STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of:

COMMON CAUSE NEW YORK, THE BLACK INSTITUTE, SUSAN LERNER, KATHERINE MARSH WOLFRAM, MARTA GOMEZ, SUE ELLEN DODELL and JULIE GOLDENBERG,

Petitioners,

DECISION AND ORDER
Index No.: 911452-23

-against-

PETER S. KOSINSKI, as Co-Chair and Commissioner of the New York State Board of Elections, DOUGLAS A. KELLNER, as Co-Chair and Commissioner of the New York State Board of Elections, ANDREW J. SPANO, as Commissioner of the New York State Board of Elections, ANTHONY J. CASALE, as Commissioner of the New York State Board of Elections, and the NEW YORK STATE BOARD OF ELECTIONS,

Respondents,

-and-

ELECTION SYSTEMS & SOFTWARE, LLP,

Intervenor-Respondent.

(Supreme Court, Albany County, All Purpose Term)

Kimberly A. O'Connor, Justice

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O'CONNOR, J.:

Background

On November 28, 2023, Common Cause New York ("Common Cause"), The Black Institute, Susan Lerner, Katherine Marsh Wolfram, Marta Gomez, Sue Ellen Dodell, and Julie Goldberg (collectively "petitioners") commenced this CPLR Article 78 proceeding for a writ of mandamus to compel respondent New York State Board of Elections ("NYSBOE") to rescind its approval for the use of the "ExpressVote XL" machine in New York State. The ExpressVote XL is manufactured by respondent-intervenor Election Systems and Software, LLC ("ES&S"). Petitioner brought this proceeding against NYSBOE, as well as NYSBOE Commissioners Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Anthony J. Casale ("respondents"). By Order to Show Cause, dated December 29, 2023, ES&S made an application to intervene as a respondent in this matter and file a response to the petition. By Decision, Order, and Judgment, dated March 15, 2024, the Court (O'Connor, J.) granted ES&S's application to intervene in this matter and file opposition to the petition.

On February 2, 2024, respondents filed a motion to dismiss the petition pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction based on a lack of standing, and pursuant to CPLR 3211 (a) (7) for failure to state a claim. By Decision and Order, dated February 16, 2024, the Court (O'Connor, J.) granted respondents' motion to dismiss for lack of standing, finding that Common Cause, The Black Institute, and individual petitioners failed to establish an injury-in-fact.

Petitioners now move to reargue its opposition to the motion to dismiss, in accordance with CPLR 2221(d). In the alternative, petitioners seek court leave to file an amended verified petition pursuant to CPLR 3025(b). Respondents and intervenor ES&S opposed the motion and petitioners replied.

Discussion

I. Motion to Reargue

In support of its motion to reargue, petitioners claim that the Court overlooked necessary facts and misapprehended the law. Petitioners argue that the Court improperly focused on the use of the ExpressVote XL system, when the petition challenged the Board's authority to approve the use of the ExpressVote XL system, not its use. Petitioners maintain that it is "reasonable to assume" that petitioners or their members will cast future votes in elections, and "if the ExpressVote XL system is in place, the harm complained of will occur." Petitioners emphasize that under CPLR Article 78, challenges to final Board determinations must be brought within four months. Petitioners claim that by requiring the actual use or purchase of an election poll system in an election, any delay in use or purchasing beyond the statute of limitations would render the Board immune from accountability under Article 78. Petitioners assert that this would leave counties at risk if they chose to purchase the ExpressVote XL system.

In opposition, respondents argue that petitioners' arguments surrounding Article 78 timeliness and delays with purchase or use of the ExpressVote XL system were not raised in petitioners' opposition to the motion to dismiss, and as such, are not properly before this Court. Respondents further argue that petitioners improperly argue for the first time within its motion to reargue that requiring voters to wait to challenge the system would render the Board immune from accountability. Intervenor-respondent ES&S also opposed the motion to reargue, stating that petitioners fail to articulate a valid basis for reargument, and reargue the same points made in opposition to respondents' motion to dismiss. ES&S maintains that the Court's basis for a lack of standing was based upon petitioners' allegations and the record in this case.

In reply, petitioners reiterate its initial points about the effect of the Court's decision on petitioners' ability to challenge the Board's approval of a voting system before the statute of limitations expires.

As is relevant here, "[a] motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the trial court" (*Guidarelli v. City of Schenectady*, 167 A.D.3d 1402, 1403 [3d Dep't 2018] [internal quotation marks and citations omitted]; *see Cascade Bldrs. Corp. v. Rugar*, 154 A.D.3d 1152, 1154 [3d Dep't 2017]). To succeed on such motion, the "[moving] party must demonstrate that the court 'overlooked or misapprehended the facts and/or law or mistakenly arrived at its earlier decision'" (*Weaver v. Weaver*, 198 A.D.3d 1140, 1143 [3d Dep't 2021], quoting *Matter of Reed v. Annucci*, 175 A.D.3d 1700, 1701 [3d Dep't 2019]; *accord David v. Zeh*, 200 A.D.3d 1275, 1279 [3d Dep't 2021]; *Guidarelli v. City of Schenectady*, 167 A.D.3d at 1403; *see* CPLR 2221[d][2]). However, the motion "shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]), and it is not intended to offer an unsuccessful party successive opportunities to argue issues previously decided or to raise arguments different

from those originally asserted (*see Rodriguez v. Gutierrez*, 138 A.D.3d 964, 967 [2d Dep't 2016]; *Matter of Mayer v. Nat'l Arts Club*, 192 A.D.2d 863, 865 [3d Dep't 1993]).

