Mot. Seq. No. 11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Plaintiff, v. THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL, Defendants.	Index No. 451625/2020 Hon. Joel M. Cohen

THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN PARTIAL OPPOSITION TO THE MOTION TO INTERVENE BY FRANCIS TAIT AND MARIO AGUIRRE

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Plaintiff New York Attorney General Letitia James ("Attorney General") respectfully submits this memorandum of law in partial opposition to the motion to intervene by Francis Tait and Mario Aguirre. NYSCEF 243-60.

PRELIMINARY STATEMENT

The Attorney General takes no position as to whether Francis Tait and Mario Aguirre (together, the "Proposed Intervenors") may intervene in this action to assert the crossclaims against the individual defendants and third-party claims raised in their proposed answer and counterclaims, NYSCEF 249. The Attorney General submits this partial opposition to address arguments made by the Proposed Intervenors to intervene and interpose defenses and counterclaims against the Attorney General.

First, the Proposed Intervenors do not have a property interest in the assets of the National Rifle Association ("NRA") that gives them a right to intervene in this action pursuant to Civil Practice Law and Rules ("CPLR") 1012(a)(2) or (a)(3). Assets held by the NRA cannot, as a matter of law, inure to the benefit of NRA members except as provided for in the Not-For-Profit Corporation Law ("N-PCL").

Second, the Proposed Intervenors have failed to allege how their proposed intervention is necessary to adequately advance their interests with respect to the Attorney General's dissolution claims and alleged constitutional violations. In particular, the Proposed Intervenor's defenses and counterclaims against the Attorney General are virtually identical to the existing defenses and counterclaims currently being advanced by the NRA. Therefore, the Proposed Intervenors are not entitled to intervention as of right under CPLR 1012(a)(2) with respect to the Attorney General's dissolution claims or alleged violations of their constitutional rights.

Third, the Proposed Intervenors' reliance on CPLR 1012(a)(1) is misplaced because they have not identified a statutory right to intervene against the Attorney General in this plenary action.

Otherwise, with a full reservation of rights, the Attorney General takes no position as to whether the Proposed Intervenors may intervene in this action.

ARGUMENT

I. The Proposed Intervenors cannot intervene to assert claims or defenses against the Attorney General.

The Proposed Intervenors argue that they should be permitted to intervene as of right or by permission in order to defend against the Attorney General's dissolution claims, and to pursue counterclaims for alleged constitutional violations committed by the Attorney General. But the Proposed Intervenors' arguments all fail.

With respect to the Proposed Intervenors' arguments that they have a right to intervene pursuant to CPLR 1012, those arguments fail because (A) NRA members do not have a property interest in assets held by the NRA, a public charity; (B) the Proposed Intervenors' proposed counterclaims for alleged constitutional violations and defenses against the Attorney General's dissolution claims are duplicative of arguments already made and being prosecuted by the NRA, and the Proposed Intervenors have not alleged facts showing that their interests are being inadequately represented with respect to those arguments; and (C) N-PCL § 1104 does not grant NRA members a right to intervene in this action.

With respect to the Proposed Intervenors' arguments that they should be permitted to intervene pursuant to CPLR 1013, such request should be denied for all of the same reasons that they cannot intervene as of right pursuant to CPLR 1012. They do not have a statutory right to intervene and as against the Attorney General, claims and defenses virtually identical to their

proposed claims and defenses are already being litigated. The Attorney General would be prejudiced in pursing this important regulatory enforcement action if required to respond to such duplicative motion practice.

A. The Proposed Intervenors do not have a property interest in the NRA's assets giving them a right to intervene.

The Proposed Intervenors argue that they have a right to intervene in this action pursuant to CPLR 1012(a)(3), which provides a right to intervene "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." The Proposed Intervenors state that they meet the requirements of CPLR 1012(a)(3) because they contend that the NRA "is a private association of individuals, and its assets are private property contributed and owned collectively by its members, including the [Proposed] Intervenors, and held for their use and benefit." NYSCEF 244 at p. 24.

