

Pacheco v Cline

2022 NY Slip Op 31664(U)

May 19, 2022

Supreme Court, New York County

Docket Number: Index No. 153244/2022

Judge: Arthur Engoron

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

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CARMEN PACHECO,	INDEX NO. <u>153244/2022</u>
Petitioner,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>002</u>

RAYMOND CLINE, BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion for REARGUMENT

Upon the forgoing documents and for the reasons stated hereinbelow, the motion of respondent-objector to reargue, pursuant to CPLR 2221, is denied.

Background

Petitioner-candidate Carmen A. Pacheco commenced this Election Law special proceeding by Order to Show Cause (“OSC”) dated April 16, 2022, and signed April 18, 2022, seeking an order validating a designating petition for herself as a candidate of the Democratic Party for Judge of the Civil Court of the City of New York from the 2nd Civil (Municipal) Court District, Borough of Manhattan, New York, Assigned Vacancy Number 18, in the Primary Election to be held on the 28th day of June 2022. NYSCEF Doc. No. 5. The validating proceeding was initiated in response to a written objection to Pacheco’s Designating Petition filed with respondent Board of Elections in the City of New York (“Board of Elections”) by an objector named Raymond W. Cline (see below). NYSCEF Doc. No. 1 ¶ 6.

Three other special proceedings address the same judicial vacancy: (1) an invalidating proceeding against Pacheco, Raymond Cline and David Fraiden v Carmen Pacheco, The Board of the Elections in the City of New York, Index No. 153241/2022; (2) an invalidating proceeding against the Designating Petition for candidate David Alan Fraiden, Jesus Salas v David A. Fraiden, Index No. 153321/2022; and (3) a validating proceeding for the Designating Petition of candidate Fraiden, David Alan Fraiden v Jesus Salas, Index No. 153349/2022.

On April 27, 2022, Cline’s attorney filed an answer with no affirmative defenses, counterclaims, or crossclaims. NYSCEF Doc. No. 7.

On Monday, May 2, 2022, virtual oral arguments were heard on all four matters. NYSCEF Doc. No. 27. At the start of those arguments this Court dismissed the invalidating proceeding against Pacheco, Index No. 153241/2022, for lack of jurisdiction. NYSCEF Doc. No. 20.

This Court during the virtual oral arguments made clear the matter was over. Accordingly, as there was no longer an active proceeding to *invalidate* Pacheco's petition, nor an invalidating determination from the Board of Elections, the motion to *validate* Pacheco's petition was denied as moot, and the case was properly disposed of with a Decision and Order dated May 2, 2022. NYSCEF Doc. No. 11.

A week later, on May 9, 2022, respondent-objector Cline filed a consent to change attorney in the instant matter (NYSCEF Doc. No. 12) and his new attorney promptly attempted to file an amended answer with a counterclaim and crossclaim seeking to invalidate Pacheco's petition (NYSCEF Doc. No. 13). Cline's new counsel also moved, pursuant to CPLR 2221, to reargue. NYSCEF Doc. No. 13. The motion to reargue was expressly directed not to this Court but to the Honorable Margaret Chan, J.S.C. NYSCEF Doc. Nos. 14 and 13 ¶ 4.

On May 12, 2022, petitioner filed a notice of rejection of the motion to reargue as untimely and improperly filed and a notice of rejection of the amended answer as being untimely filed as well as defective for failure to seek leave of court to interpose counterclaims and crossclaims. NYSCEF Doc. Nos. 23 and 24.

On Friday, May 13, 2022, a virtual conference call was held, at the request of plaintiff (NYSCEF Doc. No. 25), with counsel for respondent, counsels for petitioner, and petitioner in attendance. During that conference, counsel for respondent claimed the attempt to direct the instant motion to reargue to Justice Chan was in error.

Discussion

A motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221(e)(2).

In a Special Proceeding, the "court may permit such other pleadings as are authorized in an action upon such terms as it may specify." CPLR 402.

Election Law § 16-102 provides the exclusive remedy for seeking to remove a candidate from a ballot. See Matter of Ferguson v Cheeseman, 138 AD2d 852, 853 (3rd Dep't 1988) citing Matter of Scaringe v Ackerman, 119 AD2d 327, 328-329 (3rd Dep't 1986) aff'd 68 NY2d 885.

Election Law § 16-102(2) states: "A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later."

On the rare occasions when the courts have found leeway in the 14-days after filing or 3-days after determination time limit that Election Law § 16-102 lays out, courts have done so to facilitate validating, not invalidating, proceedings arising after a determination. The Court of Appeals articulated the logic simply: “Objectors, unlike candidates, have sufficient knowledge and information regarding the nature of the objections in order to enable them to commence a timely proceeding to invalidate designating petitions without the need to await a determination of the Board of Elections.” Matter of Bruno v Peyser, 40 NY2d 827, 828 (1976).

