

Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT I. CALORAS Emergency Part EPM
Justice

JAMES C. QUINN, a/k/a JIM QUINN,

Petitioner,

- against -

ANDREW M. CUOMO, Governor of the
State of New York; NEW YORK STATE
BOARD OF ELECTIONS; NEW YORK CITY
BOARD OF ELECTIONS; and NEW YORK CITY
CAMPAIGN FINANCE BOARD,

Respondents.

Index
Number 705011 2020

Motion
Date May 15, 2020

Motion Seq. No. 1

FILED & RECORDED
MAY 18 2020
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this application by petitioner for an order 1) declaring the portion of an order issued by respondent Andrew M. Cuomo, Governor of the State of New York (Cuomo), to wit: Executive Order 202.23, which canceled the June 23, 2020 Special Election for Queens Borough President, to be unauthorized, unconstitutional, and invalid; 2) enjoining respondents Governor Cuomo and the New York State Board of Elections from cancelling the June 23, 2020 Special Election for Queens Borough President, and reinstating the same; 3) granting a preliminary injunction and temporary restraining order against the portion of Executive Order 202.23 that cancelled the June 23, 2020 Special Election for Queens Borough President; and 4) granting a preliminary injunction and temporary restraining order against the Campaign Finance Board's demand that, consistent with the challenged Executive Order cancelling the Special Election, Quinn immediately withdraw from the ballot and return the public funds for which he qualified.

Papers
Numbered

Order to Show Cause - Pet. -Affs - Exhs.....	EF 3-12
Answering Affidavits - Exhibits.....	EF 13,15
Reply Affidavits.....	EF 17-19

Upon the foregoing papers it is ordered and adjudged that the application is denied, and the petition is dismissed.

The instant petition is brought by James C. Quinn a/k/a Jim Quinn (hereinafter "Quinn"), who seeks an order from this court as more fully set forth above.

On January 1, 2020, Former Queens County Borough President, Melinda Katz, vacated that office upon being sworn-in as the Queens County District Attorney. Pursuant to the New York City Charter, the next day, January 2, 2020, Mayor Bill de Blasio declared a Special Election for Queens Borough President to take place on March 24, 2020. The winner of that Special Election would serve as the Queens Borough President immediately upon being elected until December 31, 2020. A primary was scheduled for June 23, 2020, to select each party's nominee for the November 2020 general election. The nominees from the primary would proceed to the general election in November 2020. The winner of the November 2020 general election would serve as Queens Borough President from January 1, 2021 to December 31, 2021, when Melinda Katz's underlying term would have come to an end. Pursuant to section 81 (e) of the New York City Charter, the Special Election was to be held by popular vote regardless of party affiliation.

On or about March 3, 2020, the New York State Legislature amended Article 2-B § 29-a of the Executive Law to expand respondent Governor Andrew M. Cuomo's (hereinafter Governor Cuomo) powers to combat the current COVID-19 pandemic. According to that amended statute, the governor "by executive order, may issue any directive during a state disaster emergency declared" during an "epidemic" or "disease outbreak." Paragraph two of § 29-a lists the "standards and limits" applicable to any suspension or directive issued by the governor. In particular, any "suspension order or directive shall provide for the *minimum deviation* from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary." [Emphasis added].) On March 7, 2020, Governor Cuomo, pursuant to Section 28 of Article 2-B of the Executive Law, issued Executive Order 202 declaring a state of emergency in New York State until September 7, 2020.

On or about March 16, 2020, Mayor De Blasio issued Emergency Executive Order No. 100 that "canceled the Special Election to be held on March 24, 2020 to fill the vacancy in the Office of Borough President of Queens and elect a Borough President to serve until December 31, 2020. This order shall not affect the primary and general elections scheduled pursuant to my January 2, 2020 proclamation of election."

However, on or about March 29, 2020, Governor Cuomo issued Executive Order No. 202.13, which restored the Special Election for Queens Borough President and scheduled it to take place on June 23, 2020, when a number of other elections were also to take place, including the primary for the position of Queens Borough President to determine the candidate who would run in the general election in November 2020.

On or about April 24, 2020, in light of continuing concerns caused by the pandemic, Governor Cuomo issued Executive Order 202.23 canceling the June 23, 2020 Special Election for the office of Queens Borough President, and directing that "such office shall be filled at the general election." The Executive Order left in place the June 23, 2020 primary for the Office of Queens Borough President, as well as the general election for that position in November 2020.

The cancellation of the Special Election on April 24, 2020 ordered by Governor Cuomo was intended to minimize the threat to the health and safety of New York voters and election workers. This action was part of an overall effort to "flatten the curve" of the spread of the virus by reducing the crowds on election day and enable "social distancing" policies. These terms have become part of the general lexicon surrounding the pandemic response.

Petitioner was one of six candidates who had secured a place on the June 23, 2020 Special Election ballot for the position of Queens Borough President. However, for whatever reasons, or perhaps by his own decision, petitioner Quinn did not secure a place on the primary ballot. Consequently, Quinn maintains, should the Special Election not take place, he will have lost his opportunity to serve as Queens Borough President for the sixth-month term that will expire December 31, 2020. For this reason, petitioner seeks to re-institute the cancelled June 23, 2020 Special Election.

Petitioner brought this proceeding on May 8, 2020, fifteen (15) days after the April 24, 2020 cancellation of the Special Election. The matter was made returnable before the court on May 14, 2020. Named as respondents in this proceeding are Governor Cuomo, the New York State Board of Elections, the New York City Board of Elections and the New York City Campaign Finance Board. However, none of the other five candidates for the Special Election were named in the instant petition.

