

Matter of Crowley v DeVore

2007 NY Slip Op 33443(U)

October 23, 2007

Supreme Court, Suffolk County

Docket Number: 0029110/2007

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. <u>Gary J. Weber</u> Acting Justice of the Supreme Court	MOTION DATE Motion Seq. #
<p>In the Matter of the Application of</p> <p>KEVIN J. CROWLEY, a candidate aggrieved,</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">-against-</p> <p>WILLIAM A. DE VORE, CHRIS ANN KELLEY, WILLIAM J. BURKE, Voters R.S. and G.S.,</p> <p style="text-align: center;">-and-</p> <p>CATHY L. RICHTER GEIER and ANITA S. KATZ, Commissioners constituting the Suffolk County Board of Elections,</p> <p style="text-align: right;">Respondents.</p> <hr style="width: 30%; margin-left: 0;"/>	<p>VINCENT J. MESSINA, JR., ESQ. Attorney for Petitioner 267 Carleton Avenue, Suite 301 Central Islip, New York 11722</p> <p>PATRICK KEVIN BROSNAHAN, JR., ESQ. Attorney for William A. DeVore The 1826 House 73 West Main Street Babylon, New York 11702</p> <p>DANIEL BELANO, ESQ. Attorney for Chris Ann Kelley 93 Wheeler Road Central Islip, New York 11722</p> <p>REYNOLDS, CARONIA, GIANELLI, HAGNEY & LA PINTA, LLP, ESQS. By: Anthony La Pinta, Esq. Attorney for Respondents R.S. & G.S. 35 Arkay Drive Hauppauge, New York 11788</p> <p>JASPAN SCHLESINGER HOFFMAN, LLP, ESQS. By: Steven R. Schlesinger, Esq. By: Christopher E. Vatter, Esq. Attorneys for Suffolk County Board of Elections 300 Garden City Plaza Garden City, New York 11530</p> <p>RYAN, BRENNAN & DONNELLY, LLP By: John M. Donnelly, Esq. Attorney for Commissioner Geier 131 Tulip Avenue Floral Park, New York 11001</p>

This is a proceeding brought pursuant to Section 16-106 of the Election Law by way of Order to Show Cause granted September 27, 2007 and originally returnable October 5, 2007 in which the Petitioner, Kevin J. Crowley, a candidate aggrieved, (hereinafter "Crowley") seeks an order setting aside the certification of the Respondent Suffolk County Board of Elections (hereinafter "The Board") that results in the Respondent, William A. DeVore (hereinafter "DeVore") from appearing on the ballot for the General Election to be held on November 6, 2007 as one of the two candidates of the Working Families Party for the public office of Judge of the Suffolk County District Court, Sixth

District (Brookhaven) and declaring Petitioner (Crowley) as the Working Families nominee for the same, or, in the alternative, directing that a new primary election be held for such office.

As a matter of simple practicality under the extremely unique factual circumstances which gave birth to this controversy, the only options the court has open to it are to leave the vote totals as certified by the Respondent Board, which result in the nomination of DeVore by a one vote margin or to set aside that determination and reduce DeVore's total votes by two, leaving Judge Crowley as the nominee, by a one vote plurality over DeVore.

All counsel agreed at the return date of the order to show cause on October 5, 2007 that, in so far as the Respondent candidates Chris Ann Kelley and William J. Burke are concerned, that these proceedings are moot since Ms. Kelley has an insurmountable lead over both Crowley and DeVore and Judge Burke is too far behind to catch either of them.