This is incorrect. The NRA is a New York not-for-profit corporation formed for charitable purposes and it is granted tax exempt status as a social welfare organization under § 501(c)(4) of the federal tax code. As a New York charity, the NRA is a "charitable trust," and is obligated to hold and administer its assets for a charitable purpose. Estates, Powers and Trusts Law ("EPTL") § 8-1.4(a). The NRA's assets are not collectively owned by the NRA members, but are instead held in trust by the NRA for unnamed beneficiaries in accordance with the NRA's charitable mission. Indeed, "no part of the [NRA's] assets, income or profit" can be distributed to or inure to the benefit of "its members, directors or officers except to the extent permitted" by the N-PCL. N-PCL § 102(a)(5); *see also 64th Assocs., L.L.C. v. Manhattan Eye, Ear & Throat Hosp.*, 2 N.Y.3d 585, 590 (2004) ("[N]ot-for-profits, unlike their for-profit counterparts, by definition and concept do not have shareholders to whom profits are distributed.").

The Court of Appeals has held that, except in limited circumstances inapplicable here,

> [t]he general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust . . . . Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes.

Alco Gravure, Inc. v. Knapp Found., 64 N.Y.2d 458, 465 (1985) (internal citations omitted). Therefore, the Proposed Intervenors do not have a property interest that would entitle them to intervene as of right pursuant to CPLR 1012(a)(3). To the extent that the Proposed Intervenors also argue that they are entitled to intervene pursuant to CPLR 1012(a)(2) because of their alleged property interest in the NRA's assets, *see* NYSCEF 244 at p. 15, those arguments fail for the same reasons.

B. The Proposed Intervenors have not shown that their interests in opposing dissolution and asserting counterclaims against the Attorney General are inadequately represented where their proposed counterclaims and defenses are virtually identical to those being prosecuted by the NRA.

The Proposed Intervenors argue that they have a right to intervene pursuant to CPLR 1012(a)(2) because, among other reasons, they will not be adequately represented with respect to "[o]pposing the Attorney General's demand for dissolution" and "[p]reserving their First Amendment rights to freedom of speech and freedom of association with the NRA." NYSCEF 244 at pp. 14-15. But the Proposed Intervenors fail to allege how they would advance different arguments or facts against the Attorney General than those currently being litigated. Given that they largely duplicate the NRA's existing defenses and claims, Proposed Intervenors cannot establish that their interests regarding claims and defenses against the Attorney General are inadequately represented sufficient to justify intervention.

Proposed Intervenors include allegations in their motion aimed at the current counsel for the NRA in this litigation, and the ways in which the relationships between the NRA leadership and NRA counsel may result in the NRA's interests not being adequately represented vis-à-vis crossclaims against the named individual defendants in this action or potential third-party claims

for breaches of fiduciary duties, waste, and other causes of action. *See* NYSCEF 244 at pp. 18-23; NYSCEF 249 at pp. 16-20. The Attorney General does not take a position concerning the Proposed Intervenors' assertions that their participation in this action as a party is "critical to assuring the NRA of independent counsel." NYSCEF 244 at 19. The Attorney General similarly defers to the Court whether intervention is warranted to allow the Proposed Intervenors to pursue claims against third parties for excessive or unauthorized payments because the NRA is allegedly "controlled by the individuals who would be implicated" by such claims and "is represented by the same law firm which billed the legal fees that would be questioned." *Id.*

The Proposed Intervenors, however, do not state how those alleged conflicts interfere with the NRA's ability to defend the NRA's and its members' interests in this action with respect to the dissolution claims and alleged constitutional violations. In fact, the Proposed Intervenors' proposed affirmative defenses and counterclaims are materially identical to the affirmative defenses and counterclaims already alleged by the NRA. *Compare* NYSCEF 228 pp. 136-38 (NRA's answer asserting affirmative defenses) *with* NYSCEF 249 pp. 15-16 (Proposed Intervenors' proposed answer asserting affirmative defenses); *compare* NYSCEF 228 Counterclaims Two through Seven (NRA's counterclaims alleging constitutional violations by the Attorney General) *with* NYSCEF 249 Counterclaims One and Two (Proposed Intervenors' proposed counterclaims alleging constitutional violations by the Attorney General); *see also* NYSCEF 279 (Attorney General's memorandum of law in support of her motion to dismiss the NRA's counterclaims).

Therefore, the Proposed Intervenors have failed to allege why they have a right to intervene in this action due to inadequate representation of their interests by the NRA.

