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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF MORGAN,

Appellant,

-against-

No. 131

DE BLASIO,

Respondent.

20 Eagle Street
Albany, New York
August 30, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 This is number 131 on the calendar, Matter of Morgan v.
3 de Blasio. Counsel?

4 MR. WALSH: Thank you, Your Honor; Chief Justice,
5 Your Honors, may it please the court. My name is James
6 Walsh, and I'm here representing Mr. Lauder (ph.) and the
7 other individuals who have - - - I - - - I misspoke. Your
8 Honor, I apologize. I'm here in - - - in this action
9 representing Mr. Morgan and the other individuals that have
10 brought this action below. We brought it in Richmond
11 County, and in Richmond County, Your Honors, we brought the
12 action specifically because there was a - - -

13 CHIEF JUDGE DIFIORE: Counsel, may I interrupt
14 you for a moment? Would you like some rebuttal time
15 reserved?

16 MR. WALSH: I would - - - I would like to reserve
17 some rebuttal time, if I may. Can I have - - -

18 CHIEF JUDGE DIFIORE: Two minutes?

19 MR. WALSH: - - - just two minutes? Your Honor,
20 specifically, the - - - there was a failure within the
21 authorization of Mr. de Blasio. The authorization pursuant
22 to the statute 6-120(3), the authorization needs to be made
23 by the executive committees of the five counties in the
24 five boroughs that make up the City of New York, that when
25 those executive committees meet, those executive

1 committees, using weighted vote from the last gubernatorial
2 election, designate who the candidate will be. And that's
3 what 6-120(3) is. We don't have that type of
4 authorization. The City Board of Elections should have
5 thrown this out on its face because the statute - - - the -
6 - - the authorization fails to comply with the statute, but
7 they didn't. They had five members who ruled to throw it
8 out, two members abstaining, and a couple of members ruling
9 to make it valid.

10 JUDGE STEIN: Counselor, would - - - would you
11 address what you believe the rule is or should be in terms
12 of when the party has to be served?

13 MR. WALSH: Your Honor, this - - - this - - - the
14 issue that is who is a party that has an interest and whose
15 rights would be affected and whose rights would be affected
16 - - - and I want to say equitably. Whose equitable rights
17 would be affected?

18 JUDGE STEIN: So if - - - if a candidate is
19 either kept on or - - - or kept off a party's line, does
20 that equitably affect the party in your view?

21 MR. WALSH: No, Your Honor. It doesn't. And I
22 say it doesn't because the candidate is the individual who
23 is at interest whether or not they're going to appear on
24 the party line.

25 JUDGE WILSON: But doesn't the party have an

1 interest in having a candidate on its line?

2 MR. WALSH: If the party properly followed the
3 law, I would say yes, they would have an interest. And if
4 the party properly followed the law and followed 6-120(3),
5 then I - - - if I was objecting to it, then I would have
6 had to sue all of those county committees, and I would have
7 had to sue the County Committee of the Working Families
8 Party because they do, then, have an interest. But when
9 they failed to follow the law, they can't come saying
10 equitably, we've got to protect our rights.

11 JUDGE WILSON: Well, but if they'd followed the
12 law, you'd have no suit.

13 MR. WALSH: If they followed the law, I'd have no
14 suit. Yes, Your Honor.

15 JUDGE WILSON: So you're really saying because
16 you win - - - because you should win you don't have to sue
17 them. But that - - - you're putting the - - - the cart
18 before the horse now.

19 MR. WALSH: Well, Your Honor, I shouldn't have to
20 sue them because the - - - the New York City Board of
21 Elections should have, on its face, found it invalid for
22 failure to comply with 6-120, but the board didn't. They -
23 - - there was a split ruling, and the ruling went five
24 votes to - - - to invalidate it, two abstentions, and I
25 think three to say it was okay. So the board on its own

1 should have looked at it and said it doesn't comply with
2 the law. We're not accepting this, the - - - prima facie
3 review.

4 JUDGE WILSON: Are there pract- - - are there
5 practical consequences for a political party whether it has
6 a candidate on - - - on the ballot or not?

