

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 9, 2022

535511

In the Matter of LEAGUE
OF WOMEN VOTERS OF NEW
YORK STATE,

Appellant,

v

MEMORANDUM AND ORDER

NEW YORK STATE BOARD OF
ELECTIONS,

Respondent.

Calendar Date: June 9, 2022

Before: Garry, P.J., Clark, Pritzker, Reynolds Fitzgerald
and Ceresia, JJ.

Holwell Shuster & Goldberg LLP, New York City (Gregory
Dubinsky of counsel), for appellant.

New York State Board of Elections, Albany (Brian Quail of
counsel), for respondent.

Per Curiam.

Appeal from a judgment of the Supreme Court (Zwack, J.),
entered June 3, 2022 in Albany County, which dismissed
petitioner's application, in a combined proceeding pursuant to
CPLR article 78 and action for declaratory judgment, to, among
other things, declare invalid respondent's certification of the
2022 state assembly ballots for the June 28, 2022 primary
election.

On February 3, 2022, the Governor signed into law redistricting maps enacted by the Legislature for the congressional, state senate and state assembly offices. On April 27, 2022, the Court of Appeals decided Matter of Harkenrider v Hochul (___ NY3d ___, 2022 NY Slip Op 02833 [2022]), holding that the congressional and state senate maps had been enacted in violation of the procedure set forth in NY Constitution, article III, §§ 4 (b) and 5-b (a), and that the congressional map was also drawn in violation of the substantive prohibition against partisan gerrymandering in NY Constitution, article III, § 4 (c) (5). The Court of Appeals remitted the matter to Supreme Court (McAllister, J.) for purposes of redrawing the congressional and state senate maps with the assistance of a special master (id. at *13).¹ Notwithstanding its findings, the Court of Appeals – in a footnote – expressly declined to invalidate the assembly map "despite its procedural infirmity," stating that the "petitioners neither sought invalidation of the 2022 state assembly redistricting legislation in their pleadings nor challenge[d in the Court of Appeals the Fourth Department's] vacatur of the relief granted by Supreme Court" (McAllister, J.) in sua sponte invalidating the assembly map (id. at *9 n 15).

One week later, on May 4, 2022, respondent certified the ballots for various races across the state, including the state assembly districts, for the primary election scheduled for June 28, 2022. More than two weeks later, on May 20, 2022, petitioner commenced this combined proceeding pursuant to CPLR article 78 and action for declaratory judgment challenging respondent's certification of the assembly ballots in the primary election. Petitioner asserts claims for declaratory relief and writs of mandamus and prohibition, all of which are premised upon the assertion that respondent's certification of the assembly ballots – after the Court of Appeals opined that the assembly map had the same "procedural infirmity" as the

¹ The process of redrawing the congressional and state senate maps was completed on May 20, 2022, and the primary election for those offices was rescheduled for August 23, 2022.

congressional and state senate maps (id. at *9 n 15)² – was contrary to law and in excess of respondent's jurisdiction (see CPLR 7803 [1], [2], [3]). Petitioner takes the position that the Court of Appeals affirmatively "stated that the [a]ssembly map[] enacted by the Legislature [is] unlawful" and that respondent certified the assembly ballots and is now "implementing and facilitating" the June 28, 2022 primary election for the assembly and other offices "despite the fact that [a] valid [a]ssembly map[] do[es] not exist." Supreme Court (Zwack, J.) dismissed the petition, prompting this appeal by petitioner.

We agree with respondent that dismissal of the petition/complaint is required under the equitable doctrine of laches – a "threshold procedural issue" that was raised as an objection in point of law in respondent's answer (Matter of Schulz v State of New York, 81 NY2d 336, 347 [1993]; see CPLR 7804 [f]; 404 [a]). Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" (Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 [2003]; see Matter of Barabash, 31 NY2d 76, 81 [1972]). "The essential element . . . is delay prejudicial to the opposing party" (Matter of Barabash, 31 NY2d at 81; see Saratoga County Chamber of Commerce v Pataki, 100 NY2d at 816-818; Matter of Schulz v State of New York, 81 NY2d at 348).