Procedural History

In addition to the order to show cause above mentioned and described the court has read and considered the following items in rendering the decision and order which follows:

1. Original Order to Show Cause dated September 26, 2007 and returnable October 5, 2007
2. The Return of the Suffolk County Board of Elections which includes a number of items - some of which are more particularly described herein.
3. The Verified Answer of the Respondents "R.S." & "G.S." by their attorney, Anthony M. La Pinta, Esq., dated October 5, 2007.
4. The Verified Answer of the Respondents Cathy L. Richter Geier and Anita S. Katz constituting the Suffolk County Board of Elections by their attorneys, Jaspan, Schlesinger, Hoffman, LLP, dated October 4, 2007.
5. The Verified Response and/or "Answer" of William A. DeVore, Esq. by his attorney, Patrick Kevin Brosnahan, Esq., dated October 4, 2007.
6. The Amended Verified Answer of Respondent Anita S. Katz by her attorneys Jaspan, Schlesinger, Hoffman, LLP, dated October 11, 2007.
7. Petitioners Affirmation in Opposition by Vincent J. Messina, Jr., Esq., dated October 12, 2007.
8. Petitioners Memorandum of Law in Opposition to Motion to Dismiss by Vincent J. Messina, Jr., Esq., dated October 12, 2007.
9. Respondent Anita S. Katz Memorandum of Law by her attorneys, Jaspan, Schlesinger, Hoffman, LLP in support of the Motion to Dismiss the Petition dated October 11, 2007.
10. Minutes of Hearing held at the Suffolk County Board of Elections before Hon. John C. Bivona, a Justice of the Supreme Court, on September 18, 2007.
11. Transcript of the proceedings held before the undersigned on October 5, 2007.

12. Respondent William A. DeVore Memorandum of Law by his attorney Patrick Kevin Brosnahan, Esq., dated October 17, 2007.
13. The Amended Verified Answer of Respondent Commissioner Cathy L. Richter Geier dated October 17, 2007 by her attorneys Ryan, Brennan & Donnelly, L.L.P..
14. Respondent Commissioner Cathy L. Richter Geier Memorandum of Law by her attorneys Ryan, Brennan & Donnelly, LLP, dated October 17, 2007.

On October 5, 2007, the return date of the Order to Show Cause, the attorneys for the respective Respondents made oral application to dismiss the petition and supported their application by way of the written materials enumerated as above described attributed to them.

Judge Crowley's attorney opposed these applications both on the record of the proceedings and by way of the written materials submitted on behalf of Judge Crowley as above described, and argued for the relief sought by the order to show cause as is more fully discussed later in this opinion.

As a kind of offshoot of these applications to dismiss, DeVore's attorney, Patrick Kevin Brosnahan, Esq., maintains that the only Justice who should properly hear this case is Justice John C. Bivona because it was he who issued the two orders which were a link in the chain of events leading to the instant controversy giving rise to this litigation and that the earlier proceedings and resultant orders are "related cases".

The Facts

This case is truly *Sui generis*. Although, when it comes to matters of Election Law, one never knows, I doubt that another like it will arise again.

The parties are not in significant disagreement as to the facts.

At the Primary Election of September 18, 2007 there was a four way primary for two nominations of the Working Families Party for the public office of Judge of the Sixth District Court in and for the Town of Brookhaven. The final results of the canvass by the Suffolk County Board of Elections showed DeVore with a one vote lead over Judge Crowley for one of these two nominations - the fate of the other two candidates and the other contested nomination were decided by significant majorities in traditional fashion, are not contested, and are not now before the court.

Two voters, who are husband and wife and enrolled voters of the Working Families Party, hereinafter, "R.S." & "G.S." arrived at the 38th Election District polling place in the Town of Brookhaven for the purpose of voting in their party primary.

It appears that there was at least one opportunity to ballot contest in the Working Family Party primary as well as the District Court Judge contest. The District Court Judge's Primary, which was a four way contest for two ballot spots, appeared on the voting machine in the usual manner as in any standard primary and required that voting levers be pulled for the candidate of choice. The opportunity to ballot contests, on the other hand, required an opening of the machine and a hand written vote on a scroll if the candidate of choice was other than the party designated choice. The party designated candidate in those contests could be supported by simply pulling the lever associated with his or her name.¹

¹These complications are clearly the result of the workings of the vagaries and nuances of the Wilson Pakula Law - a topic that needs no further discussion here.

At some point, whether because of mistaken advice by the election inspectors or as a product of their own mix up, "R.S." & "G.S." wound up attempting to vote on a write in basis for the District Court Judge race, even though all of the candidates names appeared on the voting machine. Under the circumstances, it is easy to see how confusion could have arisen over the proper manner of voting in the District Court contest.

