

Eisen v Cuomo

2020 NY Slip Op 34357(U)

October 29, 2020

Supreme Court, Westchester County

Docket Number: 54542/2020

Judge: James W. Hubert

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Application of JOSHUA EISEN,

Petitioner,

For Judgment Pursuant to CPLR Article 78, Executive Law §28, Executive Orders 202, 202.2, 202.8, 202.13, 202.14 and 202.15 and Election Law Article 6,

-against-

ANDREW M. CUOMO, the GOVERNOR of the STATE OF NEW YORK, and PETER S. KOSINSKI (CO-CHAIR), and ANDREW J. SPANO, COMMISSIONERS, constituting the NEW YORK STATE BOARD OF ELECTIONS,

Respondents.
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Hubert, J.S.C.

Index No. 54542/2020

Respondent’s Motion to Dismiss
Petition pursuant to
CPLR §3211(a)(7)

DECISION and ORDER

Motion Seq. No. 2

Before the Court is the motion by the above captioned Respondents to dismiss the petition of the Petitioner Joshua Eisen, pursuant to CPLR §3211(a)(7). The petition before the Court seeks judgment pursuant to CPLR Article 78, Executive Law §28, Election Law Article 6 and various Executive Orders of the Respondent Governor Andrew Cuomo against the Respondents. Upon review of all of the submissions of the parties, and upon review of the applicable laws, it is the Court’s determination that the Defendants’ motion to dismiss is granted.

The Petitioner is a citizen of the State of New York and is in the process of seeking election to the United States Congress, New York District 17. He has sought appearance on the election ballot governing District 17 as an “ independent candidate,” i.e., a candidate that has not been designated, nominated or supported by a major, established political party.

As permitted under New York Election Law Article 6, Mr. Eisen began the process of

acquiring in-person (original) signatures from registered voters on his own designating petitions. As a prospective independent candidate he was required, by law, to collect a certain number of valid signatures (3,500), within a specific time frame (April 14, 2020 to May 26, 2020). The signatures had to be written (originated), in ink, by the signing person. The filing of said petitions had to occur no later than May 26, 2020.

However, the pandemic out-break of the COVID-19 illness necessitated intervention by the New York State Governor as to both petition signature totals and the time frame in which to acquire them. To handle the risk of disease exposure, to both registered voters and campaign workers who were tasked with collecting signatures, a series of executive orders (EOs) were issued by the Governor.

On March 29, 2020, EOs 202.12 and 13 modified the “political calendar” (the Board of Election document of dates for execution of necessary campaign activities by prospective candidates). Circulation of designating petitions, and filing of same, was suspended and postponed at that time. On April 7, 2020, the directives under Eos 202.12 and 13 were extended to May 7, 2020, and then again to June 27, 2020.

On June 30, 2020, the Governor issued EO 202.46. The new order opened the door to the resumption of signature collection, and extended filing time to July 30, 2020. In addition the order cut the number of signatures needed by prospective independent candidates to get on the ballot. For nomination as an independent, the required number of petition signatures would be the lesser of either 3.3% of the total number of votes cast for governor at the last gubernatorial election, or a number equal to 70% of the statutory minimum provided under subdivision 2 of section 6-142 of the election law.

The Petitioner raises numerous complaints about the rules, as written by State Legislators, that govern what steps an independent candidate must take to get on the ballot. For example, independent candidates are required to get more signatures on their designating petitions than their party supported competitors. They must also collect those signatures in a shorter time span. See, Election Law §§6-138 and 140 (1)(a).

The Court will not spend significant time enumerating and discussing all of the rules that independent candidates must follow in order to get on the voting ballot. The Petitioner himself acknowledges the fact that any claims (by an independent candidate) of a lack of equal protection under New York State election laws have been heard by the courts and rejected by the courts.

The United States Supreme Court has recognized that a state has a legitimate interest in limiting the names printed on a ballot to candidates who have demonstrated some degree of support. See, *Kuntz v. New York State Senate*, 113 F.3d 326, 327 (2d Cir. 1997); *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct 1970 (1971). Candidates who have won their party's primary have already demonstrated a substantial level of support, unlike independent candidates. *Kuntz, supra* at 328.

The situation that ultimately seems to have initiated the Petition in this case is a situation no one saw coming, i.e, the COVID-19 pandemic. Lacking assistance from the major party (who had chosen to support other candidates) the Petitioner put together his own group of supporters. However, what was ultimately at the core of his concern was the fact that his staff was exposed to a person who was infected with COVID-19. Some of his staff came down with the virus. The work in front of them was fraught with health risks and “derailed” their ability to go out and

collect original signatures.¹

The solution pleaded by the Petitioner in his Petition was for the Court to order his desired use of electronic signatures on his nominating petitions. Representing a complete departure from firmly established statutory law, it's not at all clear how the accumulation of electronic signatures would have been accomplished: remotely? in quarantine? by e-mail or text message?²

Some of what is before the Court may be said to be interesting. However, it is mostly ironic. The Court takes judicial notice of the fact that the Petitioner, through effort, acquired the needed signatures and is on the same ballot as his competitors. Thus the entire venture set forth herein by the Petitioner is moot. The motion of the Defendants is granted, and the petition is dismissed.³

Accordingly, it is hereby

ORDERED, that the motion of the Defendants in this matter is granted, and it is further ORDERED, that the Petitioner's petition is dismissed.

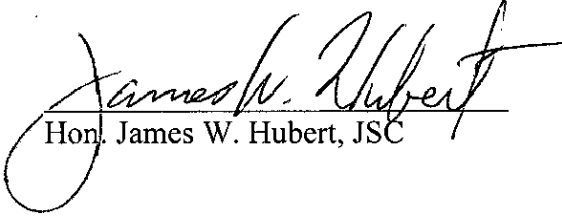
The foregoing constitutes the decision and order of the Court.

¹ In all fairness, the political party's candidate, who doubtlessly had more resources, likely had similar, if not identical, problems to those of the Petitioner.

² Not surprisingly, this deviation from the clear mandates of the election law, was to be the Petitioner's privilege exclusively. It was never so much as proposed that use of electronic signatures be extended to all candidates. Rules govern conduct. Conduct does not govern the rules. Convenience often makes life easier, It does not necessarily make it fair.

³ It is consistently argued by many that Courts do not (and should not) legislate. So be it. However, the courts do enforce the laws. So be that as well.

Dated: White Plains, New York
October 29, 2020



Hon. James W. Hubert, JSC