

Matter of Haynes v Nunes

2008 NY Slip Op 32274(U)

August 11, 2008

Supreme Court, Queens County

Docket Number: 0018129/2008

Judge: Howard G. Lane

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Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

ELECTION PART F

In the Matter of the Application of
DELORES HAYNES as Objector and
THOMAS WHITE JR. as Aggrieved
Candidate

Index No. 18129/08

Motion

Date August 4, 2008

Petitioners,

Motion

Cal. No. 4

-against-

LYNN NUNES

Motion

Sequence No. 1

-and-

THE BOARD OF ELECTIONS OF THE CITY
OF NEW YORK,

Respondents.

For an order declaring invalid the
designating petition which purports
to designate the above-named
candidate-respondent as Democratic
candidate for the Party Position of
Male Assembly District Leader from
the 32nd Assembly District, Part B
New York State
and which bears the identification
numbers of QN'08 01268

The following papers numbered 1 to 7 read on this order to show
cause by petitioners to invalidate the designating petition of
the Candidate Lynn Nunes as the Democratic Party candidate for
the Party position of Male Assembly District Leader from the 32nd
Assembly District, Part B, New York State to be voted for at the
Primary Election to be held on September 9, 2008 on the ground
that the Candidate does not meet the residence requirements of
the Election Law.

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits.... 1-7

Minutes of Proceeding

Upon the foregoing papers it is ordered that this petition is determined as follows:

This is a proceeding brought pursuant to Article 16 of the Election Law, to invalidate the designating petition of the Candidate Lynn Nunes ("Candidate" or "Mr. Nunes") as the Democratic Party candidate for the Party position of Male Assembly District Leader from the 32nd Assembly District, Part B, New York State to be voted for at the Primary Election to be held on September 9, 2008 on the ground that the Candidate does not meet the residence requirements of the Election Law. The court notes that although petitioners allege numerous violations of the Election Law in the petition, upon conference and on the record counsel for the petitioners stated that the sole issue for trial is related to the Candidate's residence.

Findings of Fact

The following facts are without dispute.

On or about July 10, 2008, the Candidate filed with the Board of Elections petitions purporting to designate him as a candidate in the September 9, 2008 Democratic Primary election for public office of Male Assembly District Leader from the 32nd Assembly District, Part B, Queens County, New York State. The petitions listed 105-32 131st Street, Richmond Hill, New York 11419 as Mr. Nunes' place of residence. Thereafter, petitioners commenced this proceeding to invalidate the designating petitions of Mr. Nunes. A trial on this matter was held and concluded on August 7, 2008. Petitioners called two witnesses, Tim Duffy an employee of the New York City Board of Elections and Mr. Nunes. Mr. Duffy testified that the address of 95-16 123rd Street, Queens County is located within the 25th Assembly District and that the address of 105-32 131st Street, Richmond Hill, New York is located within the 32nd Assembly District. Mr. Nunes testified that he resides at 105-32 131st Street, Richmond Hill, New York 11419 (hereinafter referred to as "131st Street"). He is 23 years of age, unmarried and has no children. Prior to residing at 131st Street, except for a two-year period when he was young, for his entire life he resided with his parents in a first-floor apartment in a two-family house owned by them at 95-16 123rd Street, Queens County, New York (hereinafter referred to as "123rd Street") where he had a bedroom and paid no rent.

His parents paid all of the bills. He testified that he is a part owner along with his parents of the 123rd Street property. He has no real interest in this property other than the fact that his name is listed on the deed of title. His parents who have owned the 123rd Street property for over 20 years, put his name "on the deed, if anything happens."

In or about May 2008, Mr. Nunes moved from 123rd Street to 105-32 131st Street, Richmond Hill, New York 11419. Mr. Nunes describes the premises as a house with two floors with each floor having separate entrances. His unit is located on the first floor and has a kitchen. His monthly rental fee of \$700.00 includes all utilities, and is paid in cash on or about the 12th day of each month. He presented four paid receipts for the months of May, June, and July 2008 and one month security. When he moved from 123rd Street he transferred his bedroom furniture, television and dresser to 131st Street. Since he moved he sleeps overnight only at 131st Street, no longer stays overnight at 123rd Street and has not stayed overnight there since May 12, 2008. He uses a cellphone and has no telephone service at either 123rd Street or 131st Street. Prior to May 2008 his voting address was at 123rd Street and is now at 131st Street. There are two mailboxes at 131st Street and he uses the 131st Street address to receive mail related to his credit card bills and election materials. He has not notified the United States Postal Service or the Internal Revenue Service of change of home address. He testified that on May 2, 2008 he entered into a written lease for one year to rent 131st Street and he intends to live at this premises for one year.

