

Matter of Espada v New York City Bd. of Elections
2007 NY Slip Op 32517(U)
August 9, 2007
Supreme Court, New York County
Docket Number: 0110670/2007
Judge: Jacqueline W. Silbermann
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. JACQUELINE W. SILBERMANN
Justice

PART 50L

George F. Espada

INDEX NO. 11CG70/07

MOTION DATE AUG 8 2007

- v -

MOTION SEQ. NO. 1

NYC Board of Elections

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *matter is disposed of in accordance with accompanying memorandum decision, order and judgment*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/9/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART 50L

-----X
In the Matter of the Application of

GEORGE L. ESPADA,

Candidate for the Democratic Party Primary for the
Male District Leader in the 68th Assembly District, Part A,
New York County,

Petitioner,

INDEX NO. 110670/2007

-against-

New York City Board of Elections and
Anthony Como, Terrence C. O'Connor, Nancy Mottola-Schacher,
James Joseph Sampel, Gregory C. Soumas, Nero Graham, Jr.,
Julie Dent, Frederic M. Umame, and Maryann Yennella, as
Commissioners of the New York City Board of Elections, and
Jonny Rivera, as an individual objector to the Designating
Petition of Petitioner,

Respondents,

For an Order Pursuant to the Election Law Declaring Valid and
Proper and Legally Effective a Petition Designating Petitioner
as a Candidate for the Party Office of the Male District Leader
in the 68th Assembly District, Part A, New York County, and
Directing the New York City Board of Elections to Place
Petitioner's Name on All Official Primary Ballots,
Voting Machines and Absentee Ballots as a Candidate for
Such Nomination at the Primary Election of the Democratic
Party Scheduled to be Held on September 18, 2007.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B)

-----X
Silbermann, J.:

Upon reading and filing the Order to Show Cause and Verified Petition, sworn to August
3, 2007, and the exhibits annexed thereto, and the affirmation of Stephen Kitzinger in opposition
thereto, upon hearing the oral arguments in open court on August 8, 2007, and upon all the
papers and proceedings heretofore had, it is hereby

Ordered and Adjudged that the application of petitioner is denied and the petition is dismissed.

The only issue is whether petitioner, George L. Espada, is eligible to run as an enrolled Democrat.

It appears that on September 24, 1991, Espada registered with the Board of Elections in the City of New York (the BOE or the Board) as a voter in New York County; he enrolled himself in the Republican Party.

On September 11, 2003, petitioner submitted a change of address form advising the Board that his new address was 425 East 117th Street, New York, New York 10035. The form indicated that petitioner wished to remain enrolled in the Republican Party.

On September 16, 2003, petitioner submitted still another change of address form, again advising the Board that his new address was 425 East 117th Street, New York, New York 10035. The form indicated that petitioner wished to remain enrolled in the Republican Party.

On January 7, 2004, petitioner submitted still another change of address form, again advising the Board that his new address was 433 East 102nd Street, New York, New York 10029. The form again indicated that petitioner wished to remain enrolled in the Republican Party. The Board updated petitioner's voter registration record to reflect his new address.

The BOE had listed Espada as "inactive" since February 2005, after a routine voter information notice mailed to him on or about September 2004, came back marked "moved, no forwarding address."

On July 16, 2007, a designating petition purporting to nominate petitioner as a candidate for the Party Office of Male District Leader in the 68th Assembly District, Part A, New York

County, at the Primary Election of the Democratic Party, scheduled to be held on September 18, 2007. A general objection was filed by respondent objector Jonny Rivera (Rivera) on July 19, 2007. On July 25, 2007, Rivera filed Specifications of Objection, alleging that petitioner was ineligible to appear on the ballot for District Leader because Espada was not enrolled in the Democratic Party, and that his change of enrollment from the Republican Party to the Democratic Party would not be effective until November 13, 2007.

On August 2, 2007, after reviewing its records, the Board determined that Espada was currently enrolled in the Republican Party, and therefore, would be ineligible to appear on the ballot in the Democratic Party Primary Election scheduled to be held on September 18, 2007, and ordered his name stricken from the ballot.

Petitioner asserts that in the summer of 2004, he moved to Clay County, Florida, and that he registered to vote there on July 7, 2004. He has submitted documentary evidence from the Supervisor of Elections of Clay County, Florida, confirming that he registered as a voter and voted in August and November 2004, and last voted in 2006. Significantly, there is no indication that this information ever was furnished to the BOE prior to the commencement of this proceeding.

Petitioner claims that, by reason of his moving to Florida, registering to vote and voting in Florida, his New York voter registration was *automatically* cancelled by operation of law, and, therefore, the BOE should have processed his registration and enrollment in the Democratic Party as a *new* registration, rather than as a *changed* registration.

