV-1955

Supreme Court, Saratoga County
Index No.: 2022-2145

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS – CROSS APPELLANTS’ MOTION TO PRECLUDE / VACATE STAY

I. THE STATE IS NOT ENTITLED TO A STAY OF A PROHIBITORY ORDER

The Decision & Order of the Honorable Dianne N. Freestone dated October 21, 2022 (NYSCEF Doc. #140), invalidated Chapter 763 of the Laws of 2021 and granted leave for your Petitioner-Respondents herein to file a motion for a preservation order so as to prohibit boards of elections from canvassing/re-canvassing any ballots prior to the general election date of November 8, 2022.

This Department has held, in Matter of Pokoik v Department of Health Servs. (220 A.D.2d 13, 641 N.Y.S.2d 881), that the service of a notice of appeal by the State, a political subdivision thereof or their officers or agencies has the effect of automatically staying all proceedings to enforce executory directives in the order or judgment appealed from. Executory directives are those which direct the performance of a future act. However, such a presumptive stay of enforcement does not apply to prohibitory orders, such as the case at bar. See State v. Town of Haverstraw, 219 A.D.2d 64, 65-66, 641 N.Y.S.2d 879, 881 (App. Div. 2nd Dept. 1996). The nature of the aforesaid Order herein is one of prohibition. No automatic stay is available by appealing--either as of right or by permission--from an order or judgment which prohibits certain conduct. See Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 78, 688 N.Y.S.2d 830, 835 (App. Div. 3rd Dept. 1999).

In fact, Haverstraw, supra, instructs us that mandatory injunctions are automatically stayed because in commanding the performance of some affirmative act they usually result in a change in the status quo. A prohibitory injunction, on the other hand, is one that operates to restrain the commission or continuance of an act and to prevent a threatened injury, thereby ordinarily having the effect of maintaining the status quo (Id. citing Annotation, Appeal from Award of Injunction as Stay or Supersedeas, 93 ALR 709, 718).

Until judicial relief to stay or vacate the order was successfully obtained, a defendant is duty-bound to honor it, and any action to the contrary constitutes civil contempt. Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 78, 688 N.Y.S.2d 830, 835 (App. Div. 3rd Dept. 1999)[finding defendant state in contempt of court, holding that the trial court had the authority to enjoin defendant].

Here, the Judge Freestone ordered what the state may not do; namely to canvass and recanvass ballots prior to election day. The nature of the Order is one of prohibition, not that of an executory order. As such, the instant appeal should not be afforded stay. Further, any boards of elections, or commissioners thereof, which disobey the Order of the court below, should be held in civil contempt.

II. VACATING ANY STAY OF THE ORDER PRESERVES THE *STATUS QUO ANTE*

Under the Civil Practice Law and Rules at Section 5519 "the court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a)."

We maintain that there is no stay which attaches in this case. We have no writing from the Governor or the Attorney General on behalf of the State asserting that a stay has been brought about by their Notice of Appeal. Assuming, *arguendo*, that there is a stay, we must urge the Court to apply the following analysis.

The objective of the automatic stay provided by CPLR 5519 (a) (1) is to maintain the status quo pending the appeal. State v. Town of Haverstraw, 219 A.D.2d 64, 65, 641 N.Y.S.2d 879, 881 (App. Div. 2nd Dept. 1996). In applying this standard, this Department vacated a 5519(a) automatic stay in the Rensselaer County voting site matter Matter of People v. Schofield, 199 A.D.3d. 5, 14 (3rd

Dept., 2021) [Where the Court vacated the statutory stay of a judgment that required respondents to select early voting polling places that comply with Election Law § 8-600 “by the earliest date practicable.”].

Vacating any statutory stay that might exist is what would maintain the *status quo ante* by allowing voters to cast absentees, which would be preserved unopened and un-canvassed until after Election Day. Also, voters who attempt to cast an in person vote either during early voting or on election day, would be able to cast an affidavit ballot. Thus, there would be no change to the voting process at this late date. Continuing to implement the Supreme Court’s Order would preserve the ballots of all qualified voters for any review and tabulation until after the election.

If the stay of the yet to be filed preservation order exists and is not vacated by this Court, each and every county board of elections will need to re-program electronic poll books [there are at least three different systems employed by local boards in this state – the ability to adjust the systems would vary by county]. Further, without a preservation order or with a stay of preservation, boards of elections may not be able to re-program electronic poll books and re-print the required hard copy back up poll books in time for early voting and election day. Further yet, should this Court impose a stay of the Supreme Court’s

order, the special ballot of a poll worker who fails to come to work (and is now not eligible for a special ballot), would nonetheless be canvassed.

Boards of Elections already have the ability and know how to conduct the process pre - Chapter 763. Appellants have radically changed the election process from what it has been for nearly a century. They seek to test this new system which affects fundamental rights in this important election for the first time.

Traditionally, a major change in the law is rolled out in an “off year” election when fewer people are affected. The actions here are not only unconstitutional but completely counterintuitive and contrary to years of legislative precedent. Vacating the stay would only serve to promote the efficient functioning of elections, preserve the ballots of all qualified voters, and further the spirit of the preservation order.

Accordingly, this Court should NOT grant any discretionary stay of the order below. This Court should NOT stay the preservation order which has yet to be filed. Further, should the Court determine that a statutory stay attaches here; that stay must be vacated.

Accordingly, we respectfully pray that this Court sign the annexed Order to Show Cause, grant the relief requested therein and maintain the status quo brought about by the Supreme Court’s Order which restores the law to its former state and

prohibits the execution of the unconstitutional provisions of Chapter 763, Laws of 2021.

DATED: October 25, 2022



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