

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MARK A. FAVORS, et al.

Plaintiffs,

v.

ANDREW M. CUOMO, et al.

Defendants.
-----X

C.A. No. 11-CV-05632
(RR)(GEL)(DLI)(RLM)

ECF CASE

**INTERVENOR PLAINTIFF YITZCHOK ULLMAN'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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I. INTRODUCTION.

Intervenor Plaintiff Yitzchok Ullman (“Plaintiff”) respectfully submits this memorandum of law in opposition to the Motion to Dismiss filed by Defendants Sheldon Silver, John McEneny, and Roman Hedges (the “Defendants”).¹

II. STATEMENT OF FACTS

On March 15, 2012, following the 2010 decennial census, Defendant Cuomo signed into law the Assembly redistricting plan, Chapter 16 of the Laws of 2012 (the “Plan”). At issue in this matter is the redistricting of the Town of Ramapo.

According to the 2010 U.S. census, the Town of Ramapo has a population of 126,595. The ideal population for an assembly district in the state is 129,187 with a 5% +/- margin of acceptable deviation. Ramapo is within the acceptable deviation margin to be a single assembly district.

Prior to the enactment of the Plan, Ramapo was divided into three assembly districts known as districts 94, 95, and 96. The Plan does not redistrict Ramapo as a single district, but instead keeps it separated among three districts (now districts 96, 97, and 98). Moreover, the Plan considerably alters the previous district lines within Ramapo such that it splits the Villages of Kaser and New Square, two neighboring low-income, majority Chassidic communities with strong commonalities of interest and a long history of being contained within the same district, into separate districts. Plaintiff is Chassidic and resides in a surrounding area of Kaser called the hamlet of Monsey. New Square, Kaser, and Monsey were located within the former district 95.

¹ Additionally, this memorandum of law is also submitted in opposition to the Motion to Dismiss filed by Dean G. Skelos, Michael F. Nozzolio, and LATFOR member Welquis R. Lopez, who joined the Assembly Majority Defendants’ Motion to Dismiss. See n.1 of Senate Majority Defendants’ Motion to Dismiss. For ease of reference, the term “Defendants” refers to all defendants.

Under the Plan, Kaser and Monsey are now located in district 98 and New Square is located in district 97.

On March 19, 2012, Intervenor Plaintiff filed a Complaint (the "Complaint")² challenging the Plan as unconstitutional under the United States Constitution and the New York State Constitution. Thereafter, Defendants moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). Because Plaintiff has alleged sufficient facts to raise a plausible claim that Defendants violated the state and federal constitutions when they split Ramapo into three districts and separated Kaser and New Square into separate districts, this Court should deny Defendants' motion.

I. STANDARD OF REVIEW.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Davison v. Goodwill Industries of Greater N.Y. and Northern N.J., No. 10-2180, 2012 U.S. Dist. LEXIS 43283, at *4 (E.D.N.Y. March 28, 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,' but only '[f]actual allegations [that are] enough to raise a right to relief above the speculative level.'" Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 323-24 (2d Cir. 2011) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

² Intervenor Plaintiff filed an Amended Complaint on March 27, 2012.

II. ARGUMENT.

a. **The Plan violates Article III, Section 5 of the New York State Constitution because it impermissibly divides Ramapo into three districts.**

The Plan impermissibly divides Ramapo into three assembly districts in direct contravention of the New York State Constitution. Defendants have failed to set for a compelling reason, or even a rational basis for doing so.

Article III, Section 5 of the New York State Constitution states in, in relevant part, that:

No town, except a town having more than a ration of apportionment and one-half over, and no block in a city inclosed by streets or public ways shall be divided in the formation of assembly districts

This New York State constitutional directive recognizes the overall commonality of interests of all residents living within a town with regard to state legislative issues, and the public policy of keeping each township as a whole when drafting Assembly districts.

Despite the admitted pre-eminence in the redistricting process of the federal equal-population mandate, the New York Court of Appeals has long affirmed the continued vitality of the state constitutional directives enshrined in Article III, Section 5. See generally, Matter of Orans, 15 N.Y.2d 339 (1965); Schneider v. Rockefeller, 31 N.Y.2d 420 (1972). Indeed, in examining a redistricting plan, the Court must determine whether the Legislature has “made a good-faith effort to comply with . . . the equal-population principle . . .,” Schneider, 31 N.Y.2d at 428-29, *and* “has [not] ‘unduly departed’ from the State Constitution’s” anti-gerrymandering provisions and those provisions aimed at the preservation of the integrity of certain municipal boundaries, such as the one quoted above. Wolpoff v. Cuomo, 80 N.Y.2d 70, 78 (1992). In short, while the Legislature may deviate from state constitutional directives to satisfy federal mandate, it is not free to treat state constitutional requirements as merely precatory.

Here, the separation of Ramapo into three separate assembly districts is not required to comport with either the federal equal-population directive or the state directives of Article III, Section 5. Indeed, according to the 2010 U.S. census, the Town of Ramapo has a population of 126,595, which is well within the ideal population for an assembly district in the State of New York. The districting of Ramapo as a single district therefore complies with both state and federal directives. Yet, inexplicably, Ramapo remains the only town in New York to be split by district lines. Moreover, based on the attached draft plan and supporting population figures illustrating a possible districting of the Lower Hudson Valley State Assembly created by the group Common Cause³, the assembly districts in Rockland County, where Ramapo is located, as well as the surrounding counties, easily could be redrawn in such a way that would not only protect the integrity of vast majority of Ramapo's borders but would also produce a lesser population deviation than is achieved in the Plan, thus assuring greater compliance with both state *and* federal directives. Thus, the separation of Ramapo into three separate districts is unconstitutional, as it is necessitated neither by the obligation to achieve proportional representation nor by any state constitutional directives. Indeed, the existence of a plan of redistricting that achieves both better population deviation *and* greater compliance with state constitutional directives clearly "belies any serious claim that the present redistricting plan was motivated solely by a legislative desire to comply" with federal or state mandates.⁴ Wolpoff, 80 N.Y.2d at 85 (Titone, J. dissenting).

³ See Exhibit A, attached.

⁴ Plaintiff does not present the Common Cause plan and districting figures as manner of suggesting that the Court adopt it as an alternative or superior plan. Plaintiff merely presents the plan to illustrate the plausibility of its claim that the redistricting of Ramapo was not based on a legislative desire to comply with the state and federal constitutions but rather was the product of political gerrymandering. See Wolpoff v. Cuomo, supra, 80 N.Y.2d at 85 (Titone, J. dissenting).

Nevertheless, Defendants, relying on Schneider, contend that when the Legislature divided Ramapo, it merely exercised its discretion in balancing the “convenience” factor of Article III, Section 5’s anti-gerrymandering provisions with the command to maintain town lines and determined that the former outweighed the latter. To be sure, however, Defendants’ motive for continuing to ignore Ramapo’s constitutionally protected lines was not so lofty; and their reliance on Schneider is nothing more than pretext. For, even a cursory review of the facts detailed below reveals that the true motivation animating the Defendants’ gerrymandering of the assembly district lines in Ramapo was to protect Assemblywoman Jaffee as the incumbent, not to pay any homage to the state directives regarding “convenience” – or, as they see it, “habitual associations, prior traditions, and prior lines.”

In the 2010 elections, then-assembly district 95 incumbent Assemblywoman Jaffee carried New Square in a landslide (1,841-80), but could not carry Kaser⁵. Following the 2010 census, given the new population numbers in Ramapo, there existed the potential that Ramapo would be drawn as a single district, thereby diluting Assemblywoman Jaffee’s sizable advantage in New Square. To cure Jaffee’s problem, Defendants once again divided Ramapo into three districts but this time purposefully manipulated the assembly district boundary lines so as to separate Kaser out of Assemblywoman Jaffee’s assembly district (now district 97) while keeping New Square in it. In doing so, Defendants inexplicably separated two communities with deeply intertwined common interests under the guise of a claimed respect for “habitual association, prior traditions and prior lines.”

⁵ See, Exhibits, B, C, and D, attached. Exhibits B and C shows the 2010 election results from Ramapo Election Districts 55 and 58, respectively (New Square). Exhibit D shows the 2010 election results from Ramapo Election District 35 (Kaser).

For over 20 years, New Square and Kaser have remained in the same district – and for good reason. Kaser – including surrounding communities such as Monsey – and New Square are low-income, majority Chassidic communities located adjacent to each other in Ramapo. The Chassidic communities of New Square and Kaser are insular communities that, unlike many other American Jewish communities, have not assimilated into the mainstream culture. The members of these communities are instantly recognizable from their manner of dress and often speak primarily Yiddish. In short, these communities share significant commonalities of interest and they have long been contained within the same assembly district.

As indicated, Defendants now seek to split these communities between assembly districts in the name of “habitual associations, prior traditions, and prior lines” and ostensibly for the purpose of satisfying the “convenience factor” contained by Article III, Section 5. In reality, however, the Plan appears to pay no attention to the former district lines in Ramapo. Indeed, the altering of assembly district lines to carve out an entire village from a district in which it has remained for over 20 years and severing it from its neighboring community with whom it shares strong commonalities of interest is hardly evidence of a respect for “habitual associations, prior traditions, and prior lines.” As such, the Plan’s division of Ramapo is not countenanced by the Schneider decision.⁶

⁶ While it is true that the Schneider decision upheld a redistricting plan that split Ramapo, the decision cannot be read as a continuing endorsement of that practice. In the 40 years that have passed since Schneider, Ramapo has changed considerably. It has grown significantly in population and its culture, like that of many other towns, has also grown and changed. These changes, among others, justify a renewed examination of the Defendants’ claimed reasoning for departing from the state constitutional directive that Ramapo should not be split among multiple districts. While the principles espoused in Schneider allow deviation from the state directives in limited circumstances for good reasons in light of the federal equal-population mandate, nowhere in that decision does the Court grant a blanket authorization for the continued violation of Ramapo’s constitutionally protected borders in the redistricting process.

[The anti-gerrymandering] provisions were adopted for the salutary purpose of averting the political gerrymander and at present are the only means available to the courts for containing that pernicious practice. If the Legislature plays fast and loose with these constitutional requirements, it risks having a districting plan set aside

31 N.Y.2d at 430; (see also Reynolds v. Sims, 377 U.S. 533, 578-79 (1964) (“Indiscriminate districting, without any regard for political subdivision or natural or historic boundary lines, may be little more than an open invitation to partisan gerrymandering.”)).

Further, Defendants’ reliance upon Schneider is flawed in another way. Defendants appear to argue that the Court in Schneider approved the division of Ramapo into three Assembly districts in apparent contravention of the New York State constitutional mandate that “No town...shall be divided in the formation of assembly districts...” The argument follows that the continued division of the Town of Ramapo has been approved by the judiciary. In the first instance, the Schneider decision merely dealt with the question of whether a county has been divided into Assembly districts “as nearly equal in number of inhabitants...as may be, of convenient and contiguous territory in as compact form as practicable...” The Court of Appeals did not specifically pass upon the question of the constitutionality of the division of a town in New York State. Therefore, Schneider has no precedential value to the case at bar. Moreover, Schneider is further distinguishable inasmuch as the Legislature is now changing the boundaries of the divisions of the Town and those changes are based upon improper motivations. Therefore, to the extent that the Defendants argue that Schneider approved the division of the Town, it does not stand for the proposition that said division is proper when based upon improper considerations and/or motivations.

In carrying out its redistricting obligations the Legislature must comport with both the United States and New York State Constitutional directives. One such directive requires the

Legislature to maintain the integrity of town lines in its reapportionment. While the Legislature may depart from this directive in limited circumstances for good cause, it may not do so merely at its partisan whim. Here, Plaintiff has alleged that the Legislature has divided Ramapo into three separate districts in violation of that constitutional directive⁷. Moreover, Plaintiff has alleged that such division is impermissible because it was borne neither out of an effort to comply with the federal requirement of proportional representation nor out of an effort to balance the state constitutional directives with that requirement, but rather was the result of illegal partisan gerrymandering. Accordingly, Plaintiff has alleged facts that raise a plausible claim that the Plan violates Article III, Section 5 of the New York State Constitution. And, while Defendants dispute Plaintiff's contentions regarding their motives for the division of Ramapo, that dispute is clearly grist for the discovery/fact-finding mill. For, if the principles espoused in Schneider and its progeny mean anything at all, they mean that the Legislature cannot justify deviations from the state constitution simply through a talismanic invocation of its "legislative discretion" to apply the requirements of Article III, Section 5 in any manner it sees fit. Accordingly, dismissal under Rule 12(b)(6) is inappropriate.

b. The Plan violates the Equal Protection Clause of the United States Constitution because in enacting it the Defendants purposefully separated the communities of Kaser and New Square in an effort to dilute the voting power of those communities and politically gerrymander the assembly districts in Rockland County and Ramapo.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. 14, § 1. The United States Supreme Court has held that the claims of a person who

⁷ Defendants Assembly Minority Leader Brian M. Kolb and LATFOR member Robert Oaks in ¶ 15 of their respective Answers to the Amended Complaint, each admit that the Plan impermissibly divides the Town of Ramapo into three assembly districts.

suffers invidious discrimination as a result of political gerrymandering are justiciable under the Equal Protection Clause. Davis v. Bandemer, 478 U.S. 109, 123 (1986); see also Vieth v. Jubelirer, 541 U.S. 267, 304-305 (2004).

As detailed above, Defendants purposefully singled out the communities of Kaser and New Square and diluted the votes of the low-income, majority Chassidic members of those communities, of which Plaintiff is a member, by splitting the two villages into separate election districts. Given the significant commonality of interests shared between these communities, the separation of these two communities into different assembly districts severely harms the voting power that they enjoyed when combined as a group. Accordingly, the facts alleged by Plaintiff set forth a plausible claim that Defendants have violated the equal protection rights of Plaintiff.

Cleverly, Defendants attempt to avoid Plaintiff's straightforward, cognizable claim of invidious discrimination by arguing against a claim not made by Plaintiff – they argue that under controlling precedent Plaintiff and the Chassidic community is not entitled to “protected status” under the Equal Protection Clause. However, as noted, Plaintiff makes no such claim. Plaintiff does not claim that he or his community is entitled to anything more than any other voters; he merely claims that he is entitled to not be treated differently. And, while it is true that the neither the state nor the federal constitution assures Plaintiff that his particular community or portion of a community will not be “separated from the rest of his community and joined with neighboring areas in the formation of an election district,” Mirrione v. Anderson, 717 F.2d 743, 744 (2d Cir. 1983), it is equally true that Plaintiff's right to be free from invidious discrimination through gerrymandering, be it religiously, racially, or even politically motivated, is protected and justiciable under the Equal Protection Clause. Davis, 478 U.S. at 125 (“[T]hat the claim is submitted by a political group rather than a racial group, does not distinguish it in terms of

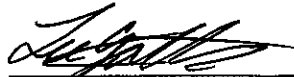
justiciability. That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.”). In this way Defendants’ cited case of UJO v. Wilson, 510 F.2d 512 (2d Cir. 1974) is entirely distinguishable from the case at bar. There may be no constitutional violation when a community is bisected as a result of proper redistricting. On the other hand, as is present here, redistricting that purposely bisects a community for the purpose of dividing that community will not survive constitutional scrutiny. Defendants’ argument is therefore misplaced and the motion pursuant to Rule 12(b)(6) should be denied.

III. CONCLUSION.

For the foregoing reasons, Defendants’ Motion to Dismiss should be denied.

Dated: White Plains, New York
April 9, 2012

Respectfully submitted,



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