A write in ballot where the candidates name appears on the regular machine ballot is invalid. Election Law Section 8-308-2.

Sometime during the course of Primary Day, "R.S." & "G.S." learned that their votes would not be counted in the District Court race and sought an order from the regularly assigned Election Day Judge, Justice John C. Bivona, to permit them to vote again.

Justice Bivona, sitting at the Board of Elections in Yaphank, granted each of the applications of "R.S." & "G.S." and, pursuant to Justice Bivona's orders, each dated September 18, 2007, "R.S." & "G.S." were permitted to vote on a machine, actually designed for handicapped voting, which was available at the Suffolk County Board of Elections in Yaphank that produced a form of paper ballot.

The scroll from the original polling place at District 38 (where "R.S." & "G.S." had originally voted), which is part of the return, shows two write in votes for the contested District Court nomination.

The paper scroll from District 38 also contains a notation "Do Not Count as per Judge's Order", together with the signatures of the Republican and Democrat Commissioners..

Parenthetically, the court notes that Election Law Section 8-302(3)(i) provides that "At a Primary Election, such a court order must specify the party in which the voter is permitted to vote."

The Court has reviewed Justice Bivona's two orders and nowhere does either of them, or, for the matter of that, the transcript before Justice Bivona of September 18, 2007 direct that anything be done as to the original write in votes.

On the other hand, the Board records (see handwritten notes made by commissioners on the write in scroll included in the return) show that the write in votes were not counted and this should be so, as a matter of law, in any case, by virtue of Election Law Section 8-308-2.

No index number appear on the orders signed by Justice Bivona, nor was Judge Crowley made a party to the applications made by "G.S." & "R.S." to Justice Bivona.

Respondents Application Pursuant to The
Doctrines of Res Judicata and Collateral Estoppel

Respondents assert that this application must be dismissed because, pursuant to the doctrines of res judicata and collateral estoppel, the petitioner is precluded from bringing this proceeding, since Justice Bivona's order permitting "G.S." & "R.S." to vote again is the law of case and, no appeal having been filed, is controlling on the issue of whether or not "G.S." & "R.S." should have been permitted to have what amounts to a "do over" of their vote.

In support of his application to dismiss the petition, counsel for the Respondent Suffolk County Board of Elections (currently appearing only for Commissioner Anita S. Katz) argues:

"If the Petitioner wished to challenge the Bivona Order he should have moved to intervene in that proceeding, pursuant to CPLR 1012, and then sought either leave to reargue that Order or appeal it. The

Petitioner did neither and instead attempts to circumvent the CPLR and to have this Court overturn the Bivona Order. This is procedurally defective and the Petition must be dismissed.

CPLR 2221 provides in pertinent part that:

- (a) a motion for leave to renew or reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an Order shall be made on notice, to the judge who signed the Order; ***[and] shall be made within thirty days after service of the Order determines the prior motion and written notice of entry.

CPLR 5513 provides in pertinent part that:

“[a]n appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or Order appealed from and written notice of its entry.”

“As a matter of policy, an attempt to avoid the binding effect of a prior ruling should be accomplished by reversal of such ruling upon an appeal, and not by a coordinate tribunal’s failure to follow it.” 28 N.Y. Jur. Courts and Judges Section 236 *citing Walker v. Gerli*, 257 A.D. 249, 251, 12 N.Y.S.2d 942 (1st Dep’t 1939), vacated on reargument on other grounds 257 A.D.2d 959, 14 N.Y.S.2d 278 (1st Dep’t 1939) *Werthner v. Olien*, 186 Misc.2d 829, 62 N.Y.S.2d 646 (Trial Term, N.Y. Co., 1945), *aff’d* 272 A.D.2d 798, 71 N.Y.S.2d 926 (1st Dep’t 1947).

