

Hill v. Markowitz, No. 640-9-08 Wncv (Toor, J., Oct. 17, 2008)

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STATE OF VERMONT
WASHINGTON COUNTY, SS

<p>CRAIG HILL, Plaintiff</p> <p>v.</p> <p>DEBORAH MARKOWITZ, Defendant</p>	<p>SUPERIOR COURT Docket No. 640-9-08Wncv</p>
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is brought by Craig Hill, a member of the Green Party of Vermont, seeking placement of his name on the November ballot as a candidate for the House of Representatives.¹ A hearing was held on October 8 at which Hill and representatives of the Secretary of State's office testified. The parties were given until today to file any further memos of law.²

Findings of Fact

¹ The case was originally filed by Hill on behalf of the entire Green Party. After the court required the Party to obtain counsel pursuant to Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 159 Vt. 454 (1992), Hill moved to substitute himself individually as plaintiff. Thus, the relief available became limited to relief for him as opposed to relief for the entire party.

² Defendant submitted a motion for summary judgment prior to the hearing. Given the need for a speedy resolution of the case, the evidentiary hearing was held and the parties agreed that the court would rule based upon the evidence presented rather than ruling on the motion.

The court finds the following facts to be established by a preponderance of the evidence. The Green Party failed to comply with 17 V.S.A. § 2313, which requires that a party seeking to be on the November ballot file its certification of officers with the State within ten days of the first meeting of the party's state committee. The meeting took place on November 10, 2007, but the certification was not filed until January 11. Thus, the Secretary of State's Office rejected the certification. This was made clear by letter to Mr. Hill dated February 8, 2008. Exhibit F. Hill acknowledges receipt of the letter.

In addition, the evidence is clear that the certification filed by the Green Party would not have been adequate even if it had been filed on time. The statute requires that the party filings include certifications that (1) the party has the required number of town committees organized, and (2) the party "substantially complied with" the provisions of the statute. 17 V.S.A. § 2313. The form filed by the Green Party lacked both certifications. Exhibit E.

Hill is representing himself, and thus the legal claims he is asserting are less than clear in his papers. However, the gist of it appears to be a claim of estoppel based on what he asserts were misrepresentations by an employee of the Secretary of State's office. First, Hill testified that he was in regular contact with David Crossman at the office, and was assured by Crossman that certain deadlines required by statute were not hard and fast requirements. In particular, Hill testified that he asked Crossman what would happen if the form showing that a particular town committee had been organized was filed late, and was told that it would still be accepted. Hill therefore suggests that he assumed he did not need to worry about other time deadlines in the statute. Hill also testified, however, that he "you could say lazily" did not get the form in on time, and that he had forgotten about the form until another member of the party mentioned in

January that there seemed to be some problem with the party's' registration. Hill then "looked in my file and there it was and I had not turned it in." Hill offered no explanation for the fact that the late-filed form was also inadequate because it lacked the two required certifications

Hill's second argument is that the following exchange occurred with Crossman: Hill turned in proof of the party having organized in eleven towns (the statute requires at least ten for a minor party) and then said to Crossman "so we're going to be on the ballot?" Crossman said "yes, unless you have any changes in your by-laws." Because the party was not changing any by-laws, Hill says, he assumed they would be on the ballot.

Hill also testified that the reason he did not file this lawsuit until September 26, days before the distribution of the ballots to towns, was that although he had been told by the Secretary of State's office back in February that he could go to court to try to get the party on the ballot, he needed to wait for some "triggering event" such as the election coming up.

Kathy DeWolfe, the Director of Elections, also testified. Her credible testimony established the following. The Green Party successfully met all the requirements to be on the ballot in 2004 and 2006. In January of this year, she personally told Hill that the party could not be placed on the ballot because of the failure to file the required form back in November. However, she also told him that the party could seek a court order to get on the ballot. She subsequently drafted the February letter to Hill confirming the office's position.

The Secretary of State's office is required to get all the ballots to the towns thirty days before the election. Over 450,000 ballots were printed this year. The printing deadline was September 17, and many ballots were already distributed by September 29. Many overseas and

absentee ballots – those for 163 towns – have also already been distributed. An error on the Burlington ballots required a reprinting of those ballots on September 30 but those corrected ballots were all redistributed by October 6 and 7. Because Hill seeks a statewide office, all ballots for the entire state would have to be reprinted now to place him on the ballot. The cost would be in the neighborhood of \$250,000, assuming one of the few printers who print optical scan ballots could even be found with time to print them. Moreover, despite the failure of the Green Party to get on the ballot, Hill could have gotten on the ballot as an independent candidate.

