

SCANNED ON 8/24/2004
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. DORIS LING-COHAN PART 62

Justice

INDEX NO. 103434/04

Daniel Hernandez et al.

Plaintiff/s,

MOTION DATE

-v-

MOTION SEQ. NO. 002

Victor L. Robles, in his official
Capacity as City Clerk,

Defendant/s.

MOTION CAL. NO.

The following papers, numbered 1- 8 were considered on this motion to/for intervene;

PAPERS

NUMBERED

Notice of Motion & Proposed Order — Affidavits — Exhibits 1, 2, 3, 4, 5, 6

Answering Affidavits — Exhibits 7

Replying Affidavits _____

Other letter: plaintiffs dated 6/8/04 8

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{to intervene} motion ^s is ~~are~~ resolved in accordance with the accompanying memorandum decision, in which such motion is denied.

FILED

AUG 24 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/20/04

DORIS LING-COHAN, J.S.C.

Check one: [] FINAL DISPOSITION [x] NON-FINAL DISPOSITION
Check if Appropriate: [] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. DORIS LING-COHAN, Justice PART 62

DANIEL HERNANDEZ and NEVIN COHEN,
LAUREN ABRAMS and DONNA FREEMAN-TWEED,
MICHAEL ELSASSER and DOUGLAS ROBINSON,
MARY JO KENNEDY and JO-ANN SHAIN, and
DANIEL REYES and CURTIS WOOLBRIGHT ,

INDEX NO.: 103434/2004

Plaintiffs,

-against-

MOTION SEQ. NO.: 002

VICTOR L. ROBLES, in his official capacity as
CITY CLERK of the City of New York,

Defendants.

DORIS LING-COHAN, J.:

This is an action brought by five same-sex couples seeking a judgment declaring that the Domestic Relations Law violates the Due Process and the Equal Protection Clauses of the New York State Constitution, insofar as it denies marriage licenses and access to civil marriage to same-sex couples, and an injunction requiring defendant Robles, the City Clerk of New York City, to grant plaintiffs marriage licenses on the same terms and conditions as are available to different-sex couples.

Four individuals and one organization now move, pursuant to CPLR 1012 and 1013, to intervene as party-defendants. Ruben Diaz, Sr. moves as a state senator and as a business owner; Raymond A. Meier moves as a state senator; Daniel Hooker moves as a member of the Assembly; Michael Long, the chairman of the Conservative Party, moves as the co-owner of a small business; and the New York Family Policy Council (FPC) moves as a non-profit educational organization.

Both plaintiffs and defendant oppose the granting of the motion for intervention. Defendant,

however, has no objection to movants being accorded amicus curiae status and to submitting briefs amicus curiae. Additionally, plaintiffs acknowledge movants' appropriate role in this litigation as amicus curiae. [See Memorandum of Plaintiffs in Opposition to Motion to Intervene, Footnote 4, at 16].

Messrs. Diaz, Meier, and Hooker argue that whether same-sex marriage is to be allowed is a question for the Legislature, and that, if this court grants plaintiffs the relief that they have requested, then the proposed-intervenor legislators will be deprived of their right to define marriage. Messrs. Diaz and Meier are co-sponsors of Senate Bill 2220, which provides that "A marriage or union is absolutely void if contracted by two persons of the same sex, regardless of whether such marriage or union is recognized or solemnized in another jurisdiction." Messrs. Diaz and Long argue that, as business owners who have religious and moral objections to same-sex marriage, they have a religious and an economic interest in not being required to provide benefits to same-sex spouses of employees. The FPC states that its mission is "to reaffirm and promote the traditional family unit and Judeo-Christian value system upon which it is built." The FPC also argues that the definition of marriage is a matter for the Legislature to decide. Finally, the FPC and Mr. Hooker argue that, if this court grants plaintiffs relief, then the people of the state will have been deprived of having their elected representatives decide whether same-sex marriage is to be allowed.

CPLR 1012 provides, in relevant part, that any person shall be permitted to intervene as of right:
when the representation of the person's interest by the parties is or may be inadequate
and the person is or may be bound by the judgment.

CPLR 1012 (a) (2) (emphasis added).

The Court of Appeals has held that whether a movant for intervention "will be bound by the judgment within the meaning of [CPLR 1012 (a) (2)] is determined by its res judicata effect" Vantage Petroleum v Board of Assessment Review of Town of Babylon, 61 NY2d 695, 698 (1984)(citations omitted); see also Tyrone G. v Fifi N., 189 AD2d 8 (1st Dept 1993). Only a party to an action, or one in privity with a party, may be bound by the res judicata effect of a judgment in

that action. See Green v Santa Fe Ind., Inc., 70 NY2d 244 (1987). Here, none of the proposed intervenors are, or claim to be, in privity with any of the parties to this action. Accordingly, none of the proposed intervenors may intervene as of right.

