

Lynch v Duffy

2019 NY Slip Op 31198(U)

May 3, 2019

Supreme Court, Suffolk County

Docket Number: 02095-2019

Judge: David T. Reilly

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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, J.S.C.

INDEX NO.: 02095-2019

GEORGE P. LYNCH, as Citizen Objector,
Petitioner,

x Lawrence H. Silverman, Esq.
Attorney for Petitioner
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Commack, NY 11725

-against-

EILEEN M. DUFFY, purported candidate of the Democratic Party for the public office of Councilman of the Town of Southampton, SUFFOLK COUNTY BOARD OF ELECTIONS, ANITA S. KATZ, Commissioner of the Suffolk County Board of Elections, and NICK LALOTA, Commissioner of the Suffolk County Board of Elections, together constituting the SUFFOLK COUNTY BOARD OF ELECTIONS,

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Attorney for Respondent Eileen M. Duffy
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Respondents.

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In this special proceeding petitioner, George P. Lynch (Petitioner), a Citizen Objector, seeks an Order pursuant to Election Law §16-102 to invalidate the designating petition for respondent Eileen M. Duffy (Duffy) as a candidate of the Democratic Party for the public office of Councilman for the Town of Southampton at the primary election to be held on June 25, 2019.

According to the petition, and as confirmed by the return of the Suffolk County Board of Elections (BOE), on April 4, 2019, two documents were filed with the BOE. The first is identified as designating petition D19-24 which names, *inter alia*, Duffy as a candidate of the Democratic Party for the public office of Councilman for the Town of Southampton. The second designating petition, identified as D19-55, lists, *inter alia*, Duffy as candidate of the Democratic Party for the public office of Trustee for the Town of Southampton. (Emphasis supplied). Notably, the cover sheet to this later-referenced designating petition lists only four (4) trustee positions, rather than the five (five) positions listed on each of the sheets which comprise the designating petition. Conspicuously missing from the

cover sheet is Duffy's name and her candidacy for Trustee.

Petitioner claims here that an individual may not serve as a Town Councilman and Town Trustee at the same time and, therefore, by causing designating petitions to be filed for these incompatible offices, Duffy has committed election fraud. Petitioner also claims that Duffy is guilty of election fraud as voters were misled by the inclusion of candidates on her designating petition, D19-24, who did not consent to run together with her. Petitioner timely filed general and specific objections to designating petition D19-24.

The BOE's return shows that on April 8, 2019 Duffy filed a Certificate of Declination for the Democratic Party nomination for the public office of Trustee for the Town of Southampton. The BOE's supplemental return provides the April 26, 2019 minutes of a special meeting of the BOE in which a motion was offered finding the petitioner's specific objections insufficient and the designating petition naming Duffy as a candidate for the Public Office of Councilman, Town of Southampton (D19-24) valid. The motion failed by a split decision and as a result the designating petition was deemed valid.

On April 24, 2019, the original return date of this special proceeding, Duffy appeared and requested an adjournment in order to obtain counsel. In addition, the Court was advised that the BOE would issue its decision on the specific objections on or before April 29, 2018. Therefore, the matter was adjourned to that date.

On the adjourn date, Duffy appeared by counsel and submitted an answer with affirmative defenses which included, among other things, her claim that the papers which were served on her did not contain an index number. Accordingly, Duffy maintains that Petitioner violated CPLR 305(a) and claims a jurisdictional defect rendering the petition void. Duffy also argues that Petitioner failed to properly plead his fraud claim with sufficient specificity in violation of CPLR 3106. The Court reserved decision on Duffy's affirmative defenses and proceeded to a hearing on this matter.

During the hearing, John V. Bouvier and Andrew J. Brosnan testified on behalf of Petitioner. Each of the witnesses are seeking public office in the Town of Southampton, for Councilman and Trustee respectively, and their names were listed as candidates on the designating petition bearing Duffy's name for the position of Councilman (D19-24). Each witness stated that they did not give Duffy consent to place their names on that designating petition. Both Bouvier and Brosnan's names also appear as candidates on another designating petition filed with the BOE in which Duffy is listed as a Democratic Party candidate for the public office of Trustee (D19-55).

Mr. Bouvier served on the Southampton Democratic Party's screening committee and understood that Ms. Duffy was seeking the position of Trustee. At the Party's convention he recalls Duffy accepting the nomination as candidate for that position. Mr. Bouvier further recalls having conversations with David B. Mayer, another candidate who appears on both sets of petitions, in March 2019 where, the witness stated, he may have learned that Duffy was circulating a designating petition with her name listed for the public office of Councilman and not that of Trustee. Mr. Bouvier made no request of Duffy to remove his name from her designating petition.

