

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

COUNTY OF NASSAU, NASSAU COUNTT BOARD OF ELECTIONS, JOHN A. DEGRACE, in his official capacity as Nassau County Republican Commissioner of Elections, and WILLIAM T. BIAMONTE, in his official capacity as Nassau County Democratic Commissioner of Elections,

Petitioners-Plaintiffs.

-against-

STATE OF NEW YORK, NEW YORK STATE BOARD OF ELECTIONS, and JAMES A. WALSH, DOUGLAS A. KELLNER, EVELYN J. AQUILA, GREGORY P. PETTERSON as Commissioners constituting the Board,

Respondents-Defendants.

Papers Read on these Motions:

Petitioner-Plaintiff's County of Nassau Order to Show Cause	02
Defendant-Respondent New York State's Notice of Cross Motion	04
Defendant-Respondent NYS Board of Elections Affirmation in Opposition to Motion for Disclosure	xx
Petitioner-Plaintiff's County of Nassau Affirmation in Opposition to Cross Motion for a Stay	xx
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The petitioners seek to be able to continue using lever as opposed to electronic voting machines. The petitioners challenge the New York Election Reform and Modernization Act, the legality of the manner in which the New York State Board of Elections ("NYSBOE") has implemented it, and specifically the State's mandate to local boards of elections to replace lever voting machines with computerized electronic machines.

In motion sequence number two, the petitioner's move for an order pursuant to CPLR §408 and §3101 granting immediate disclosure. Specifically, the petitioners seek an order expressly authorizing their experts to conduct testing on the functioning of the ES & S machines, Dominion Optical Scan

MICHELE M. WOODARD
J.S.C.
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DECISION AND ORDER

and EMS system at their Connecticut facility. The respondents oppose the petitioner's application.

The petitioners claim that the new machines proposed by the state are "gravely flawed and subject to technical malfunction and deliberate distortion and manipulation." The petitioners's claim they need the ability to test/examine the machines to highlight how various flaws could negatively impact voter's choices and ultimately undermine their constitutional rights. The petitioners have submitted the affidavit of Dr. Alexander Shvartsman, Principal Analyst for Voting System Security, LLC. Voting System Security LLC employs engineers and scientist who specifically analyze voting machines to test their accuracy and vulnerability. Dr. Shvartsman has outlined in his affidavit the need for and procedures to be utilized in the "white box" and "black box" testing. Said procedures would allow them to provide specific examples of the flaws in the system claimed by the petitioners.

The NYS BOE respondent oppose the petitioner's application indicating that the petitioner's expert has not provided any information to substantiate that the proposed machines have ever presented any issues in any of the other jurisdictions in which they have been used and that the State of New York is the last state of the union to comply with the Federal voting machine requirements and may be the last state using lever voting machines. The NYS BOE further argues that the choice of machines is strictly a question for the legislature and not the Courts to decide.

CPLR § 408 provides that for Special proceedings, "leave of court shall be required for disclosure except for a notice under section 3123. A notice under section 3123 may be served at any time not later than three days before the petition is noticed to be heard and the statement denying or setting forth the reasons for failing to admit or deny shall be served not later than one day before the petition is noticed to be heard, unless the court orders otherwise on motion made without notice."

CPLR § 3101 provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.

Expedited Discovery can be ordered at the discretion of the Court.

The petitioner's application is granted with respect to the Electronic Systems & Software machine and denied with respect to the Dominion machine, it is hereby

ORDERED, that the petitioners are authorized to deliver to the Connecticut testing facility an Electronic Systems & Software voting machine for the requested testing. It is further

ORDERED, that to the extent that it has not already been provided, the respondents are directed to deliver to the petitioner an EMS for the machine simultaneously with the voting machine. It is further

ORDERED, that to the extent that it has not already been provided, the respondents shall provide as to the individually configured and installed software and firmware component including the voting terminal and the election management system the following:

- Function specification and requirements document (or equivalent);
- High level design specification (or equivalent)
- Detailed design specification (or equivalent)
- Identification of all third-party software used in the system;
- Interface specifications (and application programming interfaces, or API) for any external software and hardware system;
- Installation, integration and configuration specification (or equivalent);
- Source code and system build specification;
- Maintenance and service manual (or equivalent)
- User-level documentation and manuals
- Other relevant information following completing the white box testing

In motion sequence number four, the State of New York (hereinafter referred to as "State") cross moves to stay this proceeding pending a determination in the federal action of United States of America v. New York state Board of Elections et al, CV 06-263 (N.D.N.Y) pursuant to CPLR §2201. The State argues that an action related to the within matter has been pending for four years in the Federal Court. According to the State the federal court has issued a number of remedial orders.

Nassau County opposes the State's application for a Stay indicating that the State is attempting to unnecessarily delay the proceedings to prevent Nassau from having the opportunity to expose the systems vulnerabilities.

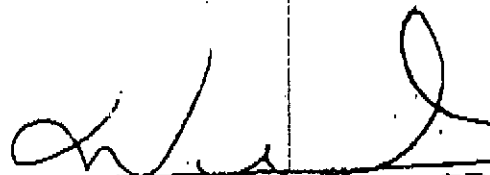
The State's application for a Stay is denied. "It is appropriate to stay an action in deference to another only where the determination in the other will resolve all of the issues in the stayed action and the judgement on one trial will dispose of the controversy in both actions." *Somoza v. Pechnik* 3 A.D.3d 394 (2004). Contrary to the respondents' assertions, ordering this discovery is not in contravention with the previously issued Federal Court orders.

ORDERED, the parties are directed to appear before the undersigned on August 10, 2010 at 10:00 am before the undersigned for a status conference.

This constitutes the Decision and Order of the Court.

DATED: July 21, 2010
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.