DeWolfe and Crossman both deny telling Hill that he should wait until a “triggering event” to file a lawsuit. The court finds them credible. The court does not find Hill to be lying, but believes that he misinterpreted something he was told, perhaps about past court orders allowing individuals to get added to the voting rolls on the day of the election or something similar.

Legal Conclusions

The problems with Hill’s argument are several. First, the court finds that Hill’s testimony does not establish that the delay in filing the certification form was because of reliance upon anything Crossman said. Instead, the evidence is that Hill merely forgot about filing the required form until reminded by a colleague almost two months later. Moreover, it would have been unreasonable for Hill to make the leap from any assurance that some deadlines can be stretched to assuming that he could file a statutorily required form almost two months late.

Second, Hill could have filed this action back in February when he was first advised that the party was not going to be on the ballot. Instead, he waited until the eleventh hour, when the

ballots have all been printed and distributed and voting is already occurring. There is no legitimate reason for Hill to have waited until the last minute to bring this lawsuit. Had he done so back in February or March, the equities might have weighed in favor of placing him on the ballot. However, at this point ballots have already been distributed – and presumably some have already been returned – and reprinting of the ballots would cost \$250,000 to the taxpayers. It would also be likely to lead to voter confusion and possibly miscounting of ballots from those who have already obtained or returned their ballots.

The doctrine of laches applies here to bar Hill’s claim. That doctrine essentially states that the failure to act to enforce a right for an unreasonable period of time, leading to prejudice to the other party, makes it inequitable to enforce that right. Petition of Vermont Electric Coop., Inc., 165 Vt. 634, 635 (1994). Laches has been held to bar similar claims in other election cases. *See, e.g., Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990)(finding laches when petition was not filed until three weeks before election); Dobson v. Dunlap, 2008 WL 4273200 *5, __ F. Supp. 2d __ (D. Me. Sept. 16, 2008) (“the prejudice to the Secretary in stopping the printing presses is manifest”); Harris v. Purcell, 973 P. 2d 1166, 1169 (Ariz. 1998)(“In election matters, time is of the essence because disputes concerning election and petition issues must be initiated and resolved, allowing time for the preparation and printing of absentee voting ballots”); Liddy v. Lamone, 919 A. 2d 1276, 1288 (Md. 2007) (“injunctive relief may be inappropriate in an elections case if the election is too close for the State, realistically, to be able to implement the necessary changes before the election”).

Given the late date, the problems and the expense that would be created by changing the ballots at this late date, and the lack of any justification for the delay, the balance of equities falls

heavily against Hill here. *Accord*, Duenas v. Guam Election Comm’n, 2008 WL 111302 *5 (Guam Jan. 2, 2008) (“Courts are more likely to find a lack of diligence and the existence of prejudice when a party waits to file until the eve of an election, especially if absentee voting has already begun”); Farnum v. Burns, 548 F.Supp. 769, 774 (D.R.I. 1982) (“equitable principles may require a court not to interfere with the conduct of rapidly upcoming elections where the election machinery is already in gear”). The court finds Hill’s claim barred by laches.

Even if his claim were not barred by laches, Hill could not succeed here. What Hill seeks is to estop the government from applying the statutory requirements for listing on the ballot. Estoppel requires, among other things, reliance by the party seeking it. In re Lyon, 2005 VT 63 ¶ 17, 178 Vt. 232. As noted above, the court did not find Hill’s claim of reliance to be convincing. Instead, the court finds that the error in not filing the form in time was unrelated to any advice from Mr. Crossman. Moreover, even if the evidence had established that the delay was based upon such reliance, Hill offered no explanation for the fact that the late-filed form was inadequate because it lacked the two required certifications. Finally, because Hill seeks estoppel against the government, he would also have to show that “the injustice that would ensue from a failure to find an estoppel sufficiently outweighs any effect upon public interest or policy that would result from estopping the government...” *Id.*, ¶ 17. *See also*, Cold Brook Fire Dist. v. Adams, 2008 VT 28 ¶ 7, ___ Vt. ___ (“We will apply estoppel against a government entity... only in rare cases.”). This he cannot do, given the late hour and the burden that would be imposed upon the entire election process were Hill to obtain the relief he seeks.

Order

The petition of Craig Hill to be added to the statewide ballot as a candidate for the House

of Representatives is denied. Judgment will be entered for Defendant.

Dated at Montpelier this 17th day of October, 2008.

Helen M. Toor
Superior Court Judge