Both Brosnan and Bouvier were credible witnesses despite their difficulties in recalling events which would have given them notice of Duffy's efforts to force a primary to be one of the Southampton Democratic Party's candidates for Councilman.

Ms. Duffy testified that she was invited by the Southampton Democratic Party's Chairman, Gordon Herr, to screen to be the organization's nominee for the public office of both Councilman and Trustee. She acknowledged that at the Party's convention she accepted its nomination for the position of Trustee. She is an elected Democratic Committeeperson and obtained a copy of the designating petition being circulated by the Southampton Democratic Committee. Duffy later determined that she would seek the Democratic Party's designation as its candidate for Councilman and cause a primary. She allegedly secured alternate designating petitions removing her name as a candidate for Trustee and inserting her name as candidate for Councilman. In doing so she removed the Democratic Party's other designated candidate's name, Craig Catalanotto, as a candidate for Councilman.

While Duffy admits that she did not publicize her efforts to force a primary against the organization's candidates, she did not conceal this fact either. Duffy was apparently concerned that the Democratic Party would canvass Southampton Town election districts and obtain signatures from the party faithful, thereby making her effort to obtain Democratic signatories more difficult. She claimed that approximately one quarter of the Southampton Town Democratic Committee knew she was seeking the Councilman designation. Ms. Duffy stated that she met with David B. Mayer and provided him with a copy of the petition she was circulating.

Duffy explained that she supported the candidates listed on her designating petition and wanted to gather signatures for them while she was collecting signatures for herself. She knew that if successful she would force a primary for the Southampton Democratic Party's candidates for Councilman. Duffy admits that she never sought the permission of the other candidates named on her designating petition to list their names together with hers.

Ms. Duffy testified that during the designating petition process, less than ten (10) voters she spoke to recognized the candidate's name for Southampton Town Supervisor, the incumbent Jay Schneiderman. She explained that she would advise perspective signers that she supported the candidates on her designating petition, but was forcing a primary for the public office of Councilman.

Duffy identified an email dated March 14, 2019 from the Southampton Town Democratic Committee wherein its Chairman advised the Committee members that Duffy was circulating her own designating petition for Town Council and that certain names of the party organization's candidates appeared along with her name. The Chairman stated in the email that these organization candidates did not give their permission for their names to be placed on Duffy's designating petition.

Ms. Duffy further testified that the order to show cause and verified petition which were served upon her did not have an index number, nor did the verified petition show the date of filing. Petitioner stipulated that the index number did not appear on either the order to show cause or the verified petition served on Duffy. Petitioner's attorney reviewed the papers served on Duffy and marked the request for judicial intervention (RJI) contained therein for identification. It was noted that the RJI

included the index number for the verified petition.

PERSONAL JURISDICTION

Petitioner's failure to include an index number or date of filing on the verified petition or order to show cause does not require dismissal of the proceeding absent demonstrable prejudice to respondent (*see Harris v Williams*, 264 AD2d 453, 694 NYS2d 144 [2d Dept. 1999]), *citing Matter of City of Amsterdam v Board of Assessors of the Town of Providence*, 237 AD2d 63, 667 NYS2d 493 [3d Dept. 1998]). In the instant matter, the record reveals that Petitioner purchased an index number, filed an order to show cause with verified petition annexed, which was signed by a Justice of the Supreme Court [Leo, J.] and was otherwise timely served upon Duffy. Accordingly, Petitioner's failure to affix the index number or, where necessary, the date of filing on the subject papers is excusable under the circumstances.

PLEADING FRAUD

Duffy claims that Petitioner's pleadings fail to plead fraud with sufficient specificity as required under CPLR §3016. That statute provides, at subsection (b),

Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

In *Waugh v. Nowicki*, 10 AD3d 437, 780 NYS2d 737 [2d Dept. 2004]) the Appellate Division sustained the trial court's dismissal of an Election Law case for failure to plead fraud with the requisite specificity. In that case the trial court noted that the entire petition contained 159 signatures and found that it would not be too burdensome for the petitioners to identify those signatures which were claimed to be fraudulent (*see Matter of Waugh v Nowicki*, 4 Misc.3d 1014(A), 798 NYS2d 349 [Sup. Ct., Nassau Cty. 2004]). Here, Petitioner alleges that each and every one of the 537 signatures collected were invalid by reason of the election fraud committed by Duffy when she included her name on the same designating petition with other candidates for public office without their knowledge or consent (*see* Court Exhibit I, Petition, ¶14).

