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 Motion Sequence No. 20

THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR REARGUMENT OF 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 opposition to the motion for reargument of the motion to intervene by Francis Tait and Mario Aguirre.

PRELIMINARY STATEMENT

On August 6, 2020, the Attorney General commenced this regulatory enforcement action against the National Rifle Association of America (the "NRA") and four of its current and former officers. On June 17, 2021, two current NRA members, Francis Tait and Mario Aguirre (together, the "Proposed Intervenors"), moved pursuant to CPLR 1012(a) and CPLR 1013, to intervene in this action. NYSCEF 243.

The NRA, along with Defendants Wayne LaPierre and John Frazer, opposed the Proposed Intervenors' motion. NYSCEF 300, 301, 303. The Attorney General submitted a partial opposition to reject arguments made by the Proposed Intervenors to intervene in this action and interpose defenses and counterclaims against the Attorney General. NYSCEF 290. She took no position as to whether they could intervene to assert crossclaims against the individual defendants and third-party claims raised in their proposed answer and counterclaims. *Id*. Following an oral argument on September 9, 2021, this Court denied the motion to intervene in its entirety, holding that the Proposed Intervenors failed to make a showing "that their intervention as independent parties is warranted, either as a matter of right or as a matter of discretion." NYSCEF 395 at 46:23-25.

In the instant motion, the Proposed Intervenors argue that the Court overlooked or misapprehended matters of fact and law when it denied their motion to intervene. NYSCEF 401. However, they have not offered any relevant facts or points of law that they previously raised and that the Court overlooked or misapprehended. The Proposed Intervenors have therefore failed to establish that they are entitled to reargument and their motion should be denied.

ARGUMENT

I. STANDARD OF REVIEW

For the Proposed Intervenors to succeed on their motion for leave to reargue, their motion must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). They must establish "that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979). Such motions are not intended to serve as "vehicle[s] to permit the unsuccessful party to argue once again the very questions previously decided." *Id.*; s*ee also William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992) (explaining, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided"). In seeking reargument, the Proposed Intervenors are unable to meet this burden because the Court correctly understood and applied both the relevant facts and the controlling principles of law when it denied the motion to intervene.

II. THE PROPOSED INTERVENORS MISCHARACTERIZE THE COURT'S DECISION AS IT RELATES TO INTERVENTION IN ACTIONS INVOLVING CLAIMS FOR DISSOLUTION

At the outset of its September 9, 2021 decision, the Court explained that this action is "first and foremost, a law enforcement matter" and that "[g]enerally…members of companies do not have a right to intervene as separate parties in a law enforcement action." NYSCEF 395 at 45:1-12. In their motion for reargument, Proposed Intervenors claim that "[t]his reasoning would make every judicial dissolution action by an AG immune from intervention by interested persons, because every such action is a 'law enforcement matter.'" NYSCEF 401 at 2.

While the Court properly held that the Proposed Intervenors had no right to intervene as parties in this case, nowhere does the Court reach the conclusion that intervention is never

appropriate in dissolution actions brought by the Attorney General, nor does the Court hold that CPLR 1012 or 1013 contain an exception for an Attorney General's law enforcement actions. As detailed below, the Court analyzed the Proposed Intervenors' arguments under the relevant law governing CPLR 1012 and 1013, and correctly held that the Proposed Intervenors did not meet any of the statutory requirements for intervention as of right or by permission. At the same time the Court also expressly acknowledged that the interest of the public—which includes the interest of NRA members—is of paramount importance in a dissolution action brought by the Attorney General. NYSCEF 395 at 47:4-10. The Court properly determined that intervention by NRA members is not the appropriate process to consider their interest. Instead, the Court recommended that the parties establish "an organized process to receive the views of members." *Id*. at 47:1-3.

The Court did not misapprehend the law as it relates to intervention in dissolution actions brought by the Attorney General. Accordingly, the Proposed Intervenors' motion to reargue on this basis should be denied.

III. THE COURT CORRECTLY APPREHENDED AND APPLIED THE FACTS AND LAW IN DENYING THE MOTION TO INTERVENE UNDER CPLR 1012

a. The Court apprehended and applied the facts and law correctly when it determined that Proposed Intervenors are not entitled to intervention under CPLR 1012(a)(2).

CPLR 1012(a)(2) provides for intervention 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." In ruling on the motion to intervene, the Court fully considered and properly rejected Proposed Intervenors' arguments that: (1) their interests will not be adequately represented by any of the parties in this action; and (2) they will be bound by the judgement.