7 MR. WALSH: Your Honor, I would say that there
8 are practical consequences whether a party is there. But
9 in order to protect your rights as a party, you would have
10 had to follow the law in the first place. I can't serve in
11 - - - a proper suit against the New York City Working
12 Families Party for the five boroughs because they don't
13 exist.

14 CHIEF JUDGE DIFIORE: So whose action are you
15 challenging here, counsel?

16 MR. WALSH: Your Honor, I - - - I don't think
17 that the board should have authorized the candidacy. I
18 don't think that the - - - there should be a Working
19 Families Party candidate for the mayor of the City of New
20 York. Nor - - - I - - - I really am complaining, also, of
21 the actions of the board. The board should have
22 invalidated this on its face, but without the board's
23 action, I had to preserve my rights. And the way I
24 preserve my rights is I go in pursuant to the Election Law
25 6-102 - - - 16-102, and I bring an action with either a

1 candidate, a party chairman, or with the objectors. I have
2 two objectors, the parties, the - - - the named member of
3 this case. They objected pursuant to 16-102. They did so
4 timely. They brought their objections before saying,
5 listen, for an authorization you need the authorization,
6 you need the acceptance, and you need the petitions in
7 order - - - you have to have all three and all three need
8 to be legal in order to get on the ballot. And without all
9 three, it's a three-legged stool, remove one of the legs,
10 and it fails.

11 CHIEF JUDGE DIFIORE: Are you challenging the
12 action of the State Executive Board?

13 MR. WALSH: I'm not challenging their actions,
14 Your Honor. I'm saying that it's a nullity. It's a legal
15 nullity. It doesn't exist because they didn't follow the
16 statute. The statute says - - - 6-120(3), says it's the
17 five committees within the city, the executive committees
18 within the City of New York. So I'm not objecting to their
19 actions and nor am I objecting to the rules despite what my
20 - - - what my learned adversary says. I'm not objecting to
21 the rules because their rules - - - I - - - I did not have
22 an independence party member file an objection against
23 their rules. Their rules can be whatever they would like
24 their rules. But when it comes down to the rules versus
25 the law, they have an obligation to follow the law.

1 JUDGE STEIN: But what - - - getting back to
2 Judge Wilson's question, you say their actions were a
3 nullity. So it is their actions that are in question.
4 Their actions are doing something that you say violates the
5 law. What if they have a legal - - - hypothetically, if
6 they have a legal argument as to well, no, we really didn't
7 violate the law because - - - and - - - and they
8 interpreted some - - - you know, some case law or something
9 else or they - - - they had a novel argument, legal
10 argument, that in fact what they did was perfectly okay,
11 but they didn't get served. How could they make that
12 argument?

13 MR. WALSH: Well, Your Honor, I - - - I couldn't
14 serve the - - - the five executive committees of the
15 Working Family Party in the City of New York because - - -

16 JUDGE STEIN: Because there are none.

17 MR. WALSH: - - - they don't exist.

18 JUDGE STEIN: Yeah. We're - - -

19 MR. WALSH: So - - -

20 JUDGE STEIN: We're talking about the - - - the
21 state.

22 MR. WALSH: The - - - the State Executive Party?
23 If - - - if what they did had the color of law, Your Honor,
24 I would - - - I would agree that I would have had to serve
25 them. But they were - - -

1 JUDGE STEIN: But who decides whether it has
2 color of law? You're making that determination? Isn't
3 that what the court is ultimately for when you challenge
4 their action of designating or nominating this candidate?

5 MR. WALSH: I - - - I think the legislature did
6 that, Your Honor. It's not my - - - it's not up to me.
7 The legislature did that when they established 6-120(3).
8 That - - -

9 JUDGE STEIN: But if there was a legal argument
10 that said that statute didn't control, that there was some
11 exception or there was some interpretation somewhere in the
12 law that called that into question in these circumstances,
13 without serving the State Executive Board they would never
14 be entitled to come in and make their argument. So isn't
15 that what the purpose of service is?