Upon consideration of all attendant equities, we find that petitioner unduly delayed in bringing the present challenge to

² As respondent argues, the Court of Appeals' statement, in footnote 15 of Harkenrider, that the assembly map suffers from the same procedural infirmity as the congressional and state senate maps does not necessarily lead to the inescapable conclusion that the assembly map is invalid. Indeed, in footnote 12 of its Harkenrider decision, the Court of Appeals acknowledged the possibility that the congressional primary election could be "permitted to proceed on the maps drawn by the [L]egislature, despite the determination of procedural unconstitutionality" (Matter of Harkenrider v Hochul, 2022 NY Slip Op 02833 at *9 n 12).

respondent's certification of the ballots for assembly and other offices in the primary election.³ Such delay was entirely avoidable and undertaken without any reasonable explanation. Indeed, after the Court of Appeals issued its decision in Harkenrider on April 27, 2022, petitioner did not seek to enjoin or otherwise prohibit respondent from certifying the assembly ballots, as respondent is statutorily required to do 55 days prior to the primary election (see Election Law § 4-110). Nor did petitioner move expeditiously following respondent's certification of the assembly ballots on May 4, 2022. Rather, without any explanation as to its delay, petitioner waited 16 days to challenge respondent's certification of the assembly ballots. Significantly, petitioner did not commence this proceeding/action until one week after the assembly ballots were finalized and mailed as required to military and overseas voters.⁴

Petitioner's delay results in significant and immeasurable prejudice to voters and candidates for assembly and innumerable other offices (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d at 816; Matter of Nichols v Hochul, ___ Misc 3d ___, ___, 2022 NY Slip Op 22167, *3-4 [Sup Ct, NY County 2022]). Additionally, election matters are exceedingly time sensitive and protracted delays of this nature impose impossible burdens upon respondent, who is obligated to comply with the strict timelines set forth in the Election Law. Given petitioner's protracted, avoidable and unexplained delay in commencing this proceeding/action and the enormity of halting the June 28, 2022 primary for the assembly and other associated offices, which is already underway, we find that petitioner's failure to exercise due diligence requires dismissal of the proceeding/action under the equitable doctrine of laches (see Matter of Cantrell v

³ Although the assembly map was enacted on February 3, 2022, petitioner did not directly challenge the map or seek to intervene in the Harkenrider litigation.

⁴ Petitioner commenced this proceeding/action on the same day that the special master finalized new congressional and state senate maps per the Court of Appeals' directive in Harkenrider.

Hayduk, 45 NY2d 925, 927 [1978]; Matter of Nichols v Hochul, 2022 NY Slip Op 22167 at *2-3).

Even if petitioner had commenced this proceeding/action with the requisite haste, we would nonetheless find that petitioner is not entitled to the relief requested in the petition/complaint. Petitioner's first cause of action is for mandamus to compel respondent to perform a duty enjoined by law (see CPLR 7803 [1]), premised upon the claim that respondent lacked authority to certify the assembly ballots under Harkenrider. However, in the absence of an express judicial order invalidating the assembly map, petitioner failed to demonstrate that it had "a clear legal right to the relief demanded" or that "there [was] a corresponding nondiscretionary duty on the part of [respondent]" to refrain from certifying the ballots in the primary election; therefore, petitioner is not entitled to the extraordinary remedy of mandamus to compel (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 757 [1991]; see Matter of Waite v Town of Champion, 31 NY3d 586, 592-593 [2018]; Matter of Mental Hygiene Legal Serv. v Delaney, 176 AD3d 24, 33 [2019]).

As for petitioner's claim for a writ of prohibition, such relief is unavailable because respondent was not acting in a judicial or quasi-judicial capacity in certifying the primary ballots (see Matter of American Tr. Ins. Co. v Corcoran, 65 NY2d 828, 830 [1985]). Additionally, as with its claim for a writ of mandamus to compel, petitioner failed to demonstrate a clear legal right warranting the extraordinary remedy of a writ of prohibition (see CPLR 7803 [2]; Matter of Soares v Carter, 25 NY3d 1011, 1013 [2015]; Matter of Heggen v Sise, 174 AD3d 1115, 1116 [2019]).

Lastly, in its third cause of action for mandamus to review and declaratory relief, petitioner avers that respondent's certification of the primary ballots was unlawful, arbitrary and capricious and an abuse of discretion (see CPLR 7803 [3]; 3001) and seeks a declaration to that extent, as well as an order annulling respondent's certification of the assembly ballots for the June 28, 2022 primary election. Petitioner

further asserts that respondent "is implementing and facilitating the June 28, 2022 primary election without waiting for the creation and adoption of [a] new and valid [a]ssembly map[]" and seeks to enjoin respondent from carrying out the June primary election prior to the implementation of a valid assembly map. When respondent certified the assembly ballots on May 4, 2022 (and as it remains today), there was no court order directing the invalidation of the assembly map. In the absence of any such judicial order, respondent acted in accordance with its statutory obligation to certify the assembly ballots 55 days in advance of the primary (see Election Law § 4-110). Petitioner failed to demonstrate that respondent acted unlawfully or arbitrarily in any respect (see Matter of Beck-Nichols v Bianco, 20 NY3d 540, 560 [2013]; see generally Matter of Alessi v Pataki, 21 AD3d 1141, 1142 [2005]). As such, petitioner is not entitled to the requested declaratory relief (see CPLR 3001). Petitioner's remaining contentions have been examined and found to be without merit.

Garry, P.J., Clark, Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court