

Matter of Forman v Dutchess County Bd. of Elections

2020 NY Slip Op 35466(U)

November 12, 2020

Supreme Court, Orange County

Docket Number: Index No. EF006603-2020

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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In the matter of
PETER M. FORMAN,
Petitioner,

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,
JESSICA SEGAL, Candidate for the County Court Judge
in Dutchess County,
Respondents.

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

Index No. EF006603-2020

DECISION AND ORDER

Motion Date: November 12, 2020

For an ORDER, pursuant to §§ 16-102, 16-106, 16-112 and
16-113 of the Election Law, directing the preservation of all
ballots cast in the General Election held on November 3,
2020, for the public office of County Court Judge in
Dutchess County, and invoking the jurisdiction of the Court
to rule upon the casting or canvassing or the refusal to cast
or canvass any ballot as set forth in Election Law §
16-106(1), and preserving the rights of Petitioner under
Articles Five, Six, Seven, Eight, Nine, Ten, Eleven and
Sixteen of the Election Law and § 16-113 of the Election
Law and any / all related sections of law; and, pursuant to §
16-100 of the Election Law, as well as Article 78 CPLR and
CPLR § 3001, declaring Petitioner Candidate the lawfully
elected candidate in this Election and ordering the
certification of said Petitioner Candidate by Respondent
Board of Election.

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The Petitioner, Peter M. Forman, a sitting County Court judge in Dutchess County, New
York, commenced this proceeding to challenge certain aspects of the 2020 general election.

He submits an order to show cause seeking broad relief as to the entire election process,

including significant interim relief.

However, the order to show cause will not be signed, and the proceeding is dismissed.

Initially, as noted by the Petitioner, this proceeding should have been commenced in Dutchess County. *Election Law § 16-112*. However, the Petitioner asserts, that it was not commenced in Dutchess, and intentionally so, because he assumed that, given his status as a sitting judge, all other judges in the County would recuse themselves. This is mere speculation and in fact no such evidence of recusal has been submitted or is apparent from the petition or any of the supporting documentation.

In any event, and significantly so, according to unofficial results, the petitioner is currently the frontrunner in the election, to wit: He has 59,970 votes, and his opponent, the Respondent Jessica Segal, has 52,585. Thus, he is currently winning by 7,385 votes. Moreover, the number of votes yet to be counted has not even been revealed in the submissions.

Nevertheless, the Petitioner argues that immediate, emergency relief is needed, because, given the exigencies created by the COVID-19 pandemic, which resulted in an unprecedented number of paper ballots being cast, many of which are being sent via the mail, there may be issues with such ballots. Further, he alleges, he may be hindered in any subsequent challenge to the same. The Petitioner seeks declaratory and other extensive relief.

A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties. *CPLR 3001; Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d 774 [2nd Dept. 2013]. A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff. *Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d 774 [2nd Dept. 2013]. The dispute must be real, definite, substantial, and sufficiently matured so as to

be ripe for judicial determination. *Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d 774 [2nd Dept. 2013]. A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights. *Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d 774 [2nd Dept. 2013].

Further, in general, fundamental to the issue of standing, and this Court's authority to exercise jurisdiction, is that the petitioner must show "injury in fact," meaning that the petitioner will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761; *New York State Ass'n of Nurse Anesthetists v. Novello*, 42 N.Y.3d 207 (2004). The petitioner must have a legally cognizable interest that is or will be affected by the determination. *Glengariff Health Care Center v. New York State Dept. of Health*, 205 A.D.2d 626 [2nd Dept. 1994].

For a matter to be ripe for judicial review, it is necessary to first determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied. *Equine Facility, LLC v. Pavacic*, 155 A.D.3d 1033 [2nd Dept. 2017]. If the anticipated harm is insignificant, remote or contingent, the controversy is not ripe. *Equine Facility, LLC v. Pavacic*, 155 A.D.3d 1033 [2nd Dept. 2017]. A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. *Equine Facility, LLC v. Pavacic*, 155 A.D.3d 1033 [2nd Dept. 2017]. Ripeness is a matter pertaining to subject matter jurisdiction which may be raised at any time, including *sua sponte*. *Agoglia v. Benepe*, 84 A.D.3d 1072 [2nd Dept. 2011].

Finally, it is noted, the courts of New York do not issue advisory opinions for the fundamental reason that, in this State, the giving of such opinions is not the exercise of the judicial function. *Simon v. Nortrax N.E., LLC*, 44 A.D.3d 1027 [2nd Dept. 2007]. Thus, courts may not issue judicial decisions which can have no immediate effect and may never resolve anything. *Simon v. Nortrax N.E., LLC*, 44 A.D.3d 1027 [2nd Dept. 2007].

Here, the Petitioner has not articulated, with any degree or specificity, what policies, procedure or laws have, or are being, violated. Furthermore, he will not suffer any injury unless he loses the election. If he does not, this entire proceeding will be moot.

At this point, the potential for a loss, or for any unfairness in the vote counting, is purely speculative, as is any claim that, should that eventuality occur, the Petitioner will be prevented or hindered from obtaining proper review of the process.

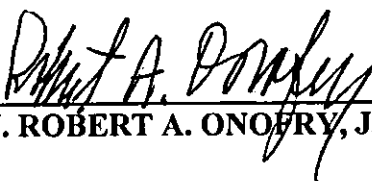
Thus, the Court will not sign the order to show cause, and dismisses the petition. This dismissal, however, is made without prejudice to the Petitioner to commence a proceeding in the proper venue should he lose the election.

Accordingly, for the reasons stated herein, and upon the Court's own motion, it is hereby, ORDERED, that the order to show cause is denied, and the proceeding is dismissed, without prejudice to renew as set forth herein.

The foregoing constitutes the decision and order of the court.

Dated: November 12, 2020
Goshen, New York

E N T E R


HON. ROBERT A. ONOFREY, J.S.C.