

Subject: Decision on Petitioners' Order to Show Cause
Date: Wednesday, March 9, 2022 at 10:49:48 AM Eastern Standard Time
From: Hon. Stephen K. Lindley
To: Alice Reiter, Dutton, Sean T.H., Craig R. Bucki, Adam M. Oshrin
CC: Tseytlin, Misha, George H. Winner Jr., LeRoy, Kevin M., Harris-Finkel, Sarah, Moskowitz, Bennet J., Lewis, Richard C., McKay, Heather, O'Brien, Ted, Halliyadde, Muditha, ereich@graubard.com, jlessem@graubard.com, dchill@graubard.com, Eric Hecker, Daniel Mullkoff, John Cuti, Alex Goldenberg
Attachments: image001.gif, image002.gif

Counselors, having reviewed the papers submitted in support and in opposition to petitioners' order to show cause, and having considered the arguments advanced by counsel during our telephone conference yesterday, I am declining to sign the order to show cause, which seeks to vacate a purported automatic stay under CPLR § 5519 (a) (1) triggered by the appeals of respondents Heastie and Stewart-Cousin from Justice McAllister's discovery ruling. I am declining to sign the order to show cause because a motion to vacate the "supposed automatic stay" is "unnecessary" (*Fassl v New York State Dept. of Taxation and Finance*, 159 AD3d 1029 [4th Dept 1990]; *Shorten v City of White Plains*, 216 AD2d 344 [2d Dept 1995]). A motion to vacate is unnecessary because there is no automatic stay in effect. The automatic stay provision of CPLR 5519 (a) applies to "proceedings to enforce the judgment or order appealed from," and, here, respondents have not appealed from a judgment or order. Instead, they appealed from Justice McAllister's decision dated March 3, 2022, and it is well settled that "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967 [4th Dept 1987]). The document in question is labeled "decision," does not contain any ordering paragraphs, and, in contravention of CPLR 2219, does not "recite the papers used on the motion" (CPLR 2219 [a]). This paper, as well as its docket entry and characterization by the parties, is substantively identical as that in *Garcia v Town of Tonawanda*, where we held that that no appeal lied from what was, in that case, deemed a mere decision (194 AD3d 1479, 1479-1480 [4th Dept 2021] [although entered as a "decision and order," paper was "on its face" a "mere decision from which no appeal lies"]). Because there is no valid appeal, my colleagues and I on the Appellate Division lack jurisdiction to take action.

In any event, even if we were to treat the decision as if it were an order, respondents' appeal therefrom does not give rise to an automatic stay because the court merely granted petitioners leave to pursue discovery; it did not compel discovery or direct any of the respondents to do anything, such as sit for depositions or turn over emails or disclose other communications regarding redistricting. CPLR § 5519 (a) does not stay all proceedings; as noted, it stays only "proceedings to enforce the judgment or order appealed from" (CPLR § 5519 [a]; see *Young v State of New York*, 213 AD2d 1084, 1084 [4th Dept 1995] ["The stay under CPLR 5519 (a) (1) stays only proceedings to enforce the order on appeal, not all proceedings"]; see *Baker v Board of Educ. of West Irondequoit School Dist.*, 152 AD2d 1014, 1014 [4th Dept 1989] [same]). What constitutes a "proceeding to enforce" is strictly construed. For example, although a trial is "a natural consequence" of an order denying summary judgment, a trial is not a

proceeding to enforce that order, and thus is not stayed by an appeal from that order (*Schwartz v New York City Hous. Auth.*, 219 AD2d 47, 48 [2d Dept 1996]; see *White v City of Jamestown*, 242 AD2d 979, 980 [4th Dept 1997]). Stated another way, the automatic stay applies to “executory directions that command a person to do an act beyond what is required under the CPLR” (*Tax Equity Now NY LLC v City of New York*, 173 AD3d 464, 465 [1st Dept 2019]; see 4 NY Jur 2d Appellate Review § 428 [“The inclusion in an order of affirmative directives on matters addressed in the Civil Practice Laws and Rules (CPLR) does not trigger the automatic stay as to obligations provided for in the CPLR pending appeal of that order”]).

