

Board of Trustees of the Vil. of Sodus, N.Y. v Allen

2011 NY Slip Op 31035(U)

April 20, 2011

Sup Ct, Wayne County

Docket Number: 71473/2010

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

BOARD OF TRUSTEES OF THE VILLAGE
OF SODUS, NEW YORK,

DECISION

Plaintiff

-vs-

Index No. 71473

KELLEY M. ALLEN,

Defendant

2010

Remington, Gifford, Williams & Colicchio, LLP
Robert B. Koegel, Esq., of counsel
Attorneys for Plaintiff

Trevett, Cristo, Salzer & Andolina, P.C.
Lawrence J. Andolina, Esq, of counsel
Attorneys for Defendant

The Plaintiff (hereinafter "Village Board") has commenced this declaratory judgment action against the Defendant Kelly M. Allen (hereinafter "Allen"), seeking a declaration that the Defendant is ineligible to remain in his current office as Mayor of the Village of Sodus, New York. The action is based on the Village Board's contention that Allen was not at the time of election in November 2008, nor is he now, a resident of the Village of Sodus, thereby rendering him ineligible to serve, pursuant to

Village Law §300(1). The Defendant maintains that he has been a resident of the Village since November 2008. Depositions have been taken, and there appear to be no outstanding discovery demands. The Village Board has now moved for summary judgment pursuant to CPLR §3212 on the issue of the Defendant's ineligibility. The Defendant has opposed the motion.

The Defendant maintains that he resides in an apartment on the second floor of a building located within the Village at 29 West Main Street, which is owned by his wife, Tracey L. Fox, Esq., who has maintained her law office at that address for some eleven (11) years. On November 1, 2008, (four days before the mayoral election), Mr. Allen entered into a written lease with Ms. Fox, pursuant to which he rented the upstairs apartment, at a cost of \$1.00 per year. He claims that this apartment is his residence. The husband and wife own a residence located at 6300 North Road within the Town of Sodus (outside the Village limits). The couple built the house sometime in 2000 and have lived there ever since, with their two children. Ms. Fox and the children still occupy that residence.

While the Village Law does not define the term "resident", under

Election Law §1-104(22), the word means “that place where a person maintains a fixed, permanent and principal home, and to which he, whenever temporarily located, always intends to return.” Numerous cases have held that it is possible for an individual to maintain more than one bona fide residence. In People v. O’Hara, 96 NY2d 378 (2001), the Court of Appeals held that the “crucial” factor in determining the legitimacy of a particular residence under the Election Law is that the individual must manifest an intent to live there, coupled with a physical presence, “without any aura of sham.” Based on the deposition testimony of Mr. Allen and his wife, Ms. Fox, the affidavits of two private investigators hired by the Plaintiff, and the affidavit of John Miner, Deputy Mayor of the Village of Sodus and a trustee of the Plaintiff, the Village Board maintains that Mr. Allen’s use of the apartment located at 29 West Main Street, Sodus, New York, does not constitute a “residence” under both statutory and case law.

In response, counsel for Allen stresses that the Election Law does not preclude a person from having two residences and choosing one for election purposes, provided he or she has “legitimate significant and continuing attachments” to that residence. (See, Isabella v Hotaling, 207

AD2d 648 (3rd Dept, 1994)). The Defendant also relies on Stavisky v Koo, 54 AD3d 432 (2nd Dept, 2008), in which the appellate court stated that "(i)n order to be a resident of a place, a person must be physically present with the intent to remain for a time." Citing People v O'Hara (supra), also relied on by the Plaintiff, Allen maintains that his is a case "(w)here there is no reason to assume that a residence has been asserted merely for the purpose of voting, where no fraud or deception has been practiced and where there is a history of the residence employed... ."

The Court is aware that, in cases of this nature, summary judgment is often an inappropriate remedy, as the motion papers may demonstrate the existence of factual issues which require resolution at trial. However, in this instance, the Court has been able to review the deposition testimony of Mr. Allen and his wife at length. Undoubtedly, their testimony at trial would not change. The Court acknowledges that the defense has not had the opportunity to cross-examine the two private investigators hired by the Plaintiff for the purpose of keeping Mr. Allen under surveillance during certain limited periods of time in November 2010. However, the Court has afforded little, if any, weight to those affidavits, which deal only with Mr.

Allen's whereabouts on certain dates during a one month period, and therefore, any issue regarding the opportunity for cross-examination is essentially moot.

Nevertheless, considering all the evidence in the light most favorable to the Defendant, the Court is forced to conclude that the Plaintiff has made a prima facia showing of entitlement to summary judgment as a matter of law, and that the Defendant has failed to rebut the showing. The testimony of Mr. Allen and Ms. Fox supports the following findings:

- 1) The Defendant rented the upstairs apartment from his wife pursuant to a written four year lease, four days before the election, for an annual rental of \$1.00, for a period which extends through December 31, 2012, which is the date his term as Mayor expires;
- 2) the furnishings of the apartment consist of one bed with a crate used as a night table, together with two disassembled cribs and a dresser; the apartment has no appliances - refrigerator, stove, microwave - and no television or computer (Mr. Allen essentially testified that he ate no meals at the apartment, other than occasionally using the microwave in the law office to heat something up);
- 3) Mr. Allen did not remove his personal belongings to the

apartment; 4) Mr. Allen regularly eats dinner with his wife and children at the North Road residence; 5) Mr. Allen spends the majority of his nights at the North Road residence (in 2010, his deposition testimony indicated he spent less than 50 nights at the apartment); 6) Ms. Fox and the children have never eaten or slept at the apartment.

Admittedly, Mr. Allen changed his address to the West Main Street address on his driver's license, registration, W-2 form and bank statement. However, in view of the overwhelming evidence as to his course of conduct throughout the period in question, the Court must conclude that these changes are insufficient to create a legitimate residence. An "intent" to create a residence is insufficient, if it is not accompanied by conduct indicating a "significant and continuing attachment" to the property (*Isabella*, supra).

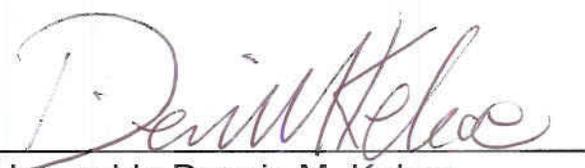
Regardless of the Defendant's claims, however well-intentioned, that he chose this "unorthodox" living arrangement in order to "serve the Village's needs", the Court must conclude that the Defendant's attempt to establish a residence in the Village of Sodus was contrived for the purpose of making him eligible to run for Mayor. He has not met the criteria

necessary to establish him as a resident of the Village of Sodus.

Therefore, the Plaintiff's motion for summary judgment is granted. The Court is aware that this decision will result in an immediate vacancy in the office of the Mayor of Sodus Village, but this outcome is mandated by the Public Officers Law §30(1)(d), unless otherwise stayed by a higher court.

Counsel for the Plaintiff is directed to submit an Order and Judgment in accordance with this Decision and CPLR §3001.

Dated: April 20, 2011
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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SUPREME AND APPELLATE COURT