

Matter of Castro v Ramirez

2007 NY Slip Op 32590(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 0110504/2007

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

CARMEN CASTRO, et al
- v -
NORMA RAMIREZ, et al

INDEX NO. 110524/07
MOTION DATE 8/16/07
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served by the County Clerk.
To obtain entry, counsel or petitioner must appear in person at
appear in person at the Judgment Clerk's Desk (Room 441B).

Dated: AUG 16 2007

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

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

-----X

In the Matter of the Application of

CARMEN CASTRO,
Petitioner,
and

ALICE CANCEL, Candidate-Aggrieved,
Petitioners,

- against -

Index No., 110504/07

NORMA RAMIREZ,
Candidate,
and

BOARD OF ELECTIONS OF THE CITY OF NEW YORK,
Respondents,

For an Order Pursuant to Section 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Designating Petitioner Purporting to Designate the Respondent-Candidate for the Party Position of Female District Leader from the 64th Assembly District, Part B New York County, Borough of Manhattan, City and State of New York, in the Democratic Party Primary Election to be held on September 18 2007, and to Restrain the said Board of Elections from Printing and Placing the Name Candidate Upon the Official Ballots of Such Primary Election.

This judgment may be enforced by writ of habeas corpus or writ of mandamus. To obtain entry, counsel of applicant representative must appear in person at the Judgment Clerk's Desk (Room 1003).

Silbermann, J.:

By oral direction of this court dated August 8, 2007, the issues raised in this proceeding for an order declaring **invalid** the designating petition of the respondent-candidate, **NORMA RAMIREZ**, for the party position of Female District Leader from the 64th Assembly District, Part B, New York County, Borough of Manhattan, City and State of New York, in the Democratic party

primary election to be held on September 18, 2007, were referred for assignment to a Special Referee to hear and report with recommendations.

The matter was referred to **Special Referee Louis Crespo** on August 8, 2007.

The Board of Elections ("BOE") Clerk's Report validated respondent Ramirez's designating petition, finding that she had submitted 520 valid signatures (only 500 valid signatures were needed). By Order to Show Cause ("OSC"), signed July 31, 2007; Petitioners commenced this proceeding to invalidate the designating petition of respondent Ramirez. The OSC and Petition were served by USPS Express Mail, dated August 1, 2007, as provided in the OSC.. On the return date of the OSC, August 8, 2007, petitioners filed a Bill of Particulars, dated August 8, 2007, setting forth specific signatures sought to be invalidated. The Special Referee conducted a conference.

During the conference on August 8, 2007, respondent Ramirez informed the Special Referee of her desire to serve an answer to the petition for the purpose of denying the claims interposed by the petitioners and to state a counterclaim to validate signatures which had been invalidated by the BOE. The petitioners objected to the respondent's application to file and serve an answer with counterclaim as time barred and contrary to the New York County Supreme Court Rules for Special Election Part.

The Special Referee directed the parties to appear at the Board of Elections for a line-by-line review of signatures at 10:00 A.M., on Thursday, August 9, 2007.

On Wednesday afternoon, August 8, 2007, the parties appeared before this court, at which time respondent Ramirez made an application for leave to file an answer. This court granted it to the extent that the respondent could file the original handwritten application and answer with the Special Referee by Thursday morning, August 9, 2007, but that the Special Referee would hear the

application for leave to serve and file an answer and cross-petition to validate. Respondent Ramirez provided petitioners' attorney with a copy of her handwritten "Application for Leave to File and Answer and Counterclaim to Validate Petition" sworn and notarized as well as her handwritten "Answer and Counterclaims to Validate Petition" dated and sworn August 8, 2007.

In her proposed handwritten answer, the respondent avers that there are a small number of signatures in her petition that are to be reviewed, approximately 80, which she seeks to validate. She also alleges that petitioners' attorney consented to the BOE Clerk's Report "as is" and is now barred from challenging the validity of the 520 signatures. Furthermore, she contends therein that she relied on the language of the Order to Show Cause and understood it to mean that she could serve an answer and counterclaim on August 8, 2007.

On August 9, 2007, at 10:00 A.M., the parties appeared before the Special Referee at the Board of Elections (200 Varick Street, New York, New York).

In addition to the handwritten "Answer" and "Application for Leave" the respondent filed with the Special Referee and served the petitioners with a 5-page typewritten "Answer, Counterclaim and Cross Petition to Validate Signatures" dated August 8, 2007. This typewritten answer contains relief similar to that requested in the handwritten version, but also sought to assert a claim of non-residency of the Candidate Aggrieved, Alice Cancel and cross petition to dismiss for lack of standing.

