

Winkler v Pfau

2009 NY Slip Op 32995(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 115014-09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 115014/2009

WINKLER, MARC

VS.

HON. JUDGE PFAU

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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).

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: December 22, 2009

[Signature]
HON. JUDITH J. GISCHE 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: PART 10

-----X
MARC WINKLER,
Petitioner

DECISION/ORDER
Index No.: 115014-09
Seq No.: 001

For a judgment pursuant to Article 78 and
Section 3001 of the CPLR,

Presiding:
Hon. Judith J. Gische, JSC

- against -

HONORABLE JUDGE PFAU, In her official
capacity as Chief Administrative
Judge of the State of New York

HONORABLE JUDGE MARKS, In his official
capacity as Director of The
New York State Office of Court Administration

MICHAEL COLONDER, In his official capacity as
Counsel for the Office of Court Administration

Respondents.
-----X

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):*

Papers	Numbered
Notice of Petition & Petition, AOS (3 copies), MW affid, exhs	1,2,3
Notice of Cross Motion, SK affirm, exhs	4,5
Letters from MW 11/17/09 and 12/17/09	6,7

Upon the aforementioned numbered papers, the decision and order of the court
is as follows:

Petitioner Marc Winkler ("Winkler"), who is self represented, has brought this
petition pursuant to Article 78 of the CPLR, seeking a "declaration" that the Hon. Craig
J. Doran, presently an Acting Supreme Court Justice in Ontario County ("Judge
Doran"), is not now, nor was he ever, been a judge because he was never properly

sworn into office, and therefore, his judicial office or seat is vacant.

Respondent Hon. Ann T. Pfau is the Chief Administrative Judge of the Office of Court Administration of the State of New York ("OCA"). Respondent Lawrence Marks is the Administrative Director of OCA and respondent Michael Colodner is OCA's in house Counsel. Respondents have not answered, but instead have cross moved for dismissal of this action pursuant to CPLR 3211 on the grounds that: the petitioner has failed to state a cause of action (CPLR 3211 [a][7]), the petition fails to name necessary parties (CPLR 3211 [a][10]), the petition is barred by the doctrine of laches, and even if not barred, there is no basis to declare the judicial office vacant. Alternatively, respondents seek permission to serve their answer (CPLR 7804[f]).

Arguments Presented

Petitioner alleges that Judge Doran was not timely sworn into office when he was originally elected, and therefore, his seat is currently vacant. It is undisputed that Judge Doran was elected to the Ontario County Court in November 1999, for a 10 year term beginning January 1, 2000 and ending December 31, 2009. In 2000, he was made an Acting Supreme Court Justice. Later, in 2006, he was named the Supervising Judge of the Family Courts for the seventh Judicial District. He was recently re-elected to another 10 year term in November 2009, which is due to commence on January 1, 2010.

According to petitioner, who obtained records from OCA through FOIL requests, Judge Doran's oath card shows that he was sworn into office on November 16, 2001, almost two years after the commencement date of his term. Pursuant to section 30 [1][h] of the Public Officer's Law, a judge must take his or her oath of office within thirty (30) days of the commencement of his or her term of office, or the office shall be

[* 4]

vacant. Thus, petitioner claims that this and other irregularities in the filed oath require a declaration by OCA that Judge Doran is not, in fact, a judge. Petitioner points out that the commission of the notary who notarized Judge Doran's oath expired on "October 31, 2001." Petitioner maintains this means the oath was notarized before Judge Doran signed it. Although the notary affixed his stamp and commission number to the oath, the notary did not actually sign it.

In its cross motion, respondents raise a number of procedural and practical arguments. First, they contend the oath card clearly only contains a scrivener's error because, although the card indicates it was signed on November 16, 2001, it was stamped as received by OCA on December 21, 1999, which well within the deadline imposed by the Public Officer's Law. Respondents contend further that it is established through documentary evidence that Judge Doran executed a second oath of office which he filed with the Clerk of the County of Ontario. That oath is sworn to December 14, 1999 and is indisputably valid.

Respondents argue that the petition seeks a declaration against the wrong parties because none of them has the right to invalidate Judge Doran as a judge, nor do they have any authority to declare that his judicial office is currently vacant. They point out that Judge Doran himself is not named in this action, though he is a necessary party and stands to be affected by any judgment rendered (CPLR 1001 [a]).

Finally, respondents contend the petition is untimely and barred by laches because Judge Doran has nearly completed his current 10 year term, and petitioner delayed in bringing this action notwithstanding that this information has been on file and available for nearly 10 years. Finally, respondents argue that even if Judge Doran's

oath was invalid, the decisions he made and acts he took are nonetheless valid.

Discussion

A vacancy is created under Public Officers Law § 30 [1] [h] only where the elected official "refuses or neglects" to file his or her oath of office within thirty (30) days of the commencement of his or her term of office. That is simply not the case here. Judge Doran took his oath of office and then filed two oaths. Although he may have done so imperfectly, there is no evidence that he "refuse[ed] or neglect[ed]" to take his oath of office.

The notary date of "2001" which appears on one of the oaths is clearly a transcription mistake, and nothing more, which is proved by the fact that each of the oaths were filed in a timely manner. Since it would have been impossible for the oath to have been filed with OCA before it was actually signed, the 1999 filing date makes it clear that the 2001 notary date was an error.

The fact that the notary public did not actually affix a signature does not necessarily invalidate the oath. When an notary certifies that an oath was administered by the officer, such certification should be actually signed by the officer in his or her own handwriting, but where the officer fails to sign his or her name to the oath, such omission does not render it invalid (see, Barthelmues v. Ives, 194 Misc. 13 [N.Y. City Ct. 1948]; Fawcett v. Vary, 14 Sickels 597, 1875 WL 10593 [1875]; see also: People ex rel. Fifth Avenue and 37th Street Corp. v. Miller, 261 AD 550 [1st Dept. 1941]).

In addition, an alleged defect in the oath of a public officer does not impair the validity of his or her acts (Public Officers Law § 15; Matter of Kendall, 85 N.Y. 302

affirmed 103 N.Y. 260, 8 N.E. 399 [1881]). This is to protect the rights of third persons if an officer has acted without compliance with the statute (In re Pardee's Estate, 259 AD 101 [4th Dept 1940]). Therefore, arguments by petitioner that he is seeking this declaration in order to clear his name of accusations that eventually caused his children to be placed in foster care are not only misplaced, but incorrectly presume the invalidity of the challenged judge's judicial acts were he otherwise to succeed on this petition.

Notwithstanding any of the above, petitioner has not named certain necessary parties, which in itself renders the petition defective and dismissible. These necessary parties include Judge Doran, who would clearly be affected by any decision about the office to which he was elected, and also the Governor who has the power to fill the vacancy, if so established (People ex rel. Walton v. Hicks, 173 AD 338 *affirmed*. 221 N.Y. 503 [1917]).

Although respondents allege that petitioner has a motive for bringing this petition, and he is a chronic litigator, those arguments have no place in connection with their cross motion to dismiss and are not the basis for the court's decision.

In accordance with the foregoing, the petition and motion are denied. The cross motion is granted and the petition is dismissed.

Conclusion

It is hereby

ORDERED, ADJUDGED AND DECREED that the that the petition and motion are denied; and it is further

ORDERED that respondents' cross motion to dismiss the petition is granted, and it

is hereby dismissed against all the respondents; and it is further


ORDERED that the clerk shall enter judgment in favor of the respondents, against petitioner Marc Winkler dismissing the petition; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
December 22, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

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 101B).