

Hensley v Matthews
2014 NY Slip Op 32742(U)
October 24, 2014
Sup Ct, Suffolk County
Docket Number: 20602/14
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED

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To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, SUFFOLK COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

-----X
PAUL M. HENSLEY,

Candidate-Aggrieved,

MOTION DATE: 10/23/14
INDEX NO.: 20602/14

-against-

JAMES F. MATTHEWS, STEVE HACKELING, PATRICIA
GRANT FLYNN, WALTER D. LONG and PAUL H. SENZER,

Respondents-Candidates,

-and-

ANITA S. KATZ and WAYNE T. ROGERS, Commissioners
Constituting the Suffolk County Board of Elections,

Respondents.
-----X

The following papers numbered 1 to 17 were read on this petition by Candidate Aggrieved Hensley for judgment declaring that the form of the ballot prepared for the public office of Suffolk County District Court Judge, 3rd District, improperly fails to comply with section 7-104 of the Election Law, etc., and on this motion by Respondent-Candidate Hackeling for an Order pursuant to CPLR 3211, subdivision (a), paragraph (a), subdivisions 1 and 7, dismissing the petition, and on this purported motion by Respondents Commissioners constituting the Suffolk County Board of Elections for an Order pursuant

to CPLR 3211, subdivision (a), paragraph (a), subdivisions 1 and 7, dismissing the petition.¹

Papers Numbered

Order to Show Cause - Petition - Affirmation (Schlesinger) - Ballot	1-4
Notice of Motion - Affirmation (Messina)	5-6
Answering Affirmation (Lolis) - Affidavit (Katz, Rogers) - Return - Exhs.	7-10
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Upon the foregoing papers, and this Court's having entertained two hour oral argument on the record by telephone conference, attended by all interested parties other than respondent Senzer who appears to be in default, it is hereby Ordered and adjudged that this petition and dismissal motions are disposed of as follows²:

This is a special proceeding pursuant to the Election Law section 16-104, subdivision (1),³ wherein a candidate for the position of District Court Judge, District No. 3, Paul M. Hensley ("petitioner"), seeks judgment declaring that the form of the ballot that

¹The Court finds that respondents Commissioners constituting the Suffolk County Board of Elections has not properly moved for dismissal of this proceeding. This proceeding, commenced on October 20, 2014, had been returnable before the undersigned at 10:30 a.m., on October 23, 2014, at which time all parties had presented their respective arguments and positions. Contrary to what this Court recalls had been the representation made by counsel for the Board, the latter, at that time, had neither filed and served a Notice of Motion, nor had obtained a signed Order to Show Cause. See CPLR 2214. Nevertheless, in the absence of any objection based thereon, and given that all parties have had a full opportunity to argue their positions, including the Board's having argued that it is entitled to dismissal, the Court will entertain the Board's belated motion for dismissal.

²The undersigned had been assigned this matter in the afternoon of October 22, 2014, by Order of Hon. Randall T. Eng, Presiding Justice, Second Appellate Division.

³The Court notes that petitioner himself has not identified the Election Law provision supporting his relief requests.

has been prepared by respondent Board of Election and certified for the election to be held, on November 4, 2014, is violative of Election Law section 7-104 in that it (1) fails to minimize the number of columns on the ballot for the Office of District Court Judge, 3rd District, Suffolk County; (2) fails to limit the number of columns on the ballot for the Office of District Court Judge, 3rd District, Suffolk County, equal to the number of candidates to be elected to that office; and (3) improperly segregates by the inclusion of blank spaces on the ballot the names of the candidates for the Office of District Court Judge, 3rd District, Suffolk County. Additionally, petitioner seeks an Order directing respondent Board of Elections "to cause to be prepared and furnished to the proper officials ballots for the general election to be held on November 4, 2014, for the public office of District Court Judge, 3rd District, Suffolk County, in a form and manner that, inter alia, cures the defect(s)" above described.