“The doctrine is ‘a rule of comity or convenience’ which requires that ‘a court of coordinate jurisdiction *** ordinarily should not disregard an earlier decision on the same question in the same case’”. *Burgundy Basin Inn, Ltd. V. Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140, 143, 379 N.Y.S.2d 873 (4th Dep’t 1976)”

Firstly, it is highly unlikely that the Petitioner or any of his representatives would even be aware, in the hectic circumstances of Primary Day, that “G.S.” & “R.S.” were making their applications to Justice Bivona, much less to be in a position to intervene in the proceedings before Justice Bivona, especially since the hearing before Justice Bivona took place in Yaphank at the Suffolk County Board of Elections, not at the original District 38 polling place. Further, “G.S.” & “R.S.” eventually voted again at the Board of Elections in Yaphank, not at District 38, where this sequence of events began.

Certainly, Judge Crowley was never a party to the proceedings before Justice Bivona and it is hard to see how a non-party to a proceeding can be said to be bound by its outcome unless he was a participant - much less the situation here when the importance of these particular votes only clearly manifest itself upon the canvass conducted by the Suffolk County Board of Elections, several days after the fact.

Indeed, Petitioner, it seems to me, fulfilled any reasonable due diligence requirement that ought to be imposed in these matters by dispatching his attorney, Mr. Messina, to the re-canvass where he (Mr. Messina) did object to the disputed paper ballots by “G.S.” & “R.S.”, cast pursuant to the court order.

In any event, Petitioner was not required to protest the casting of the challenged ballots in order to preserve his right to judicial review.

“Furthermore it was not necessary for Petitioner to object in order to preserve the right for judicial review. Election Law Section 16-106 allows a proceeding to protest the actions of the Board of the first time in Supreme Court”. *Jackson v. Mains* 497 N.Y.S.2d 555 115A.D.2d 1014 (A.D. 4th Dept. 1985)

Even more important is the consideration that the instant proceeding is one that is separate and distinct from that in which Justice Bivona granted the applications of "G.S." & "R.S." for a second vote. This proceeding is to review the certification of the Board as to the winner of the primary election for the one nomination in doubt. It is not for the purpose of deciding whether "G.S." & "R.S." should have the right to physically cast a second vote.

Justice Bivona's order granted "G.S." & "R.S." the right to physically cast a second vote. In no manner did such order guarantee that these ballots, once cast, were immune from attack as a result of a canvass or a subsequent judicial proceeding to review such canvass. These ballots by "G.S." & "R.S." were no more or less privileged from inquiry than any other voter's ballot which might come into question but which did not happen to be cast pursuant to judicial process or order.

Justice Bivona's orders opened the voting booth door again so that "G.S." and "R.S." could physically carry out the act of voting - that order did not close the door as to judicial review of the efficacy of their vote or that of any other participant in this primary pursuant to Election Law Section 16-102 or otherwise.

For these reasons, the applications to dismiss this proceeding base upon *res judicata*, collateral estoppel and C.P.L.R. 2221 are denied. Similarly, the application to refer the case to Justice Bivona, although more and more tempting as this writing goes on, is otherwise denied.

Respondents Application
to Dismiss the Proceeding
Pursuant to Election Law Section 8-502

Respondent's urge that this proceeding should be dismissed because no representative of the petitioner challenged the right of "R.S." & "G.S." to vote after the court order had been obtained.

The case of Stern v. Garfinkle (22 A.D. 3rd 695, 802 N.Y.S.2d 745 Second Dept. 2005) is cited for authority for this proposition.

Neither the Stern case nor Section 8-502 of the Election Law is applicable in this situation.

First, "R.S." & "G.S." were permitted to vote again at the Board of Elections in Yaphank after they had obtained their respective orders from Justice Bivona there.

No poll watchers or other potential challengers could have known to go to Yaphank in order to challenge "R.S." & "G.S."

Even if someone challenged "R.S." & "G.S.", they were armed with a Supreme Court Order which gave them the right, at least physically, to cast new votes so that any challenge at that point would accomplish nothing.

Moreover, a clear purpose of Election Law Section 8-502 is to make and preserve a record of any challenge so that any determination made upon it might be the subject of a more substantial review based upon at least some record, should that become necessary. Basically, the section is concerned with whether or not the voter is qualified to vote and establishes a protocol for those who might wish to challenge a voter's qualifications. Nowhere does the section say that no later challenge is permissible if the protocol is not followed.