Conclusions of Law

In the instant matter, petitioners argue that Mr. Nunes does not actually reside at the address stated on his aforementioned designating petitions (105-32 131st Street, Richmond Hill, New York 11419). Election Law § 6-132(1) requires that the candidate's place of residence appear on the designating petition (see, *Matter of Bridandi v. Barasch*, 144 AD2d 177, 178 [3d Dept 1988], lv denied 72 NY2d 810 [1988]). "There is no requirement that a candidate for public office be a resident of the district at the time of the filing of the petition. The only requirement is that the candidate be a resident at the time of the election." (*Matter of Jan A. Clark*, 196 AD2d 607 [2d Dept 1993]). The question of residence/domicile is one of fact based on a variety of factors and circumstances (see, *Matter of Newcomb*, 192 NY 238, 250 [1908]; see also, *Matter of Gregory v. Board of Elections*, 93 AD2d 894 [2d Dept 1983], *affd* 59 NY2d 668 [1983]; *Matter of Markowitz v. Gumbs*, 122 AD2d 906, 907 [2d Dept 1986]). "Residence" is "deemed to mean that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to

return". (Election Law § 1-104[22]; see, *Camardi v. Sinawski*, 297 AD2d 357, [2d Dept 2002]). Under the Election Law, residence and domicile are treated as one and the same (see, *Fernandez v. Monegro*, 10 AD3d 429 [2d Dept 2004]; *Matter of Isabella v. Hotaling*, 207 AD2d 648, 650 [3d Dept 1994], lv denied 84 NY2d 801 [1994]; *Matter of Markowitz v. Gumbs*, 122 AD2d 906) . "The crucial determination whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent, coupled with, physical presence without any aura of sham'" (*People v. O'Hara*, 96 NY2d 378, 385 [2001] quoting *Matter of Gallagher v. Dinkins*, 41 AD2d 946, 947 [2d Dept 1993]; *Thompson v. Karben*, 295 AD2d 438, 439 [2d Dept 2002]). Thus, to be a resident of a place, a person must be physically present with the intent to remain for a time (see, *Matter of Palla v. Suffolk County Bd. of Elections*, 31 NY2d 36 [1972]; see also, *Williams v. Salerno*, 792 F 2d 323, 327 [2d Cir [1986]]). Indeed, the determination of an individual's residence is dependent upon an individual's expressed intent and conduct (see, *Matter of Palla*, 31 NY2d at 47). Furthermore, it is well settled that a challenger claiming that a candidate's residence is not his or her true residence has the burden of proving same by clear and convincing evidence (see, *Fernandez*, 10 AD3d 429; *Matter of Camardi v. Sinawski*, 297 AD2d 357, 358 [2d Dept 2002]; *Thompson*, 295 AD2d at 440).

Applying these principles to the credible evidence presented herein, the court finds that the petitioners have not met their burden of proving by clear and convincing evidence that Mr. Nunes is not a resident of the premises at 105-32 131st Street, Richmond Hill, New York 11419 which is in the 32nd Assembly District, the address listed on his designating petitions. The petitioners have also failed to establish by clear and convincing evidence that Mr. Nunes has engaged in a fraud or deception with respect to his residence or that he has no present or future intention to maintain a legal residence at the 131st Street address. Specifically, the court finds that Mr. Nunes has lived at 131st Street on the first floor of a residential house since May 12, 2008 when he entered into a one (1) year lease to rent the premises from Jerome Bandhan at a monthly rental fee of \$700.00, inclusive of all utilities. These premises are located within the 32nd Assembly District. Mr. Nunes keeps his personal items in the premises, along with furniture, and also receives mail there. Prior to May 12, 2008 he lived in a house with his parents at 95-16 123rd Street, Queens County, New York which is an address outside of the 32nd Assembly District. The testimony of Mr. Nunes was un rebutted. Although petitioners presented evidence to show, *inter alia*, that Mr. Nunes' name is listed on a deed for property owned by his father and mother, that he has not notified the United States Postal Service or the Internal Revenue Service of a change of address and that he has no telephone service at the premises, this evidence alone is inconclusive and

not dispositive on the issue of Mr. Nunes' domicile. Furthermore, unlike the case of *People v. O'Hara*, 96 NY2d 378, which petitioners cite as authority (where there was in fact witness testimony presented which contradicted the candidate's testimony that he actually resided at the address listed on the designating petitions), petitioners presented no witness testimony or evidence to contradict Mr. Nunes' testimony that he resides at 131st Street and has moved from his former address at 95-16 123rd Street. The court credits the testimony of Mr. Nunes and further finds that he has established both by intention and physical manifestation that he sustains a residence within the meaning of the Election Law (see, *Gladwin v. Power*, 21 AD2d 665 [1st Dept 1964]).

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED that petitioners' application to invalidate is denied.

The foregoing constitutes the decision and order of this Court.

Petitioners' and Respondents' Exhibits are being returned to the parties by mail along with a courtesy copy of this decision and judgment.

Dated: August 11, 2008

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Howard G. Lane, J.S.C.