According to petitioner, his petition is timely because the Board of Elections (the "Board") had mailed its Thursday, October 9, 2014, letter to him, which letter had not been received by petitioner until Wednesday, October 14, 2014, the delay attributable to the intervening weekend and Federal Columbus Day holiday, inviting him pursuant to Election Law §7-130, to view and inspect the voting machines between 9:30 a.m. and 4:00 p.m., on October 20 through October 24, 2014, prior to their being shipped out to polling sites, and further stating that sample ballots would also be available at that time, upon request. Petitioner states that, in accordance with the foregoing, he had arrived at the Board of Elections on October 20, 2012, whereat for the first time he saw the official ballot herein being challenged. The instant Order to Show Cause promptly had been brought that same day. (Behar, J.).

Petitioner also maintains that his petition has substantive merit because Election Law section 7-104, subdivision 4, paragraph (c), states that "[e]ach office shall occupy as many columns or rows on the machine as the number of candidates to be elected to that office," and here, while only three candidates are to be elected District Court Judge for District 6, the official ballot unnecessarily includes four columns. Moreover, petitioner contends that case law requires that the candidate's names appear on the ballot in columnar spaces immediately after one another, "with no blank spaces intervening," citing Hardwood v. Dodd, 78 A.D.2d 644 (2nd Dept. 1980), and that here the official ballot improperly includes blank spaces.

Respondents Hackeling and the Board oppose the petition and each is moving to dismiss same, both arguing that this proceeding has been commenced "far too late" and that it is untimely because it now is "impossible" to render any meaningful relief to petitioner given that it in fact cannot effectuate any change to the ballot in time for the November 4th election. Respondents state that all of the voting machines having been programmed and tested, the Board having represented that it would take approximately four weeks to reprogram a software change into the voting machines whereas there now is only nine days before Election Day, that ballots throughout the County already have been printed, that absentee and military ballots already have been mailed to qualifying voters, and that voting machines already have begun to be transported to the 1053 election districts. Respondents Commissioners Katz and Rogers aver in their joint affidavit that the new electronic voting systems use election software programs which interrelate all aspects of the process so that any change in the ballot adding or, as here proposed, moving a candidate in any race, in any election district, will require that the entire process start anew,

including ordering new ballots for the County, erasing and re-programming all of the voting machines' memory cards, re-testing all of the machines, and re-mailing military and absentee ballots. Respondents rely upon several Court decisions, including one only weeks old, holding that petitions for relief under the Election Law properly should be dismissed where, as here, if the Court were to entertain the merits of the petition, it would be impossible "to render meaningful relief in compliance with the Election Law." Matter of Hunter v. Orange County Board of Elections, 11 N.Y.3d 813 (2008); see, also Matter of Semple v. Laine, __ A.D.3d __, 2014 WL 5003885 (2nd Dept. 2014); Matter of King v. Board of Elections in City of N.Y., 65 A.D.3d 1060 (2nd Dept. 2009).

Moreover, respondent Board claims that its mailed October 9, 2014, letter to petitioner and others inviting them, pursuant to Election Law §7-130, to view and inspect the voting machines between 9:30 a.m. and 4:00 p.m., on October 20 through October 24, 2014, prior to their being shipped out to polling sites, and stating that sample ballots will also be available at that time, enables compliance with the time requirement set forth in Election Law section 16-104, subdivision 4, notwithstanding the Assistant County Attorney's candid admission during the Court's conference that this time period makes it extremely difficult, if not impossible, for any candidate to thereafter viably challenge the ballot given the complexities and approximate four week time-requirements of making any changes to an electronic ballot.

Nevertheless, it is respondents' urged positions that petitioner has self-created his problem of timeliness since petitioner has known through earlier litigation that this has been a vigorously challenged campaign, that he would be in third ballot position pursuant to his party's nominating petition, and that he could have requested as early as October 4, 2014,

to have seen the prepared ballot, which then was being mailed to military personnel, but that he had failed to do so.