16 MR. WALSH: Well, Your Honor, it - - - I would -
17 - - I would say that only if it was just. Your Honor, the
18 - - - that - - - there's an inequity going on here. That
19 they're - - - they can't not follow 6-120 and then expect
20 their rights to be protected. The 6-120 doesn't give them
21 that authority to file the certificate. They could be
22 brought up on charges for filing a false instrument.

23 JUDGE FAHEY: You know, it's just not, though,
24 for their purpose of their rights being protected. It's
25 the purpose of all the litigants and also for the court to

1 have everybody in front of us so we can hear their
2 arguments. That's why we put them on notice.

3 MR. WALSH: Yes, Your Honor.

4 JUDGE FAHEY: You see what I'm saying?

5 MR. WALSH: I - - - I understand exactly what
6 you're saying, Your Honor, but the - - - the Working Family
7 Party, if - - - if the State Working Families Party was
8 allowed to designate who the candidates in New York City
9 would be, then New York City Working Family Party's members
10 wouldn't be allowed to follow the rules. My - - - my
11 position here would be that you're only a necessary party
12 if you follow the law. If you - - - you're - - - you've -
13 - - if you're - - - I understand I'm out of time, but my -
14 - - my submission would be that you only get to apply and
15 come to this court asking for equitable relief to be
16 included if you've got clean hands, and when you don't have
17 clean hands, when you put forth a certificate that's
18 unclean, you - - - you don't get a second bite at the
19 apple. Thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: Thank you.

21 Counsel.

22 MR. SCHLEIN: Good afternoon, Your Honors. I
23 apologize to this court. I'm somewhat baffled. I believe
24 there are three documents that have conferred this
25 nomination on Bill de Blasio. There was an authorization,

1 there was a petition, and there was an acceptance. Under
2 the Election Law, it takes all three documents to confer
3 such a nomination. They are all named parties. Bill de
4 Blasio filed petitions. His name is on that petition. He
5 was named as a - - - as a respondent in the Election Law
6 proceeding. Bill de Blasio signed an acceptance of the
7 Working Families nomination because he's not an enrolled
8 member of that party. He is a respondent in these
9 proceedings. The secretary and chairperson of a party
10 committee of the Working Families Party signed the initial
11 document, the authorization. They are absent from this
12 proceeding. As many of the questions coming from this
13 bench indicate - - -

14 JUDGE WILSON: Where are they - - -

15 MR. SCHLEIN: - - - they had a right to come into
16 the courthouse and say here is why our rules are in fact
17 compliant with 6-120 and maybe the case is decided by this
18 court in prior years.

19 JUDGE WILSON: Where - - -

20 MR. SCHLEIN: They were not given that
21 opportunity.

22 JUDGE WILSON: Where - - -

23 MR. SCHLEIN: And parenthetically - - -

24 JUDGE WILSON: Where are they located and how can
25 they be served?

1 MR. SCHLEIN: I'm sorry?

2 JUDGE RIVERA: Where are they located and how can
3 they be served?

4 MR. SCHLEIN: They're located in the state of New
5 York. There's an address. It's - - - it's not a hidden,
6 you know, process. They are in fact registered with the
7 Board of Elections as a - - - as a party because they had
8 to submit their rules to the Board of Elections as a matter
9 of another provision of the Election Law. So their address
10 and contact information is there.

11 JUDGE STEIN: Is this - - - is this particular
12 process that they engaged in in this case, is that in their
13 written rules?

14 MR. SCHLEIN: Yes. It is. Absolutely. As I
15 indicated during my leave argument, Your Honor - - - I want
16 to digress only momentarily because this is where my real
17 abject confusion lies in - - - in part, and I must point
18 this out to the entire bench. On the trial level, the
19 Supreme Court Richmond County, which for independent
20 reasons, we've made clear in our brief that we shouldn't
21 have been in - - - in that county, but putting that aside,
22 the court dismissed the application made by my colleague
23 for two reasons: One, the failure to join a necessary
24 party, which is what we are arguing before this court at
25 the moment. But also, they failed to comply with 6-154 of

1 the Election Law in timely filing general objections
2 against this document, this authorization that - - - that
3 is being argued here right now. The Board of Elections
4 found that to be a late document, as set forth in their
5 ledger. Judge in Richmond County found it late and
6 therefore dismissed on those grounds.

