

Robinson v Butler

2021 NY Slip Op 31371(U)

April 20, 2021

Supreme Court, Kings County

Docket Number: 508146/21

Judge: Edgar G. Walker

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This opinion is uncorrected and not selected for official publication.

At the Special Election Part of the Supreme Court of the State of New York, County of Kings, on the 20th day of April, 2021.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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WILLIAM T. ROBINSON,

Candidate Aggrieved,

- against -

Index No. 508146/21

HENRY BUTLER,
Respondent Candidate,

-and-

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

For an Order Pursuant to Sections 16-100, 16-102, and 16-116 of the Election Law, Declaring Invalid the Designating Petition Purporting to Designate the Respondent(s)-Candidate(s) for the Public Office Party position of Member of the New York City Council, 36th City Council District, Kings County, New York State in the Democratic Primary, Election To be held on June 22, 2021, and to Restrain the Said BOARD OF ELECTIONS from Printing and Placing the Names of said Candidate(s) Upon the Official Ballots of Such Primary Election.

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The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

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Opposing Affidavits (Affirmations) _____

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Reply Affidavits (Affirmations) _____

In this special proceeding, brought pursuant to Article 16 of the Election Law, the petitioner William T. Robinson, candidate aggrieved, seeks an order declaring invalid the designating petition of the respondent-candidate Henry Butler purporting to designate him as a candidate for the public office of Member of the New York City Council, 36th District, Kings County, New York, in the Democratic Primary Election to held on June 22, 2021, and to restrain the respondent Board of Elections in the City of New York (Board) from printing and placing his name upon the official ballots of such primary election.

On April 8, 2021, petitioner commenced the instant invalidating proceeding by filing with the Clerk of the Court a verified petition, as well as a proposed order to show cause. Pursuant to the terms of the signed order to show cause, the respondent-candidate was served on April 7, 2021. Respondent-candidate thereafter filed and served a verified answer dated April 13, 2021, which, among other things, states, "AS FOR A THIRD DEFENSE, OBJECTION IN POINT OF LAW AND MOTION TO DISMISS," that the petition must be dismissed because petitioner lacks standing to bring this proceeding as he is not an aggrieved candidate as required by the Election Law, and that, "AS AND FOR A SIXTH DEFENSE, OBJECTION IN POINT OF LAW AND MOTION TO DISMISS," that the petition must be dismissed because petitioner fails to allege fraud with the requisite particularity as required by law.

On April 14, 2021, the parties remotely appeared on the return date of the order to show cause for the call of the Special Election Part's calendar that was held on the record. At that time, respondent-candidate orally moved to dismiss the petition on the ground that

the petition fails to state fraud with particularity and that the petitioner had failed to file a bill of particulars or offer of proof with respect to fraud allegations as required by the part rules for the court's special election part. During argument on this issue, the court noted that the Board's preliminary clerk's report with respect to petitioner's designating petition for his own candidacy had found that petitioner did not have enough valid signatures to be placed on the ballot. The court further noted that if the Board proceeded to invalidate petitioner's own designated petition, petitioner would not have standing to continue this proceeding as an aggrieved candidate. Since the Board, however, had not issued its determination relating to petitioner's own designating petition as of the time of the calendar call, the court adjourned the petition to April 15, 2021 to await the Board's ruling. The court, at that time, made no determination relating to respondent-candidate's motion to dismiss.

At the calendar call held on April 15, 2021, which was again held on the record, counsel for petitioner conceded that the Board had invalidated petitioner's designating petition. Counsel, however, argued that the court should adjourn this invalidating proceeding to allow petitioner time to commence a proceeding to validate his petition (*see* Election Law § 16-102 [2]; *Matter of Pell v Coveney*, 37 NY2d 494, 496 [1975]). Respondent-candidate opposed the request for an adjournment, asserting that once petitioner's designating petition was ruled invalid by the Board petitioner had no standing to continue the proceeding. Respondent-candidate also renewed his oral motion to dismiss based on petitioner's failure to plead fraud with particularity and his failure to file the bill of particulars and/or an offer of proof as required by the court rules. After denying petitioner's request to orally submit

his offer of proof to the court on the record, the court indicated that it intended to dismiss the petition based on lack of standing and that it considered this issue and respondent-candidate's motion to dismiss the petition on particularity grounds and based on the failure to file the bill of particulars and/or the offer of proof as fully submitted.

It is undisputed that, following the commencement of this proceeding, the Board invalidated petitioner's own designating petition as a candidate for the same office sought by the respondent-candidate. Petitioner therefor lost his status as an "aggrieved candidate" and no longer has standing to contest the respondent-candidate's designating petition (Election Law § 16-102 [1]; *see Matter of Cipriano v Graves*, 87 AD3d 636, 637 [2d Dept 2011]; *Matter of White v Bilal*, 21 AD3d 573, 574 [2d Dept 2005], *lv denied* 5 NY3d 824 [2005]; *Matter of Cocco v Moreira-Brown*, 230 AD2d 952, 953 [3d Dept 1996], *appeal dismissed & lv denied* 88 NY2d 971 [1996]; *Matter of Novak v Jones*, 19 AD2d 781, 782 [2d Dept 1963], *aff'd* 13 NY2d 883 [1963]). This court finds no legal basis that would allow the court to adjourn the proceeding during the time that petitioner has no standing as was requested by petitioner. Moreover, even if petitioner were to commence a validating proceeding--the success of which appears unlikely in view of the number of signatures petitioner would need the court to find valid in order to reverse the Board's determination--delaying this proceeding on the speculative ground that at some future date petitioner may be declared a candidate and again have standing is wholly inconsistent with the severe time constraints inherent in election law proceedings (*see Matter of Stavisky v Lee*, 142 AD3d 933, 933-934 [2d Dept 2016]; *see also Alloway v Bowlmor AMF Corp.*, 188 AD3d 1716,

1718 [4th Dept 2020]; *Jacob v Conway*, 150 AD3d 973, 974 [2d Dept 2017]). Accordingly, respondent-candidate is entitled to dismissal of the petition on standing grounds (*see Matter of Cipriano*, 87 AD3d at 637).

The court finds that the respondent-candidate is also entitled to dismissal of the petition based on his oral motion to dismiss premised on petitioner's failure to plead fraud with particularity and his failure to serve the bill of particulars or offer of proof required by the court part rules. Initially, the court finds that the allegations of fraud contained in the petition are conclusory, blunderbuss allegations that fail to satisfy the specificity requirements of CPLR 3016 (b) (*see Matter of Robinson v Edwards*, 54 AD3d 682, 683 [2d Dept 2008]; *Matter of Waugh v Nowicki*, 10 AD3d 437, 438 [2d Dept 2004], *lv denied* 3 NY3d 603 [2004]; *Matter of Wooten v Barron*, 242 AD2d 351, 352 [2d Dept 1997]; *Matter of O'Toole v D'Apice*, 112 AD2d 1078, 1078 [2d Dept 1985], *lv denied* 65 NY2d 607 [1985]). To the extent that the lack of specificity in the complaint may be made up by a bill of particulars or other means (*see Gale v Animal Med. Ctr.*, 108 AD3d 497, 499 [2d Dept 2013]; *see also Matter of Thomas v Eugene*, 41 Misc 3d 418, 421 [Sup Ct, Kings County 2013]; *Matter of Hayon v Carrion*, 41 Misc 3d 356, 359-360 [Sup Ct, Kings County 2013]), petitioner is barred from doing so now because of his failure to provide any such material by the time of the April 14, 2021 calendar call as required by the court part rules (*see Matter of Wooten*, 242 AD2d at 351; *Matter of Rivera v Ortiz*, 207 AD2d 516, 516-517 [2d Dept 1994]).

Counsel for petitioner, however, argues that he should not be bound by the requirements of the part rules because he was not aware of the rules. While these part rules were published in the New York Law Journal from March 16, 2021 through the return date, counsel asserts that he does not subscribe to the New York Law Journal and notes that these rules were not available on the court’s website. Nevertheless, counsel is an experienced Election Law attorney who has appeared in this court’s Special Election Part for many years, and the court’s present rules simply restate requirements that have been contained in the Election Part’s rules for at least 26 years (*see Matter of Wooton*, 242 AD2d at 351 [addressing similar special election part rules from Kings County]; *Matter of Rivera*, 207 AD2d at 516-517 [same]; *Matter of Thomas*, 41 Misc 3d at 420-421). Under these circumstances, the court finds that counsel must be deemed to have notice of the part rules in this regard, and is thus bound by them.

Conclusion

Based upon the foregoing, it is hereby **ORDERED** that the petition is dismissed.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

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