In December 2006, Espada moved back to New York City. He filed a registration form with the BOE on December 26, 2006 (Resp. Ex. G), indicating that his address was 105 East

116th Street apt. 9, New York, New York 10029. In the box marked "Choose a Party" he checked "Democratic Party." At the top of the form, he checked the box marked "Address Change," rather than "New registration and enrollment."

I find that Espada is ineligible to run as a candidate for the Public Office of Male District Leader in the 68th Assembly District, Part A, New York County, or even to vote in the Primary Election of the Democratic Party, scheduled to be held on September 18, 2007.

Espada's enrollment in the Democratic Party is not effective until after the November 2007 general election, pursuant to Election Law § 5-304.

Espada contends that his enrollment as a Democrat was effective immediately, premised upon his assertion that he was a *new* registrant under Election Law § 5-210, after he moved back to New York City from Florida. However, the cancellation of his enrollment was not automatic: the Election Law sets forth the procedure for cancellation of a voter's registration and specifically provides that no such cancellation may occur until the voter is notified by the Board of its intention to cancel and given an opportunity to be heard (Election Law § 5-402 [2]; Engel v Board of Elections, 143 AD2d 291 [3rd Dept], appeal denied 72 NY2d 805 [1988]; Nesci v Canary, 112 AD2d 1056 [2nd Dept], lv.denied 65 NY2d 607 [1985]).

He is not a "new" voter entitled to the instant enrollment protection of the Motor Voter Registration Law or the National Voter Registration Act.

Petitioner-candidate Espada is not a new or first time registrant, and as such the delayed enrollment provisions of Election Law § 5-304 are applicable. This is in contrast to a newly registered voter who enrolls in a political party and is immediately eligible to vote in that party's next primary election under Election Law § 5-302. The October 2006 registration is essentially a

reregistration of his prior registration in New York County pursuant to Election Law § 5-208 and that reregistration does not release compliance with the delayed enrollment provisions pursuant to Election Law § 5-304. (*Leemhuis v. Scranton*, 141 Misc2d 548, *app. disp.*, 158 AD2d 784 [3rd Dept., 1988])

Pursuant to Election Law § 5 -304, a registered voter's change of enrollment from one party to enrollment in another party does not become effective until the first Tuesday following the next succeeding general election. In accordance with this, provision, the respondent-candidate Espada's enrollment as a Democrat will not become effective until after the November 6, 2007 general election. (*Bassalino v. DeGrace*, 230 AD2d 870 [2nd Dept., 1996]; *Homer v. Board of Elections, Cortland County*, 71 AD2d 970 [3rd Dept., 1979], *app. den.*, 48 NY2d 601 [1979]). Moreover, the delayed enrollment scheme as adopted into New York law does not burden the right to vote and is narrowly construed to minimize any abridgement of rights. (*see: Rosario v. Rockefeller*, 410 US 752 [1973]).

Espada also argues that the Board should be estopped from denying that he was properly registered as a voter and enrolled in the Democratic Party by reason of the action of a low level employee (Wanda) on or about December 28, 2006, who re-registered him, and that the BOE acted in an arbitrary and capricious manner in administratively cancelling this action as unauthorized.

A governmental entity will not be estopped from enforcing the law based upon erroneous action or advice (*Parkview Assocs. v. City of New York*, 71 NY2d 274, 279, 282, *cert denied* 488 US 801 [1988]; *McGannon v. Board of Trustees for Village of Pomona, New York*, 239 AD2d 392 [2nd Dept 1997]). If there is to any estoppel, it should be against Espada by reason of

his having checked the box marked "Address Change," rather than "New registration and enrollment."

The administrative cancellation was not arbitrary and capricious or an abuse of discretion nor was it affected by error of law (CPLR 7803 [3]).

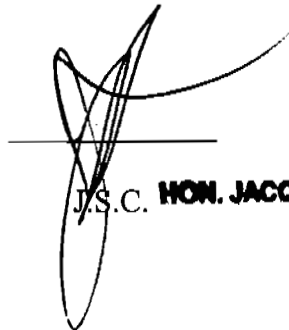
Accordingly, it is hereby

ORDERED and Adjudged that the Petition to validate Espada's Designating Petition, is denied and the proceeding is dismissed, and it is further

ORDERED and Adjudged that the Board of Elections in the City of New York is enjoined from placing Espada's name on the official ballot and voting machines for the September 18, 2007 Democratic Party Primary Election.

ENTER:

DATED: 8/9/07



J.S.C. HON. JACQUELINE W. SILBERMANN

UNFILED JUDGMENT
This judgment has been entered by the Clerk and notice of entry has been mailed to the parties. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office (Room 141B).