C. The Proposed Intervenors do not have a statutory right to intervene.

The Proposed Intervenors argue that N-PCL § 1104 gives them a statutory right to intervene pursuant to CPLR 1012(a)(1). NYSCEF 244 at pp. 9-13. This is incorrect. N-PCL § 1104(a) provides, in relevant part, that

> [u]pon the presentation of [a petition for judicial dissolution], the court shall make an order requiring the corporation and all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than four weeks after the granting of the order, why the corporation should not be dissolved.

The statute sets forth procedures that are applicable to petitions for judicial dissolution brought pursuant to N-PCL § 1102 in the context of a special proceeding. N-PCL § 1104 does not apply to this plenary action, which asserts eighteen claims against the NRA and the individual defendants pursuant to the Attorney General's authority under the N-PCL, EPTL and Executive Law. Furthermore, even if this was a special proceeding solely concerning dissolution, intervention in that context is governed by a separate provision of the CPLR, which provides that "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court." CPLR 401.

Therefore, N-PCL § 1104 does not confer a statutory right on the Proposed Intervenors to intervene in this plenary action.

D. The Proposed Intervenors should not be permitted to intervene to assert defenses and counterclaims against the Attorney General pursuant to CPLR 1013.

CPLR 1013 provides for intervention by permission

> when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

For all of the reasons provided above in Part I(A) through (C), the Proposed Intervenors have no

right, and should not be permitted, to intervene to assert defenses and counterclaims against the Attorney General in this action.

The Attorney General would be prejudiced in pursuing this important regulatory enforcement action against the NRA if the Proposed Intervenors were permitted to intercede to assert duplicative arguments and defenses already raised by the NRA. That would lead to further motion practice, which would unduly delay reaching the merits in this matter, which has already entailed months spent on defendants' motions directed to the pleadings and litigation of the NRA's failed bankruptcy petition.

For all of the reasons above, the Proposed Intervenors do not have a right, and should not be permitted, to intervene with respect to their proposed defenses and counterclaims against the Attorney General.

In the event that the Proposed Intervenors' motion is granted, they should not be permitted to unnecessarily extend and confuse ongoing litigation with defenses and counterclaims duplicative of the NRA's. This Court has broad authority to condition intervention, and may limit the arguments and claims that the Proposed Intervenors may make. *See Fleitman v. Simpson*, 166 N.Y.S.2d 727, 731 (Sup. Ct. N.Y. Co. 1957) (allowing intervention by shareholders in derivative action but conditioning intervention by requiring intervenors to acquiesce to the strategy of already appointed general counsel for plaintiffs, and not permitting service of proposed complaint that largely duplicated claims already made by parties); *John P. Burke Apartments, Inc. v. Swan*, 137 A.D.2d 321, 323-24, (3d Dep't 1988) (upholding conditions placed by Supreme Court on intervenor that included refusing to permit intervenors to call its own witnesses and cross examine witnesses, where intervenor's interests were aligned with respondent's interests).

II. The Attorney General reserves all rights to contest future motions to intervene and any motions or claims brought by the Proposed Intervenors.

Except as stated herein, the Attorney General takes no position with respect to the Proposed Intervenors' motion. However, the Attorney General reserves all rights to make any and all arguments with respect to any future motion to intervene in this action. The Attorney General further reserves all rights to make any and all arguments concerning any motion, pleading, or argument made by the Proposed Intervenors in the event that their motion is granted and they become parties to this action. This includes, but is not limited to, the right to make any and all arguments with respect to the merits of the Proposed Intervenors' proposed counterclaims, NYSCEF 249, and the Proposed Intervenors' suggestion that NRA members are entitled to notice and an opportunity to be heard in this action. NYSCEF 244 at pp. 15-16.

CONCLUSION

For the foregoing reasons, the Proposed Intervenor's arguments concerning their alleged right to intervene pursuant to CPLR 1012(a)(1) or (a)(3) are meritless.

Dated: July 9, 2021
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Stephen Thompson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Partial Opposition to the Motion to Intervene by Francis Tait and Mario Aguirre complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 2,338 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: July 9, 2021
New York, New York

/s Stephen C. Thompson

Stephen Thompson