In any event, aside from the alleged untimeliness, respondents further contend that the petition challenging the ballot substantively is without merit because the extant ballot complies with the Election Law and is valid in all respects. Citing Election Law section 7-116, subdivision (2), respondent Board argues that the Commissioners of the Board of Elections are charged with the responsibility of creating the ballot and establishing the order in which the candidates appear. They note, as supported by the Commissioners' submitted joint affidavit, that the Commissioners have agreed as to the form of the ballot. Respondents claim that it is the long established "custom and practice" of the Suffolk County Board of Elections to place candidates on the ballot in the order that they appear on the nominating petitions, as here has been done, that petitioner has acknowledged that he properly is in third party position based upon the nominating petitions, which the challenged ballot reflects, that overlapping minor party endorsements have necessitated the form of the subject ballot, and that not only does case law not hold that blank spaces on ballots must be eliminated, as argued by petitioner, cf. Harwood v. Dodd, supra, but that there has been prior judicial approval of a ballot such as that at bar which includes four columns for three vacancies and blank spaces. See Brown v. Degrace, 193 Misc.2d 391 (Sup. Ct. Nass. Co. 2002), affd. 298 A.D.2d 536 (2nd Dept. 2002) .

After long and deliberate thought, this Court is constrained under the rule of precedent to grant respondents' motions seeking dismissal of this petition, finding that the unrefuted evidence at bar demonstrates that, while the petition itself is not jurisdictionally untimely, upon consideration of the merits of same, it would be impossible to render

petitioner any meaningful relief given that Election Day now is just eleven days away. See Matter of Hunter v. Orange County Board of Elections, *supra*, 11 N.Y.3d 813; Matter of Semple v. Laine, *supra*; Matter of King v. Board of Elections in City of N.Y., *supra*. The petition accordingly is hereby dismissed.

Nevertheless, this Court makes the following observations. Firstly, irrespective of petitioner's argument that he had no duty to check the official ballot prior to October 20, 2014, as well as irrespective of whether petitioner could and should prudently have been more pro-active in his earlier seeking out review of the official ballot, the Board's mailing of its invitation to petitioner, on October 9, 2014, for him to inspect the voting machines and the ballot, commencing October 20th, while timely and in accordance with the requirements of Election Law section 7-130, as claimed by respondent Board, nevertheless, time wise, does not comport with the requirements of enabling proper judicial review of any proceeding that may have been desired to be brought challenging said ballot insofar as Election Law section 16-104, subdivision 4, requires that a final Court Order addressing the contents of a ballot pursuant to a brought proceeding "shall be made, if possible, at least five weeks before the date of the election." Applying this statutory 5-week time requirement, the Court should have entered its final Order on any formal challenge to the ballot five weeks prior to the scheduled election date, to wit, on or before September 30, 2014. Obviously, the instant matter, having been commenced on October 20, 2014, and made returnable on October 23, 2014, results in a gross departure from the time requirements set forth in section 16-104, subdivision 4.

The Court's second observation is that it is entirely inadequate to merely afford candidates the theoretical right to challenge a ballot's form while at the same time

necessarily denying any actual and meaningful way in which to obtain that review given the impossibility of granting any such relief in light of the actual demands of effective any changes to an electronic ballot. It is clear that current Election Law statutes need to be revisited and functional time periods must be implemented to afford candidates the right to challenge ballots in any meaningful way.

Finally, the Court notes that petitioner, pursuant to this Court's request, has proffered what appears to be a workable ballot which further adheres to Election Law section 7-104, subdivision (c)'s requirement that "[e]ach office shall occupy as many columns or rows on the machine as the number of candidates to be elected to that office," in this case three, as well as which further respects the custom and practice of placing candidates on the ballot in accordance with the nominating petitions. While the Commissioners' job of creating a ballot is merely ministerial, no one seriously can dispute that one's position on the ballot more times than not has a very real and pronounced effect on an election's outcome. With that in mind, the Commissioners always should endeavor to perform their duty, not simply to create what arguably is a legal ballot, but also a ballot which is fair to all candidates and not prejudicially configured.

In closing, the Court extends its gratitude to the parties for their professionalism and skill in presenting their respective arguments, having extended courtesies with respect to practice procedures and timely having addressed the Court's requests for further submissions.

Dated: October 24, 2014
White Plains, New York



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