Although not detailed in the body of the petition, Petitioner also alleges that Duffy committed election fraud when she caused her name to appear on two separate designating petitions as a candidate for two (2) incompatible offices. Petitioner incorporated in his petition by reference and attached thereto his specific objections filed with the BOE that contained the affirmation of Lawrence H. Silverman, Esq. which states in relevant part,

Upon information and belief, Eileen M. Duffy caused to be prepared and circulated for signatures Petition D19-24 after accepting the designation of the Southampton Town Democratic Committee for the public office of Trustee.

Upon information and belief, Eileen M. Duffy did not seek the consent of some or all of the candidates listed on Petition D19-24.

Upon information and belief, the voters of the Town of Southampton were deceived by the appearance of the candidates on Petition D19-24 into believing that they were supportive of the candidacy of Eileen M. Duffy for the public office of Councilman.

Upon information and belief, as a matter of law, Eileen M. Duffy cannot be a candidate for the Public Office of Councilman and Trustee simultaneously.

(see Court Exhibit 1, Petition, Specification of Objections, Attorney Affirmation).

The pleading requirements of CPLR 3016(b) apply to matters commenced pursuant to the Election Law (see generally *Waugh v Nowicki*, supra, at 437; *Eccles v Gargiulo*, 497 F.Supp. 419 (EDNY 1980)). In the case at bar, many of the facts and circumstances of the alleged fraud are uniquely within the knowledge of Duffy. It is her alleged actions, or those authorized by her, which constitute the claims of fraud that were clearly placed at issue by Petitioner. The Court finds, based upon the foregoing, that the petition provided Duffy with the notice of the fraud claim(s) in a manner sufficient for her to be able to defend against them.

PETITIONING FOR INCOMPATIBLE OFFICES

It is well settled that one may not simultaneously run for two public offices where one would be precluded from holding both offices at the same time (see *Matter of Lutfy v. Gangemi*, 35 NY2d 179, 359 NYS2d 273 [1974]; *Lawrence v. Spelman*, 264 AD2d 455, 694 NYS2d 143 [2d Dept. 1999]). Here, no proof was offered by either side that the positions of Councilman and Trustee in the Town of Southampton are incompatible. In Duffy's verified answer, however, there appears to be an acknowledgment of the issue, but she claims the issue is moot (see Court Exhibit 1, Duffy Answer, ¶23-24). Since the matter was not contested the Court deems the two offices as incompatible.

With respect to fraud, the Court notes *Matter of Lutfy v Gangemi*, where the candidate attempted to run in all 25 election districts as a County Committeeman, but knew that he could only serve in one district (see *Matter of Lutfy v. Gangemi*, 45 AD2d 939, 359 NYS2d 319 [2d Dept. 1974, Shapiro and Benjamin, JJ., dissenting]). The Court of Appeals later held in *Matter of Lutfy v Gangemi*,

Since this multiplicity of inconsistent candidacies has been properly recognized as injurious to the rights of the electorate, and described as fraudulent and deceptive, and because here the multiplicity of inconsistent candidacies for the County Committee was intentional, the dissenters at the Appellate Division were correct in concluding that respondents' designating petitions should fail entirely

(see *Matter of Lutfy v Gangemi*, 35 NY2d 179, 182, 359 NYS2d 273 [1974]).

Prior to the Court of Appeals decision in *Matter of Lufty*, where there was a timely declination of one of the two offices being sought, courts had allowed the candidate to run for the remaining office (see *Trongone v O'Rourke*, 68 Misc. 2d 6, 324 NYS2d 620 [Sup. Ct. NY Cty, 1971], *aff'd* 37AD2d 763, 324 NYS2d 295 [1st Dept. 1971]). In *Trongone* the trial court noted,

Equating the instant case to [*Matter of Ryan v Murray*], even if it is considered that the method indulged in by the respondent was an artifice or device which could be construed as deception or fraud of the enrolled members of the party, he should have the right to present his candidacy to the electorate. He has properly declined to run in one part and has secured valid signatures entitling him to run in the other. To hold otherwise would deprive the electorate of both parts from expressing their wishes by their ballots as to whether they would want him as a leader in either district and virtually leave the primary uncontested.

Courts in the absence of statute, should not undertake to decide political questions, but should leave such matters for determination of the proper party tribunals. Nor are decisions which deprive the electorate of the opportunity to express its preference favored if by a liberal construction of the law and facts, an election can be held

(see *Id.*, at 8).