Here, again, the court’s decision does not itself compel respondents to disclose any specific thing (*cf. Craigie v Consolidated Edison, Co.*, 127 AD2d 556 [2d Dept 1987] [applying stay to appeal from order granting motion to compel]). Instead, the court merely granted leave for petitioners to seek disclosure, which now places the parties within the framework of CPLR article 31, allowing petitioners to seek disclosure in those areas for which the court granted leave and, upon such a request, would allow respondent to raise any objections. Because the court’s decision merely granted leave to petitioners to seek disclosure, and required respondents to respond to those demands, as provided for in the CPLR, the decision does not “command a person to do an act beyond what is required under the CPLR,” and the stay provided by CPLR § 5519 (a) (1) does not apply to “directives on matters addressed in the [CPLR]” (4 NY Jur 2d Appellate Review § 428; see *Tax Equity Now*, 173 AD3d at 465).

Accordingly, I conclude that § 5519 (a) (1) does not prevent petitioners from serving specific discovery demands on respondents. Of course, if respondents object to those demands, petitioners may file a motion to compel, and the trial court will then be called upon to resolve the discovery dispute. If the court rules against respondents on a particular discovery request and issues an order to that effect, respondents’ appeal from such order would trigger an automatic stay.

If counsel for petitioners wishes to prepare an order for me to sign wherein I formally decline to sign their order to show cause, please submit electronically with notice to opposing counsel.

To: Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Hon. Stephen K. Lindley <slindley@nycourts.gov>; Craig R. Bucki <CBucki@phillipslytle.com>; Adam M. Oshrin <aoshrin@nycourts.gov>

Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy, Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Lewis, Richard C. <rlewis@hkh.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com; jlessem@graubard.com; dchill@graubard.com; Eric Hecker <hecker@chwillp.com>; Daniel Mullkoff <dmullkoff@chwillp.com>; John Cuti <jcuti@chwillp.com>; Alex Goldenberg <agoldenberg@chwillp.com>

Subject: Re: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)

Justice Lindley:

Attached please find the Sur-Reply Affirmation of John R. Cuti, counsel for the Senate Majority Leader, in further opposition to Petitioners' emergency application.

Respectfully submitted,

Alice Reiter
Cuti Hecker Wang LLP

From: "Dutton, Sean T.H." <Sean.Dutton@troutman.com>
Date: Tuesday, March 8, 2022 at 12:32 PM
To: "Hon. Stephen K. Lindley" <slindley@nycourts.gov>, "Craig R. Bucki" <CBucki@phillipslytle.com>, "Adam M. Oshrin" <aoshrin@nycourts.gov>
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Subject: RE: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)
Resent-From: Proofpoint Essentials <do-not-reply@proofpointessentials.com>
Resent-To: Alice Reiter <areiter@chwillp.com>
Resent-Date: Tuesday, March 8, 2022 at 12:29 PM

Your Honor,

Please see attached Petitioners' Reply Affirmation In Support Of Vacating The Automatic Stay.

Best,
Sean

Sean Dutton

Associate

troutman pepper

Direct: 312.759.1937 | Mobile: 248.227.1105 | Internal: 20-1937

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From: Hon. Stephen K. Lindley <slindley@nycourts.gov>
Sent: Tuesday, March 8, 2022 1:39 AM
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EXTERNAL SENDER

For scheduling purposes, following oral argument on the order to show cause this morning at 9:30 via telephone conference, petitioners may email reply papers to me by noon today, with any sur reply papers due by 3:00 p.m. I will render a decision on the order to show cause by the end of the day.

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From: Craig R. Bucki <CBucki@phillipslytle.com>

Sent: Tuesday, March 8, 2022 2:14:13 AM

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Dear Justice Lindley and Mr. Oshrin:

With the Graubard Miller firm, we are co-counsel to Assembly Speaker Carl Heastie in *Matter of Harkenrider v. Hochul*, in which Petitioners-Respondents provided the Appellate Division, Fourth Department, on March 7, 2022, with a proposed Order to Show Cause in support of a motion to vacate the automatic stay of discovery available to the Speaker under CPLR 5519(a)(1).

Attached are the Speaker's papers in opposition to the Order to Show Cause and Petitioners-Respondents' application to vacate that stay. They consist of the Affirmation of Steven B. Salcedo, Esq., dated March 8,

2022, with Exhibit A; and the Speaker's Memorandum of Law also dated March 8, 2022. We plan to participate in the scheduled 9:30 a.m. conference call with the Court to discuss Petitioners-Respondents' application.

Respectfully,
Craig R. Bucki
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