The Special Referee found that respondent's designating petition contained 1068 signatures, of which 614 were challenged by the petitioners in their objections filed with the BOE. On or about August 3, 2007, the BOE issued the Clerk's Report, sustaining 548 signatures as invalid, but validating 520. Hence, the respondent's petition was found to have satisfied the threshold

requirement of 500 valid signatures necessary for her name to appear on the ballot. Thus, there was no need on her part to commence a proceeding to validate her designating petition.

The Special Referee sustained petitioners' objection to the filing of an answer and counterclaim to the extent that the respondent sought to not only validate certain signatures, but to dismiss the petitioners' petition on the ground of non-residency, on the ground that her attempt to do so on August 9, 2007 was untimely. He overruled petitioner's objection to respondent's answer and counterclaim to validate her designating petition, and permitted her to contest the BOE's rulings invalidating some of the signatures contained in her designating petition.

The Special Referee conducted a line-by-line review of signatures challenged by petitioners (as amplified in petitioners' Bill of Particulars). The Special Referee ruled that, upon completion of the petitioners' proof, should their objections be sustained as to more than 20 signatures, then the burden would shift to the respondent to validate additional signatures.

The Special Referee, in his report, set forth his rulings on the objections of the petitioners. He sustained 24 of the objections leaving a total of 496 valid signatures in respondent's designating petition.

The court confirms this portion of the Special Referee's report, since his findings are supported by the record and his weighing of the evidence (Nager v Panadis, 238 AD2d 135 [1st Dept 1997]).

The Special Referee then directed the respondent to proceed on her case to validate signatures which had been invalidated by the BOE. Respondent's burden was to validate four (4) signatures in order to meet the threshold of 500 valid signatures. Petitioners' attorney conceded, without waiving their right to move before this court to reject the Special Referee's ruling granting leave to

the respondent to interpose her answer and counterclaim, that a line-by-line review of the signatures the respondent seeks to validate would result in sufficient valid signatures above the 500 threshold.

Discussion

Election Law § 16-102 (2) requires, in relevant part, that “[a] proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later” Pursuant to this year’s election calendar, the last date to commence a proceeding with respect to a designating petition was August 2, 2007. Since the BOE Clerk’s Report found that respondent had filed a sufficient number of valid signatures, there was no need for her to commence a petition to validate (although street-smart candidates frequently file a petition to validate, as a precaution). However, once respondent Ramirez was served with the OSC in this proceeding,, she was obligated to comply with the court rules pertaining to the Special Election Part, published in The New York Law Journal (see Matter of Wooten v Barron, 242 AD2d 351 [2nd Dept 1997]),

Election Law § 16-116 requires that a special proceeding under this article shall be heard upon a verified petition and such oral or written proof as may be offered, and upon such notice to such officers, persons or committees as the court or justice shall direct, and shall be summarily determined.

Here, the OSC recites that it is returnable on Wednesday, August 8, 2007, at 9:30 a., in Part 50L, 60 Centre Street, Room 228. The Rules for Special Election Part, New York County, published in the New York Law Journal (see 22 NYCRR § 601.1), provide, in pertinent part, as follow:

Orders to Show Cause to validate or invalidate designating or nominating petitions, required to be commenced on or before Thursday, August 2, 2007, shall be returnable before Justice Jacqueline Silbermann on Wednesday, August 8, 2007 at 9:30 A.M. in Room 228, located at 60 Centre Street, New York, New York.

The calendar must be answered by counsel or the litigant(s), *pro se*, who must be ready for assignment on the return date. Non-lawyer "representatives" of parties are not permitted to answer the calendar. On the return date, all counsel and parties appearing *pro se* shall advise the Clerk of the Part of their addresses and telephone numbers. Proof of Service of the Order to Show Cause, *as well as any interposed Counterclaims or Answers, shall be filed with the Clerk of the Part* (not the County Clerk) [emphasis added].

Here, it is undisputed that respondent did not file her counterclaim or answer with the Clerk of Part 50L at the call of the Special Election Part calendar at 9:30 a.m. on August 8, 2007, although she could have prepared same during the period between her actual receipt of the OSC on August 2, 2007, and the return date of August 8th. To the extent that respondent Ramirez claims that she was somehow misled by the absence of any notice on the OSC as to when she had to file her answer and counterclaim, where a motion is brought on by order to show cause, and there is no direction by the court limiting the time when answering papers could be filed, the papers could be furnished up to the time of argument or submission of the motion (W.I.L.D.W.A.T.E.R.S., Ltd. v Martinez, 148 AD2d 847 [3rd Dept 1989]). "A litigant appearing *pro se* acquires no greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants" (Roundtree v. Singh, 143 AD2d 995, 996 [2d Dept 1988]).