Based on the foregoing, the Court finds that petitioners fail to articulate a valid basis for reargument. In evaluating petitioners' standing, the Court considered the nature of petitioners' alleged injury, which was identified by petitioners as the use of the ExpressVote XL in future elections. In opposition to the motion to dismiss, petitioners argued that it is reasonable to assume that individual petitioners will vote in the future and, if the ExpressVote XL system is in place, the harm complained will occur when they go to cast their votes and, therefore, cannot be considered speculative. In opposition, petitioners further argued that the alleged injury to individual petitioners as voters, as well as those represented by the petitioner organizations, falls squarely within the zone of interests sought to be protected by the Election Law. In support of reargument, petitioners once again argue that it is "reasonable to assume" that petitioners or their members will cast future votes in elections, and "if the ExpressVote XL system is in place, the harm complained of will occur." The purpose of a motion for reargument is not to relitigate issues already decided by this Court. Moreover, petitioners argue that requiring voters to wait to challenge the system would render the Board immune from accountability due to the expiration of the statute of limitations. This argument is raised for the first time in petitioner's motion to reargue, and as such, cannot be considered in support of reargument (*see Rodriguez v. Gutierrez*, 138 A.D.3d at 967; *Matter of Mayer v. Nat'l Arts Club*, 192 A.D.2d at 865). Accordingly, the Court denies petitioners' motion to reargue its opposition to respondents' motion to dismiss the petition.

II. Motion to Amend Petition

Petitioners allege that in the alternative, if its motion to reargue is denied, it should be granted leave to amend its petition. Petitioners argue that leave to amend is freely given in the

absence of surprise or prejudice. Petitioners maintain that respondents cannot assert surprise or prejudice from the requested amendment, as facts regarding the actual purchase of the ExpressVote XL are uniquely within the purview of ES&S as an intervenor-respondent, and the litigation has not yet progressed past the initial pleading stages.

In opposition, respondents state that petitioners' motion to amend the petition and add new facts and theories of liability is improper, as they would be barred by the 4-month statute of limitations. More specifically, respondents state that petitioners attempt to add Harper Bishop as a new party is impermissible, as an individual voters' claims are time barred. Moreover, respondents contend that petitioners' claim for wrongful expenditure of state funds under New York State Finance Law is impermissible, as it was not a claim contemplated in the original petition. Respondent-Intervenor ES&S also objects to petitioners' requested amendment. ES&S states that petitioners were on notice of their pleading deficiencies on February 2, 2024, when respondents' motion to dismiss was filed, yet failed to explain why they did not seek to amend their petition at that time before a final disposition had been entered.

In reply, petitioners argue that the claims of individual voter Harper Bishop reflected in the amended petition would not be time barred because of the relation-back doctrine, which petitioners maintain apply to Bishop's claims. Petitioners assert that Bishop's claims as an individual voter "arise out of the same Board approval for use of the ExpressVote XL machine in New York State," and is "in all respects identical" to the other petitioners.

"Applications to amend pleadings [pursuant to CPLR 3025] are within the sound discretion of the court" (*34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44, 50 [2022]). "Leave to amend a pleading shall be freely granted in the absence of prejudice or surprise resulting directly from the delay in seeking leave unless the proposed amendment is palpably insufficient or patently devoid

of merit" (*Fleming v. Jenna's Forest Homeowners' Assn., Inc.*, 228 AD3d 1101, 1103 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]).

While these principles generally guide the Court's inquiry on a motion to amend, in a situation such as this, where the petition has already been dismissed at the time of petitioner's request to amend, there is no longer a pending proceeding. Consequentially, because the petition has already been dismissed, in light of the Court's denial of petitioners' motion to reargue petitioners' opposition to respondent's motion to dismiss, there is no petition available to amend (*see Eisemann v. Kosinski*, 219 A.D.3d 1607, 1610 [3d Dep't 2023], *lv dismissed & denied* 40 N.Y.3d 975 [2023]); *see also Sunnyview Farm, LLC v. Levy Leverage, LLC*, 223 A.D.3d 955, 962 [3d Dep't 2024]; *Carpenter v. Plattsburgh Wholesale Homes, Inc.*, 83 A.D.3d 1175, 1177 [3d Dept. 2011]; *Sodhi v. IAC/InterActive Corp.*, 216 A.D.3d 556, 557 [1st Dep't 2023]). In light of this, an inquiry into the applicability of CPLR 203 is not necessary, as a statute of limitations inquiry to an amendment is only relevant where there is an active proceeding before the Court.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit, or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED, that petitioners' motion to reargue is denied; and it is further

ORDERED, that petitioners' motion to amend its verified petition is denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the

Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: September 27, 2024
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

09/27/2024

Papers Considered:

1. Decision and Order (O'Connor, J.), dated April 18, 2024;
2. Notice of Motion to Reargue or Amend Petition, dated May 20, 2024; Memorandum of Law in Support, dated May 20, 2024; Affirmation of Michael S. Fischman, Esq., in Support, dated May 20, 2024, with Exhibits A-B annexed;
3. Respondents' Memorandum in Opposition to Motion, dated July 7, 2024;
4. Respondent-Intervenor ES&S's Memorandum in Opposition to Motion, dated July 7, 2024; *and*
5. Petitioners' Memorandum in Reply, dated July 17, 2024.