However, in *Lawrence v Spelman* (264 AD2d 455, 694 NYS2d 143 [2d Dept. 1999]), the candidate respondent filed designating petitions for County Committeeman and judicial office. The Appellate Division, Second Department struck the candidate's name from both primary ballots citing *Matter of Burns v. Wiltse* (303 NY 319 [1951]) and *Matter of Lutfy v. Gandemi* 35 NY2d 179 [1974]) and explained,

Such a prohibition allows electors to "know that, when the choice is made and legally declared, the object for which the election was held has been accomplished, and that there is no legal obstruction in the way to prevent their will ... from becoming effective" [internal citations omitted]. An election involving the situation presented here, "would be illusory and sham if not an actual fraud upon the electorate and should not be permitted" [internal citations omitted].

In addition, the Appellate Division, Second Department held in *Richardson v. Luizzo* (64 AD2d 942, 408 NYS2d 532 [2d Dept. 1978]),

A fraud was committed on the enrolled voters of the party when the names of various candidates were placed on the designating petition without their consent. The petition was misleading in that it suggested that the various candidates listed together intended to run together (see *Matter of Lutfy v. Gandemi*, 35 NY2d 179). Consent may not be implied merely from the fact that the nonconsenting candidates were party members. Furthermore, the consenting candidates who do not wish to serve should not be burdened with the obligation of submitting a declination once they learn of their

candidacies

(*Id.*, at 943).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds that Duffy was a credible witness. She is a novice political candidate and seemingly became uncomfortable with the Trustee candidacy being offered to her by the Southampton Democratic Party. Respondent decided on her own to run for Councilman and secured an alternate designating petition, removing one candidate for Councilman and inserting her name. Duffy further removed her name as a candidate for Trustee and inserted another name in her stead. She and others then circulated this designating petition.

There is no proof that Duffy or her agents intentionally mislead the enrolled party members when collecting signatures for her designating petition (D29-24). Duffy claims she told prospective signers that she supported the other candidates on the designating petition and wanted to force a primary for the position of Councilman.

In the case at bar, there is no egregious conduct as was found by the Court of Appeals in *Matter of Lufty*, but rather this Court views the situation as Duffy having a change of heart early in the petition process. Why Duffy waited till April 4, 2019 to formally decline the Trustee position is unknown to the Court. The Court cannot determine based upon the record before it whether Duffy was unsure if there were enough signatures to place her on the primary ballot for Councilman and maintained her candidacy for Trustee until the declination was filed to, in a sense, “hedge her bet.”

Duffy admitted that she did not receive consent from the other candidates appearing on her designating petition prior to them being circulated. There was no evidence that Duffy was ever asked to remove a candidate’s name from her designating petition. It is clear that the Town Chairman knew about Duffy’s designating petition being circulated and the organization’s candidate’s lack of consent, but chose to do nothing at that time.

Notwithstanding Duffy’s claims to the contrary, the candidates named on her designating petitions received no benefit from the filing of her petition. Each of these candidates appeared on the organized party’s designating petition which were filed separately and never joined in this proceeding (*see* Court Exhibit 1, BOE Return).

In a case lacking in the audacious conduct found in *Matter of Lufty* (35 NY2d 179 [1974]), this Court questions whether there exists an avenue for a candidate who timely declines on one designating petition for public office to remain on the second designating petition for public office. On the facts presented in this proceeding, the Court finds that the law simply does not provide such an opportunity. The Court of Appeals in *Matter of Lufty* held,

...[T]he voters who signed the offending petitions must be assumed to have been

misled as to the candidates' intentions to serve as their representatives if designated and subsequently elected at the primary. Moreover, the petitions were misleading in suggesting that the various candidates listed intended to run together.

* * *

Thus, the petitions must be considered to have been permeated with the defect intentionally introduced into them by the circulators and those candidates who participated in the circulation

(*Id.*, at 182).

Petitioner presented clear and convincing evidence that Duffy knew her name appeared on two (2) separate designating petitions for two (2) incompatible public offices. Duffy failed to decline the designation for Trustee during virtually the entire designating petition circulation process and, therefore, knowingly allowed the enrolled voters to be misled as to which of the offices she was truly seeking. There is presumption on these facts that Duffy misled the enrolled voters of the Democratic Party and she failed to rebut this presumption by public action and/or filings in such a manner as to prevent election fraud. While her declination for Trustee was timely under the Election Law, that filing does nothing to extinguish the election fraud Duffy committed, intentionally or unintentionally, upon the enrolled voters during the circulation of the designating petitions.

Therefore, based on the above, it is

ORDERED the petition is granted and designating petition D19-24 is determined to be invalid and void.

This constitutes the decision and Order of this Court.

Dated: May 3, 2019
Riverhead, New York



DAVID T. REILEY
JUSTICE OF THE SUPREME COURT

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION