

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS
SOUTHERN DISTRICT**

SUPERIOR COURT

Docket No. 226-2022-CV-00233

603 Forward; Open Democracy Action; Louise Spencer; Edward R. Friedrich; and
Jordan M. Thompson

v.

David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and
John M. Formella, in his official capacity as the New Hampshire Attorney General

and

Docket No. 226-2022-CV-00236

Manuel Espitia, Jr. and Daniel Weeks

v.

David Scanlan, in his official capacity as New Hampshire Secretary of State; and
John Formella, in his official capacity as New Hampshire Attorney General

ORDER

The plaintiffs have brought these consolidated actions challenging the constitutionality of a newly enacted law affecting voters who are unable to produce proper photo identification prior to voting. See Laws 2022, ch. 239 ("SB 418"). On August 26, 2022, the defendants filed a motion to dismiss the complaint. Six days later, the New Hampshire Republican State Committee ("NHRSC") filed a motion to intervene as a party in this matter. The Court has a personal conflict with one of NHRSC's attorneys. Consequently, it recused itself from ruling on NHRSC's motion, and the motion was instead assigned to Judge Colburn. On December 21, 2022, Judge Colburn denied NHRSC's motion to intervene. Because NHRSC was not permitted to intervene, the Court determined that it could continue to preside over this case. To that end, it held a hearing on the defendants' motion to dismiss on January 30, 2023.

Unbeknownst to the Court and the parties, on January 20, 2023, NHRSC had filed a notice of a discretionary appeal concerning Judge Colburn's ruling denying its motion to intervene. The Court was not aware that said notice had been filed until February 15, 2023 when it received a "Notice of Docketing and Mandatory E-Filing" from the New Hampshire Supreme Court. (See Court Doc. 38.); but see Sup. Ct. R. 5(1) (requiring appealing party to file notice of appeal "with the office of the clerk of the court from which the appeal is taken"). After the Court received this notice, it decided that it would not be prudent to rule on the motion to dismiss without further input from the parties. As a result, it scheduled a conference for April 3, 2023 to discuss the status of the case and the appeal. In the meantime, on March 17, 2023, the supreme court accepted NHRSC's appeal. (See Court Doc. 50.) The Court then held the April 3, 2023 status conference as scheduled. At that hearing, the parties represented that they had all agreed, apparently with NHRSC's consent, that the Court could rule on the pending motion to dismiss while the appeal concerning the motion to intervene was resolved.

Notwithstanding the parties' agreement, the Court concludes that it no longer has jurisdiction to rule on the motion to dismiss. "As a general rule the perfection of an appeal divests the Trial Court of jurisdiction of the cause and transfers it to the appellate court." Rautenberg v. Munnis, 107 N.H. 446, 447 (1966). This general rule, however, "does not prohibit the Trial Court from passing on collateral, subsidiary or independent matters affecting the case." Id. at 448. Here, however, the Court cannot find that the defendants' pending motion to dismiss is a "collateral, subsidiary or independent matter" unrelated to NHRSC's appeal. Id. Had Judge Colburn granted NHRSC's motion to intervene, it would "have meant that [it] could participate to the full extent that the

existing parties to the case can participate in pleading, discovery, motion practice, advocacy on any of the issues that might arise in the course of pretrial preparation of the case, and, ultimately, trial participation[.]” Maine v. Norton, 148 F. Supp. 2d 81, 83 (D. Me. 2001).¹ “The Court, however, denied that motion, thereby depriving the proposed intervenor[] of the participatory role [it] seek[s] in this case.” Id. That issue is now on appeal to the supreme court, “where the generic issue posed to the [court] to be resolved is whether the proposed intervenor[] [is] entitled to such a participatory role in the ongoing development and progress of this case.” Id. Under these circumstances,


[i]t is clear beyond peradventure of any doubt to this Court, if the usual rules of analytical thought and process are to be applied, that any action that this Court allows or takes for the development of the case without the opportunity of the proposed intervenor[] to participate therein must be inconsistent with the question pending on appeal as to whether [NHRSC] [is] entitled to such rights.

Id. “Any other conclusion is nothing more than wishful thinking.” Id.

For these reasons, the Court finds that it no longer has jurisdiction to rule on any substantive matters in this case, including the pending motion to dismiss. This case is therefore STAYED until the appeal is resolved or the supreme court issues a partial remand order permitting the Court “to act upon a matter that is not a collateral, subsidiary or independent matter affecting the case.” Sup. Ct. R. 7-A Comment.²

So ordered.

Date: April 7, 2023



Hon. Charles S. Temple,
Presiding Justice

¹ Indeed, NHRSC filed a motion to join in the defendants’ motion to dismiss. However, NHRSC did not participate at the oral argument on the motion to dismiss because it was not allowed to intervene.

² “[T]hough on what basis the latter could be done without extreme violence to the fundamental rules of jurisdiction is hard to imagine.” Maine, 148 F. Supp. 2d at 84. Furthermore, should the case be remanded to allow the Court to consider the motion to dismiss while the appeal is still pending, the Court would then have to consider whether to recuse itself in light of NHRSC’s joinder in that motion. Thus, if at all possible, it is preferable for the supreme court to conduct an “expedited resolution of the appeal.” Id.