Also, there is not any dispute as to the fact that "R.S." & "G.S." were qualified voters for the Working Families Party, at least in so far as their registration and enrollment were concerned.

Accordingly that branch of Respondent's application, which is to dismiss the proceeding by virtue of Election Law Section 8-502, is denied.

Conclusion

In the case of *Sinnot v. Monahan* the voters concerned were husband and wife who were enrolled members of the Right of Life Party. Due to an error of some sort by poll officials these voters were designated as enrolled Republicans instead of Right to Life, and "locked out" of the Right to Life primary for the machine vote.

In order to get out of the booth, each voter voted in the Republican primary, and upon further discussion and complaint by these voters to the poll officials, each was furnished with an emergency (paper) ballot for the Right to Life Party primary and voted on that ballot.

Later, these ballots were disallowed by a split decision of the Board of Elections on the canvass. Special Term affirmed, based upon reasoning similar to that urged by the Petitioner here, to the effect that no person can vote twice in any election.

In reversing, the Appellate Division, Third Department held that the paper ballots should be counted, since the first votes on the Republican line were absolutely void and, therefore, the only valid votes cast were those on the second paper ballot vote. *Sinnot v. Monahan N.Y.S.2d 240, 84 A.D.2d 626 (A.D.3rd Dept. 1981)*

Apparently, as things turned out, there was no controversy as regards the Republican Primary in the *Sinnot* case, which was a good thing, since the problem would be obvious.

None the less, the case stands for the proposition that, at least under some circumstances, a second chance to vote may be a proper remedy to cure the mistaken casting of ballots occasioned by voter confusion during the election process, despite the general stricture that each voter is permitted only one vote.

Here, it would appear that, unlike the *Sinnot* case, the Board of Elections was, in fact, able to cancel the first votes cast by "R.S." & "G.S." by invalidating the "write in" votes appearing on the scroll from District 38 - something that could never be done in so far as the Republican primary in *Sinnot* was concerned.

In as much as there has been no demonstration that the net effect of Justice Bivona's two orders did anything but allow "R.S." & "G.S." to properly cast their allotted votes for the candidates of their choice, the Court can see no reason to disturb the certification of the Suffolk County Board of Elections, after the canvass.

At the end of the day, the improperly cast write in ballots were not counted and the Court ordered ballots which were then properly cast, were counted.

Had "R.S." & "G.S." voted in the regular manner by pulling levers in the voting machine and an order were granted for a re-vote, this would create an entirely different situation, since it would be impossible to verify any claim made by "R.S." & "G.S." as to any erroneous vote made by them. Suffice to say, this is not what happened here.

Here, where the voter's sworn testimony was verified through the records of the Board of Election above described, it would seem that the forfeiture of the votes of "G.S." & "R.S." would not only be unfair, but unreasonable, especially in the absence of even a claim of actual fraud. This is not to say that every time a voter has second thoughts about his vote, he or she is entitled to a court order to correct it by re-opening the voting process on a mere complaint of voter confusion. It is only to say that, absent allegations and proof of fraud, and under the very rare but compelling facts of this case, there is no valid reason not to respect the intentions of these two voters. The facts that the voters complained of and swore to were verified and the remedy employed did not give them a second vote that could be counted.

In any event, the canvass carries with it a presumption of regularity. *Stevenson v. Nine 314 N.Y.S.2d 18 (1st Dept. 1970) affirmed 27 N.Y.2d 152, 314 N.Y.S.2d 705.*

Order

The various motions to dismiss the petition on the procedural grounds above discussed are denied in their entirety and, it is further

ORDERED, that the petition is dismissed in its entirety without costs to either side based upon the substantive grounds above discussed, and it is further

ORDERED, that this memorandum decision shall also serve as the order of the court; and it is further

ORDERED, that one of the Respondent's attorneys serve a copy of this order with notice of entry upon the attorneys for all parties to this proceeding as quickly as may be practicable.

Dated: October 23, 2007



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

Final Disposition, Scan