Pursuant to Election Law § 16-102, in the 2022 primary election cycle for the 2nd Civil (Municipal) Court District seat in question, the last day to institute a judicial proceeding was either Thursday, April 21, 2022, or three days after a Board of Elections hearing where a designating petition or candidacy was invalidated.

Election Law § 6-154(2) only provides that only a person enrolled to vote in an election district in which a candidate resides has standing to challenge a designating petition. See Matter of Luthmann v Gulino, 131 AD3d 636, 637 (2nd Dep’t 2015).

There seems to be confusion over respondent-objector’s name. The instant petition, based on a written objection filed with the Board of Elections, names as respondent “Raymond W. Cline” of 505 LaGuardia Place, New York, NY 10012. NYSCEF Doc. No. 1 ¶ 6. The first answer filed by respondent specifically admits petitioner’s allegation naming “Raymond W. Cline” as the objector, but also repeatedly refers to the respondent before the Court as “Raymond C. Cline.” NYSCEF Doc. No. 7. Respondent-objector’s amended answer and later affirmations in support of the instant motion state that the initial petition was captioned “incorrectly,” and that respondent and objector are the same and named “Raymond C. Cline.” NYSCEF Doc. No. 13. However, plaintiff’s counsel affirms that “no such voter in the 2nd Municipal District exists” as Raymond C. Cline. NYSCEF Doc. No. 26 ¶ 4. Adding to the confusion is fact the consent to change attorney form filed on behalf of respondent-objector, notarized by candidate David Alan Fraiden on May 7, 2022, refers repeatedly to a “Raymond C. Cline” in its text but is clearly and unmistakably *signed* by a “Raymond W. Cline.” NYSCEF Doc. No. 12.

Whether respondent is Raymond “W.” or “C.” Cline is relevant as, if there is only a Raymond W. Cline registered in the 2nd Municipal District then the Raymond C. Cline currently before this Court may not have had standing to object in the first place. Election Law § 6-154(2).

However, even if Raymond C. Cline had standing, that would not make up for the fact that he seeks to interpose a counterclaim and crossclaim simultaneously without leave of this Court, let alone of Justice Chan. Therefore, were reargument granted, the instant counterclaim and crossclaim would not properly be before this Court. See CPLR 402; Matter of Espinal v Sosa, 153 AD3d 819, 820 (2d Dep’t 2017); Matter of Aguirre v Hernandez, 131 AD3d 716, 717 (2nd Dep’t 2015); Matter of Williams v Rensselaer County Bd. Of Elections, 98 AD2d 938, 939 (3rd Dep’t 1983) dismissed 61 NY2d 737.

And even if the court *had* given leave to assert retroactively a counterclaim and crossclaim in a properly disposed of matter, the strict statute of limitations for election matters would bar them. As there was never a valid invalidating proceeding against Pacheco’s petition, the Board of

Elections never designated it invalid and, therefore, any judicial proceeding to do so had to be filed by April 21, 2022. Respondent’s answer and amended answer were both filed after that date.

Respondent’s counsel argues in reply that its crossclaim against Board of Elections was superfluous and should be ignored (and if it is not, asks this Court for retroactive leave to allow it). And, further, that the counterclaim should be allowed because, pursuant to CPLR 203(d), a “defense or counterclaim is not barred if at the time the claims asserted in the complaint were interposed.” Respondent argues CPLR 203(d) applies in a special proceeding by citing to a footnote in an election case in Nassau County where the court allowed crossclaims it deemed to be properly interposed counterclaims, but never reached their merits. Matter of MacKay v Johnson, 20 Misc.3d 1136(A) fn. 8 (Supreme Court, Nassau County, 2008) aff’d 54 AD3d 428.

That argument is unpersuasive. Unlike the counterclaims in MacKay, the counterclaim and crossclaim here were submitted *after* the case was already disposed. Further, and not insignificantly, the Court notes that election matters are special proceedings which, by their very nature, exist with strict time limitations so that matters can be adjudicated before ballots are determined, printed, and distributed. Respondent-objector’s attempt to assert belatedly a counterclaim and crossclaim after this matter was disposed, and then move to reargue through regular motion practice rather than through an OSC, demonstrates that this is a clear attempt to re-initiate an invalidating proceeding previously dismissed for lack of jurisdiction after the time for such a motion has passed.

Thus, were this Court to allow for reargument, respondent-objector’s attempt to instigate an invalidating proceeding would still be time-barred. See Matter of Keane Clark, 43 AD3d 639 (4th Dep’t 2007); Matter of Augustine v D’Apice, 153 AD2d 714 (2nd Dep’t 1989).

As respondent cannot present any matters of fact in support of the initial motion, his motion to reargue should be denied. This Court has considered respondent-objector’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, the motion of respondent-objector Raymond Cline to reargue is hereby denied.

<u>5/19/2022</u> DATE					ARTHUR ENGORON, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER			<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE