

Hennessey v Romaine

2007 NY Slip Op 32625(U)

August 17, 2007

Supreme Court, Suffolk County

Docket Number: 0022595/2007

Judge: Gary J. Weber

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

P R E S E N T:

Hon. Gary J. Weber
Acting Justice of the Supreme Court

MOTION DATE August 8, 2007
Motion Seq. # 001 - CASE DISP
002 - MOT D
003 - MOT D

EDWARD J. HENNESSEY,

Plaintiff,

-against-

KEITH ROMAINE,

-and-

ANITA KATZ and CATHY L. RICHTER-GEIR,
BEING THE COMMISSIONERS OF THE
BOARD OF ELECTIONS IN SUFFOLK COUNTY
and the SUFFOLK COUNTY BOARD OF
ELECTIONS.

Respondents,

JOHN J. LEO, ESQ.
Attorney for Petitioner
191 New York Avenue
Huntington, New York 11743

VINCENT J. MESSINA JR., ESQ.
Attorney for Respondent
KEITH ROMAINE
267 Carleton Avenue, Suite 301
Central Islip, New York 11722

CHRISTINE MALAFI
Suffolk County Attorney
Attorney for Department of Social Services
by: Ms. Gail Lolis, Esq.
Cohalan Court Complex
400 Carleton Avenue
Central Islip, New York 11722

FOR AN ORDER INVALIDATING AND
DECLARING NULL AND VOID CERTAIN
DESIGNATING PETITIONS OF THE WORKING
FAMILIES PARTY FILED WITH THE BOARD
OF ELECTIONS PURPORTING TO DESIGNATE
THE WITHIN NAMED CANDIDATE FOR THE
PUBLIC OFFICE OF TOWN COUNCILMAN,
DISTRICT #6, TOWN OF BROOKHAVEN TO
BE VOTED UPON IN THE PRIMARY ELECTION
TO BE HELD SEPTEMBER 18, 2007 AND
ENJOINING THE SUFFOLK COUNTY BOARD
OF ELECTIONS FROM PLACING THE
RESPONDENT CANDIDATES' NAME ON
THE OFFICIAL BALLOT AND VOTING
MACHINES FOR SAID PRIMARY ELECTION.

Procedural Background

This is an invalidation proceeding brought on pursuant to the Election Law by Edward J. Hennessey, as a candidate aggrieved. (hereinafter "Hennessey"), a designated candidate of the Democrat Party for the Public Office of Town Councilman, District #6, Town of Brookhaven for the Primary Election to be held on September 18, 2007, as against his Republican designated counterpart, Keith Romaine ("Romaine") pertaining to a designating petition filed on behalf of "Romaine" for nomination as the Working Families Party candidate for that same office.

Hennessey himself filed no general or specific objections as to the "Romaine" petition and brings this action here as a "candidate aggrieved" by virtue of an Order to Show Cause signed by Justice Whelan on August 1, 2007.

On August 8, 2007, counsel for both sides and Ms. Gail Lolis, Esq. of the Suffolk County Attorney's Office representing the Suffolk County Board of Elections appeared and certain procedures were agreed to in order to expedite the disposition of the matter. This is always welcome, but especially so in matters concerning the Election Law, which by nature, almost always have to be handled on a rush basis and have from time out of mind been given top priority in scheduling by the courts.

I mention this because all three counsel clearly had an understanding of the issues involved in the case and worked together so that each side could stake out their respective positions without adding any unnecessary surplusage to the real issues truly needed to be considered here.

In the post-computer, word processor, copier age this is not an insignificant accomplishment, for which I thank all three counsel.

Pursuant to the directive of Justice Leis I have, I think, addressed all of the issues in the case without stopping at any threshold procedural issue in a manner so that any reversal on appellate review will not necessarily require a remand.

Respondent Romaine's Working Families Party petition ("The Petition") was timely filed with the Suffolk County Board of Elections ("The Board") on or about July 20, 2007. It consists of 4 pages containing 17 signatures with a required minimum number of 15 signatures, for this particular race.

One Tricia Chiaramonte filed general objections followed by specific objections against the "Romaine" petition, the latter being filed on July 24, 2007.

By resolution, on a split vote of the Commissioners of Election, the specific objections of Ms. Chiaramonte were held to be insufficient.

The current state of the law on this topic is that the petition is good on a split vote.

Hence, the instant litigation brought by "Hennessey". Apparently, Ms. Chiaramonte did not follow her objections with a lawsuit.