It has long been the law that the courts may not consider the merits of an untimely answer to a petition to invalidate containing an affirmative defense claiming that there were sufficient valid signatures to her petition (Krueger v Richards, 59 NY2d 680 [1983]), and that an untimely cross-

petition should be dismissed (Bearak v Laufer, 196 AD2d 604 [2nd Dept 1993]). As the Court of Appeals held, in Suarez v Sadowski (48 NY2d 620, 621):

In view of the fact that no cross petition to validate had been filed and the petitioners were not otherwise alerted by way of notice in the proceeding that respondents intended to seek validation of these signatures, it would be manifestly unfair to suddenly confront them with the necessity of meeting whatever proof the respondents sought to offer. This is particularly true considering the necessity of speedy disposition in cases of this sort. Under these circumstances, the respondents were not entitled to the affirmative relief sought.

I further note that, although the Board of Elections is listed in the caption as a party respondent to this proceeding, and that, in the OSC, Justice Schoenfeld directed that a copy of the OSC and petition be served upon the BOE, and the file contains an affidavit of service by petitioners, indicating service of the OSC and petition on the BOE, respondent did not serve a copy of her application for leave to serve and file her proposed answer and counterclaim upon the BOE or a copy thereof.

It has been held that the BOE is a necessary party to a proceeding to validate, and, therefore, the failure to join the BOE warrants dismissal of the proceeding (Vaughn v Withers, 153 AD2d 712 [2nd Dept], *lv denied* 74 NY2d 609 [1989]). CPLR 2103 (e) provides “Each paper served on any party shall be served on every other party who has appeared” The Uniform Rules for Trial Courts expressly provide: “The moving party shall serve copies of all affidavits and briefs upon *all* other parties ...” (22 NYCRR § 202.8 [c] [emphasis added]).

The court is cognizant of a line of case law holding that where the BOE *chose* not to appear in a matter, indicating its neutral posture, the failure to serve an application for leave to interpose a counterclaim to validate a petition is not a fatal defect (Hall v Abu, 185 AD2d 957 [2nd Dept 1992]). This court respectfully disagrees with that holding. A waiver is the voluntary abandonment or

relinquishment of a *known* right (Jefpaul Garage Corp. v Presbyterian Hospital, 61 NY2d 442, 446 [1984]; 2 *Byer's Civil Motions § 80:01* [Leventhal 2nd Rev Ed]) with an intention to relinquish it (Airco Alloys Div. Airco Inc. v Niagara Mohawk Power Corp., 76 AD2d 68, 81 [4th Dept 1980]).

If the BOE was never served with respondent Ramirez's application for leave to serve and file an answer and counterclaim, lacking knowledge of the relief sought by her, it could not waive its right to appear or submit responsive papers.

The failure of respondent Ramirez to serve her application and other papers on the BOE is a fatal defect, apart from the untimeliness of her application.

Conclusion

The Report of the Special Referee is confirmed in part and rejected in part (CPLR 4403).

To the extent that the Special Referee, in his report, set forth his rulings on the objections of the petitioners, sustaining 24 of the objections, leaving a total of 496 valid signatures in respondent's designating petition, his report is confirmed.

To the extent that the Special Referee reported that the request by respondent Ramirez to serve an answer containing a defense of lack of standing by petitioner Cancel, based upon non-residency, should be denied as untimely, his report is confirmed.

To the extent that the Special Referee granted respondent Ramirez leave to serve and file an answer and counterclaim to validate her designating petition, and, upon granting such leave, found that she had at least 500 valid signatures, the report is rejected.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition to invalidate the designating petition of respondent NORMA RAMIREZ to be a Candidate for the party position of Female District Leader

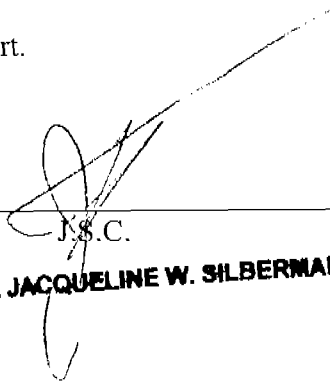
from the 64th Assembly District, Part B New York County, Borough of Manhattan, City and State of New York, in the Democratic party primary election to be held on September 18, 2007, is granted, and it is further

ORDERED AND ADJUDGED that respondent Board of Elections in the City of New York is hereby enjoined from placing the name of NORMA RAMIREZ on the ballot to be a Candidate for the party position of Female District Leader from the 64th Assembly District, Part B New York County, Borough of Manhattan, City and State of New York, in the Democratic party primary election to be held on September 18, 2007.

This constitutes the decision, order and judgment of the court.

DATED: August 16, 2007

ENTER:



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

USDP E-FILED
This judgment has not been entered by the County Clerk and notice of entry cannot be copied hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1416).