As to the first prong, the Court found that "the interests of the NRA and its members are clearly aligned" when it came to defending against the dissolution claim. NYSCEF 395 at 52:10-15. The Court explained that the Proposed Intervenors "fail[ed] to show how they would advance

different arguments or facts against the AG's claim than those currently being litigated by the NRA" and determined "[a]s a result, the [Proposed Intervenors] have not established that their interests regarding claims or defenses against the AG are inadequately represented." *Id*. at 52:15-20. In seeking reargument, the Proposed Intervenors fail to identify any facts or points of law that the Court overlooked or misapprehended when it held that their interests are being adequately represented by the NRA.[1]

Proposed Intervenors attempt to distinguish their position from that of the NRA by claiming that they would assert additional, non-duplicative claims that the NRA has not pursued. NYSCEF 401 at 10-12. For example, Proposed Intervenors argue that, in relation to the dissolution cause of action, they would assert that N-PCL § 1101 violates the due process guarantees of both the federal and state constitutions. *Id*. at 11. However, this would need to be brought as a derivative claim, which, as the Court correctly held, the Proposed Intervenors lack standing to bring because they failed to satisfy the requirements of N-PCL § 623. NYSCEF 395 at 51:5-52:9. Proposed Intervenors have not shown that the Court misapprehended New York law on this point, and as such, this argument does not help them establish that they are entitled to intervene based on inadequate representation.

As to the second prong, Proposed Intervenors originally argued that "[a] judgment for dissolution of the NRA in this action would bind the Intervenors…destroying the rights and value of their membership and effectively negating their First Amendment rights to freely associate." NYSCEF 244 at 17. However, they failed to cite to—and the Court did not independently

[1] As part of their argument that they had a right to intervene pursuant to CPLR 1012(a)(2), the Proposed Intervenors included allegations in their motion aimed at the current counsel for the NRA in this litigation. *See* NYSCEF 244 at 13-17; NYSCEF 249 at ¶¶ 28-32. The Attorney General did not take a position concerning their assertions that their participation in this action as a party is "critical to assuring the NRA of independent counsel." NYSCEF 244 at 13.

identify—"any authority holding that the dissolution of an entity necessarily implicates the constitutional rights of the entity's members such that every member has the right to intervene." NYSCEF 395 at 53:12-15. In their motion to reargue, the Proposed Intervenors have failed to establish that the Court misapprehended the law on this issue.

Because Proposed Intervenors have not established that the Court was mistaken when it denied their request to intervene as of right pursuant to CPLR 1012(a)(2), their motion to reargue on this basis must be denied.

b. The Court apprehended and applied the facts and law correctly when it determined that the Proposed Intervenors do not have a property interest in the NRA's assets.

CPLR 1012(a)(3) provides for intervention as of right "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." In ruling on the motion to intervene, the Court properly analyzed the relevant facts and law when it determined "the Proposed Intervenors have not demonstrated a property right warranting mandatory intervention." NYSCEF 395 at 56:3-5. Proposed Intervenors now seek to relitigate this issue by claiming that "this Court's denial of intervention misapprehends…title to property or direct financial interest is not a requirement for intervention." NYSCEF 401 at 8. This argument fails.

The proper analysis under CPLR 1012(a)(3) "relates to whether the Proposed Intervenors' property interests are going to be litigated and decided without their involvement." NYSCEF 395 at 55:15-17. The Court correctly interpreted and applied New York law in determining "the NRA's assets are not collectively owned by its members. They are instead held in trust by the NRA for unnamed beneficiaries in accordance with the NRA's charitable mission." *Id*. at 55:18-22. The Court also correctly concluded that the Proposed Intervenors therefore did not have a property right of the nature contemplated by CPLR 1012(a)(3). *Id*. at 56:2-5.

To the extent the Proposed Intervenors are claiming that they have a right to intervene based on some less tangible "legally protectable" right that would be implicated by dissolution—namely their First Amendment rights to freedom of speech and association—the Court already rejected this as a basis for intervention when it held that Proposed Intervenors failed to establish that they were entitled to intervention under CPLR 1012(a)(2). *Id*. at 52:10-54:16.

IV. THE COURT CORRECTLY APPREHENDED AND APPLIED THE FACTS AND LAW IN DENYING THE MOTION TO INTERVENE UNDER 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." CPLR 1013.

The Court—in a proper exercise of discretion—held that the Proposed Intervenors were not entitled to permissive intervention pursuant to CPLR 1013. Proposed Intervenors now argue that the Court misapprehended New York law because "there was no mention of any legal basis for denying intervention simply because others with similar interests or claims to standing might follow suit." NYSCEF 401 at 8 (emphasis in original omitted). However, the Court was well within its rights to take into account the potential burden that permitting this intervention was likely to create when it denied the Proposed Intervenors permission to intervene as a matter of discretion. CPLR 1013 requires that the Court "consider whether the intervention will unduly delay the determination." Here, the Court correctly considered this issue and concluded there would be "a substantial risk…of delaying resolution of this litigation by permitting intervention which…could lead to others." NYSCEF 395 at 56:22-25. Proposed Intervenors have not shown that this was an

improper basis on which to deny permissive intervention and, as such, their instant motion to reargue should be denied.

CONCLUSION

For the foregoing reasons, the Proposed Intervenors' motion for reargument of the motion to intervene should be denied.

Dated: October 27, 2021
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Erica James, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to the Motion for Reargument of 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 1983 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: October 27, 2021
New York, New York

/s Erica J. James
_____
Erica James