The Motion to Dismiss

By Motion dated August 7, 2007 Respondent's attorney moves to dismiss this proceeding because a crucial allegation made by petitioner was not pleaded with sufficient specificity.

Specifically, Respondent asserts that the individual signing page 2, line 5 of the "The Petition" is not the same person who signed the "Hennessey" petition at page 6, line 5.

Counsel points out that there are only two other viable attacks on the signatures contained in "The Petition" so that, absent a disqualification for signing the prior petition, the "Romaine" petition cannot fall because it would, absent

the disqualification of one signature, as aforesaid, for signing the prior "Hennessey" petition, contain the bare minimum of 15 signatures, in any case - no more, no less.

Petitioner's counsel points out that the alleged prior signator is one Christopher Zarcone, Jr. who resides at 104 Huntington Drive, Mastic Beach, New York. Mr. Zarcone's name appears printed on both petitions at that same address. The objection pleaded in Petitioner's order to show cause is that Mr. Zarcone's signature appears at page 2 of the "Hennessey" petition at line #5. In fact, the signature does appear at page 5 on that petition, but at line #2.

Page 5 of the "Hennessey" petition contains a grand total of five signatures, so it is hard for the Court to see how anyone reviewing the petitions could be unaware that the signatory being complained of was anyone other than Mr. Zarcone. In fact, I do not think that counsel for the Respondent "Romaine" disputes this.

What Respondent's counsel is truly urging is that this Court adopt an extremely strict construction as to the need for specificity, so that any error in citation of the proper page and line as to the location of a disputed signature will be fatal to the pleading and, hence, the action itself even if, as here, it is impossible to ignore the true facts as shown by so much of the accurate information as was actually given.

The Court can easily visualize certain circumstances where such an argument by counsel might carry the day. For example, where a petition contained several hundred pages and the erroneous citation is to an incorrect page. Then, an examiner of the petition would be greatly hindered in concluding whether he or she could agree with the Petitioner's objection or not. In such an instance Respondent counsel's position, as it is articulated here, would be reasonable.

Where, as here, the signature is literally 3 tiny lines on the document from exactly where Petitioner states it to be and with the same address given as appears on the "Hennessey" petition, Respondent's argument, as a practical matter, is of little merit - albeit, creative.

The fact remains that anyone whose attention was called to page "6" of the "Hennessey" petition could not miss the signature "Chris Zarcone Jr." of 104 Huntington Drive, Brookhaven whether directed by the objection to line 2 or line 5. There are only 5 signatures on the page in total.

Accordingly, Respondent "Romaine's" application to dismiss the petition must be denied.

The Alleged Failure To Join a Necessary Party

By way of an "Affirmation in Opposition to Summary Judgment" dated August 14, 2007 Respondent's counsel points out that the objector to the "Romaine" petition, one Ms. Tricia Chiaromonte, was never served as a defendant in this proceeding and argues that, as a result, the Petitioner has failed to name a necessary party to this lawsuit and should by virtue of this (or lack thereof) be out of court.

In support of this position Respondent cites *Butler v. Hayduk* 37 N.Y.2d 497, 373 N.Y.S.2d 863 (1973) and *Fusco v. Westchester County Board of Elections* 286 A.D.2d 456, 729 N.Y.S.2d 521 (2nd Dept. 2001).

There is a great deal of difference, I think, in the factual situations at play in *Butler* and *Fusco* and that present here. The *Butler* and *Fusco* cases involved validation proceedings brought on by candidates who either had been removed or feared that they would be removed from the ballot as a result of objections filed by the respective objectors. Having successfully argued their cases at the administrative level (Board of Elections) it is axiomatic that these objectors would be necessary parties to any legal proceeding seeking, in effect, to deprive them of the benefit of the fruits of their labor at the administrative level, i.e. the removal from the primary ballot of the candidate(s) to which they had objected.

Here, the objector, Theresa Chiamonte, was not successful at the administrative (Board of Elections) level. The Board rejected her claim and, while she maintained the right to sue and bring her own proceeding as an objector, unlike the objectants in *Butler* and *Fusco*, she had no other rights or claims that had been awarded her by the administrative agency (Board of Elections) that this Court could protect. In short, the only right that Ms. Chiamonte had after “The Board” voted not to uphold her objections was that, by virtue of filing her objections, she became qualified to bring a lawsuit in her own right as against “The Petition”.