CPLR 1013 provides, in relevant part, that any person may be permitted to intervene "when the person's claim or defense and the main action have a common question of law or fact." However, a proposed intervenor must also establish that he or she has a real and substantial interest in the outcome of the litigation. Reliance Ins. Co. of New York v Information Display Tech., Inc., 2 AD3d 701 (2d Dept 2003); Agostino v Soufer, 284 AD2d 147 (1st Dept 2001).

Here, the legislators argue that "the courts do not have the authority to redefine marriage." [Mem. in Further Support of Motion to Intervene, at 4 (emphasis in original)]. Clearly, however, the courts have jurisdiction to rule on the constitutionality of statutes. "The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face or as applied in accordance with their provisions." Benson Realty Corp. v Beame, 50 NY2d 994, 996 (1980), appeal dismissed sub nom Benson Realty Corp v Koch, 449 US 1119 (1981). A judicial ruling that a particular statute is unconstitutional may foreclose certain legislative options. Nonetheless, legislators do not have a real and substantial interest in each case in which a statute is challenged as unconstitutional. The fact that Messrs. Diaz and Meier are sponsoring a bill that is related to the subject matter of this action does not give them any more substantial an interest. See Silver v Pataki, 96 NY2d 532 (2001).

The business owners' asserted interests are no more than speculative. Neither Mr. Diaz, nor Mr. Long, has identified the business that he owns, or stated that such a business has employees, much less employees who are members of same-sex couples. Accordingly, the business owners have not shown that they have a real interest in this litigation. See National Assn. of Ind. Insurers v State of New York, 89 NY2d 950 (1997) (speculative harm insufficient to confer standing). Moreover, the prospect of economic harm to Messrs. Diaz and Long is not germane to the issue raised in this action. See Matter of Catholic Charities of Roman Catholic Diocese of Syracuse v Zoning Bd. of

Appeals of City of Norwich, 187 AD2d 903 (3d Dept 1992).

There is no legal distinction between the FPC's educational mission and the business owners' asserted religious and moral objections to extending benefits to same-sex spouses of employees, and any secular position that a person could argue to be a basis for intervention. Neither the FPC nor the business owners have made any showing that their interest in this action differs from that of any other person in the state who may favor or oppose same-sex marriage. See Society of Plastics Indus., Inc. v County of Suffolk, 77 NY2d 761 (1991); Schieffelin v Komfort, 212 NY 520 (1914).

Movants also assert that the Corporation Counsel is unable to adequately protect their interests, based on alleged media reports regarding the Mayor's "position" and the Corporation Counsel's "approval" of a committee report on same-sex marriage issued in 1997 by the Association of the Bar of the City of New York when he was its President. Unsubstantiated media reports and a committee report issued during one's tenure as President, for which the President merely reviews for appropriate bar association and professional standards, constitute an insufficient showing to merit intervention.

The Court notes that movants brought a similar intervention motion in an Article 78 proceeding which sought marriage licenses to be issued to same-sex applicants, which was denied. See Shields v. Madigan, Sup Ct, Rockland County, June 3, 2004, Weiner, J., Index No. 1458/04. It is significant that even under the less demanding standard of CPLR 7802(d), inapplicable to the instant motion as this is an action, movants were still unable to demonstrate that they are appropriate parties to intervene. See Greater New York Health Care Facilities Ass'n v DeBuono, 91 NY2d 716, 720 (1998).

Accordingly, based upon the above, the motion to intervene is denied.

However, given that this case involves issues of important public interest, this court will permit the proposed intervenors to appear as amicus curiae, for the limited purpose of submitting a brief on the

substantive motions. See Kruger v. Bloomberg, 1 Misc 3d 192 (Sup Ct, New York County 2003).

Accordingly, it is hereby

ORDERED that the motion to intervene is denied; it is further

ORDERED that movants may appear as amicus curiae, for the limited purpose of submitting a brief on the substantive motions, if so advised, which shall be filed and served by hand on or before 5 pm, 30 days after submission of the reply; plaintiffs and defendants may respond on or before 30 days thereafter. Originals shall be filed in Motion Support, Room 130, 60 Centre Street. Three courtesy copies (labeled as such), with one appendix of citations, shall be provided to the courtroom (room 279) at 80 Centre Street (or the mailroom at 80 Centre, room 101); a copy of the briefs shall be supplied in Wordperfect with the courtesy copies; and it is further

ORDERED that, within 30 days of entry of this decision/order, plaintiffs shall serve a copy upon all parties with notice of entry.

Dated: 8/26/04



Doris Ling-Cohan, J.S.C.

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FILED
AUG 24 2004
COUNTY CLERK'S OFFICE