7 And at the Appellate Division Second Department,
8 the court reached the conclusion - - - conclusion that I do
9 - - - we do not have to reach this other issue because we
10 reached the issue solely on the failure to join a necessary
11 party. So in all possible circumstances, if we were not to
12 prevail on behalf of Mr. de Blasio here today, at minimum
13 this case should be remanded back to the Second Department
14 for a ruling on the other grounds, which we sustained at
15 the - - - at the trial level dismissing the objections and
16 dismissing the initial proceeding.

17 Putting that aside, Your Honor, I believe the
18 cases that are cited by - - - by counsel are
19 distinguishable from the cases cited by the Second
20 Department. We urge this court to affirm the decision
21 below for the reasons stated.

22 JUDGE GARCIA: I'm sorry. Counsel, before you
23 go?

24 MR. SCHLEIN: Sure.

25 JUDGE GARCIA: How would you distinguish those

1 cases? On what basis?

2 MR. SCHLEIN: Certainly. A case cited by
3 counsel, in particular, the O'Brien Chrysler case from the
4 Fourth Department. That was not a case about party rules.
5 The party rules were clear and unequivocal. The party in
6 that circumstance could confer a nomination on a town
7 position by caucus of that party. And for a county
8 position, they could not effectuate that kind of a
9 nomination. Here, the fight was whether the position in
10 question was a town or county position. The trial court
11 said I'm going to have a hearing on the entire matter, and
12 I'm also going to say - - - dismiss, however, on the
13 failure to include and join a necessary party. When it got
14 to the Appellate Division and the decision was three to two
15 on that issue and that issue alone, it wasn't a challenge
16 to the rules of the party. It was a challenge to the
17 application of those rules.

18 JUDGE GARCIA: So it's only a necessary party if
19 you're challenging the rules of the party?

20 MR. SCHLEIN: Or the internal workings of the
21 party. It - - - it is action - - - authority and rules.

22 JUDGE GARCIA: But why, then, isn't the dissent
23 right in that case saying that: "By seeking a proceeding
24 to void the certificate of nominations, petitioner
25 necessarily challenged the propriety of the nominating

1 caucus." Why isn't that equitably affecting the party,
2 then?

3 MR. SCHLEIN: Well, I believe it did. I - - - I
4 would subscribe to the dissent, as I said during my brief
5 argu - - -

6 JUDGE GARCIA: So they're not distinguishable.
7 They just got it wrong?

8 MR. SCHLEIN: Yeah. Maybe that's a better way to
9 express it, Your Honor. I thank you. Thank you, all.

10 CHIEF JUDGE DIFIORE: Thank you.

11 Counsel, any rebuttal?

12 MR. WALSH: Briefly; Thank you, Your Honors. The
13 - - - the party rules can't trump the Election Law. The -
14 - - your party can make any rules it would like to do, but
15 generally speaking, the - - - the Election Law is going to
16 overrule any party rules. Many party rules would
17 incorporate Robert's Rules of Order into them. But the
18 Election Law is going to trump Robert's Rules. It's going
19 to trump the party rules. So that would be my - - - my
20 first point.

21 I - - - I have not objected to the rules of the
22 Working Families Party. For me to properly do that, there
23 would to have had to have been a person of that party who
24 filed an objection to the workings of that party. I'm not
25 going behind and objecting to the rules. What I'm saying

1 is that in order to have a good acceptance, you need to
2 have a valid authorization. You need to have a valid
3 number of signatures to gain access to the petition.
4 Without any one of the three, your whole table falls, and
5 that without a valid authorization, the acceptance is
6 invalid because the acceptance is a nullity - - - or the
7 authorization is a nullity. When I objected, I timely
8 objected to the acceptance. And you can accept a - - - you
9 cannot accept a authorization that's fatally flawed and is
10 invalid on its face. Thank you, Your Honors.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.


12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Morgan v. De Blasio, No. 131 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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