This is not to say that, *ipso facto*, she became a necessary party to a lawsuit brought by a candidate aggrieved or anybody else.

Further, as a practical matter, Ms. Chiamonte clearly is interested in removing “Romaine” from the Working Families Party Ballot. Does anyone doubt that, even if she were joined in this proceeding, that Ms. Chiamonte would do anything but support the position of “Hennessey”.

Indeed, a review of the objections brought by Ms. Chiamonte and those presented here by “Hennessey” seem to represent a certain commonality of shared thought.

For these reasons the application to dismiss the proceeding for failure to name Theresa Chiamonte as a necessary party is denied.

Papers Considered

In rendering the preliminary determinations above stated and the Findings of Fact to follow the Court has read and considered the following items or fax copies of the originals:

- 1) Original Order to Show Cause dated August 1, 2007, by Justice Whelan and supporting papers;
- 2) Notice of Motion to Dismiss by Vincent J. Messina Jr., Esq. dated August 7, 2007 and supporting papers;
- 3) Verified Return of the Suffolk County Board of Elections received in Special Term on August 8, 2007;
- 4) Affirmation in Opposition to Application to Dismiss and In Support of Cross Motion and supporting papers by John J. Leo dated August 13, 2007;
- 5) Affirmation in Opposition to Summary Judgment by Vincent J. Messina Jr., Esq. dated August 14, 2007 (Fax copy)
- 6) Petitioner’s Memorandum of Law in Opposition to Dismiss etc. dated August 13, 2007;
- 7) Petitioner’s Notice of Cross Motion by John J. Leo, Esq. dated August 13, 2007;
- 8) Affirmation in Further Opposition, etc. by John J. Leo, Esq. dated August 14, 2007 (Fax copy);
- 9) Verified Answer by the Suffolk County Board of Elections, dated August 7, 2007;
- 10) Minutes of the proceedings held before the undersigned on August 8, 2007;
- 11) Certified Copies of Records of the Suffolk County Board of Election, deemed marked as Exhibits on August 8, 2007. These are included in the Court file on this case as “Supplement to Board of Elections Return” and contained in a brown paper envelope, which is so marked.

Findings of Fact

Keith Romaine, an enrolled member of the Republican Party, timely filed a petition naming him as a candidate of the Working Families Party for the public office of Council Member, Sixth Town District, Town of Brookhaven. (Petition I.D. #SU07-25)

The required number of valid signatures for this particular office as a candidate of the Working Families Party is a total of 15 signatures.

On its face such petition contains a total of 17 signatures.

The signer at page 1, line 1 of the petition, one Yvonne L. Reventlow, registered at 74 Church Drive, Mastic Beach, New York, is an enrolled member of the Conservative Party.

The signer at page 1, line 2 of the petition, one Maria E. Cruz, registered at 109 Woodcut Drive, Mastic Beach, New York is an enrolled member of the Republican Party.

The signatures of Ms. Reventlow and Ms. Cruz are invalid because they are not enrolled members of The Working Families Party. See Election Law, Sections 6-132 [1] and 6-136[2].

The signer at page 2, line 5 of the petition, one Christopher J. Zarcone Jr., signed the "Romaine" petition on July 19, 2007. Christopher J. Zarcone Jr. was not qualified to sign the "Romaine" petition because he had previously, on July 1, 2007; signed the rival "Hennessey" petition at page 6, line 2 (Petition WFO 7-15) for the same public office. (see *Gartner v. Salerno* 74 A.D.2 958 (3rd Dept. 1980))

Decision

The petition to invalidate the "Romaine" petition is granted, since it contains only 14 valid signatures where the requirement is 15 valid signatures.

The Court notes in passing that were the Office of Brookhaven Town Councilman still a town wide or "at large" position the petition would have been good because Mr. Zarcone would have had the right to sign as many candidate petitions as there were vacancies for office.

Order

The Board of Elections of the County of Suffolk is directed to remove the name of Keith Romaine as a candidate of the Working Families Party for the Office of Council Member, Sixth District, Town of Brookhaven, for the Primary Election to be held on September 18, 2007; and it is further

ORDERED, that this memorandum decision and order shall constitute the order of the Court; and it is further

ORDERED, that either counsel may serve a copy of this order with notice of entry by fax, regular mail or personal service as soon as may be practicable.

Dated: August 17, 2007

ENTER,



Gary J. Weber, Acting J.S.C.

Non-Final Disposition
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