In this special proceeding, petitioner requests both preliminary and declaratory relief. By his own arguments, petitioner is requesting this court to grant relief more in the nature of a permanent or mandatory injunction. "The equitable principles and scope of review for a preliminary injunction and a permanent injunction remain the same." (*Rossito-Canty v Cuomo*, 86 F Supp 3d 175, 201 [EDNY 2015].) In any request for an injunction, a movant must demonstrate irreparable harm, and in the case of a mandatory injunction where the court is asked to compel action, there must be a showing of a clear and substantial likelihood of success on the merits. Finally, the court must consider the equitable considerations, which include a balance of hardships to each party. (*Id.*) Injunctive relief is not however, "an absolute right, but an extraordinary remedy to be granted or withheld by a court of equity in its exercise of discretion." (*Kane v Walsh*, 295 NY 198, 205 [1946]; *See, Gerges v Koch*, 62 NY2d 84 [1984].)

This Court held an extensive hearing on May 14, 2020, wherein counsel for petitioner and for respondents were heard. The immediacy of this proceeding is premised on the contention of the New York City Board of Elections that ballots and voting machines must be prepared and mailings made within days of this Court's determination if the Special Election is reinstated. It is for this reason that Election matters take precedence overall other Civil matters. (22 NYCRR 202.64 [b].) At the hearing, and in his submissions to the court, petitioner argues that Governor Cuomo violated Executive Order 202.23, in that the "suspension order or directive shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary." Here, petitioner argues that the action taken in cancelling the Special Election was far from a "minimum deviation" and that action was not in fact "necessary."

Petitioner further argues that the cancellation was not "minimum" action in light of the impact that it had upon him. The cancellation, he contends, impedes his Constitutional rights of speech and free association under the First and Fourteenth amendments. Indeed, under New York Law, the State Constitution's equal protection guarantee is as broad in its coverage as that of the Fourteenth Amendment. (*Golden v Clark*, 76 NY2d 618 [1990].) New York law recognizes that where an individual's fundamental rights are burdened, the State must advance a "compelling interest" and its actions must be narrowly tailored to serve that purpose. (*Id.*) Petitioner relies heavily on the recent decision in *Yang v Kellner* (2020 WL 2129597; 2020 U.S. Dist LEXIS 9331; —F Supp 3d — [SDNY May 5, 2020]), wherein it was held that the right to participation in an election is indeed fundamental. This court must then consider whether the allegedly "minimum" action taken was narrowly tailored so as to advance a compelling state interest.

Moreover, petitioner argues, Governor Cuomo's actions were far from minimal, and were not necessary, in that other protective social distancing measures could have been taken. Petitioner maintains that Governor Cuomo had other, readily available, crowd control measures, including scheduling the Democratic Primary and Special Election on different dates, or further expanding or mandating the use of absentee ballots. These more modest procedures would have had far less impact on the community and the petitioner. Petitioner also argues that the cancellation was not necessary insofar as the number of COVID-19 cases has dropped significantly, and, that even as of April 24, 2020, the declining numbers demonstrated that cancellation of the election was unwarranted. Furthermore, at the hearing, there was no dispute that the procedures put in place for the June 23, 2020 election to minimize the chances of spreading COVID-19 could have been extended to any additional voters in the Special Election. In this instance, it is the opinion of this Court that the respondent Governor's action went well beyond what was

necessary under the circumstances, thereby burdening petitioner's fundamental rights. (See, *Rossito-Canty v Cuomo*, *supra*.)

The court will consider the impact upon petitioner by Governor Cuomo's actions absent an injunction, including petitioner's loss of the opportunity to run in the Special Election. Petitioner relies on the analysis of *Yang*, in that candidates' associational rights are improperly impacted when voters are unable to exercise the right to vote. This court concurs with that Court's reasoning that where, are here, a petitioner loses their place on the ballot, there are no damages that can fully compensate that loss. Petitioner has demonstrated the harm occasioned by Governor Cuomo's actions. However, it was petitioner's own actions by which he ran only in the Special Election, and not the Primary, which must be taken into consideration of the hardship he now claims to have suffered.

Finally, the factor that must be satisfied before injunctive relief can be granted is a balancing of the equities, including the public interest. It has long been held that injunctive relief is a drastic remedy and must be exercised within the sound discretion of the; court. (*Lexington & Fortieth Corp. v Callaghan*, 281 NY 526 [1939] and see generally, *Merkos L'Inyonei Chinuch v Sharf*, 59 AD3d 403 [2009]; *Icy Splash Food & Beverage*, 14 AD3d 595 [2005].)

As this application was made well after the April 24, 2020 order cancelling the Special Election was issued, it appears that this petition was instituted after the finding in *Yang* appeared favorable. Granting petitioner's relief in light of his own delay results in hardship to the respondents and is well outside the expeditious measures set forth in the Election Law.

The difficulties that would be presented to respondent New York City Board of Elections as a result of petitioner's delay are considerable. The Board must produce ballots and meet other requirements now, so as to be prepared for the entire June 23, 2020 election. The Board would be compelled to prepare for the Special Election by making technical adjustments to voting machines, incurring the costs of producing separate ballots for the Special Election, mailing approximately 460,000 absentee ballots to voters would not otherwise participate in the primary election, mailing approximately 1.2 million notices of the Special Election to Queens voters, and making the other required publications and mailings. Aside from creating great expense, this could well result of voter confusion, which in itself, is violative of the very intent and purpose of the Election Law. While similar concerns for the burdens placed upon the State were all but dispensed with in *Yang*, this Court finds the time constraints, logistical difficulties and public expenses incurred by reinstating the Special Election to be of significant import.

In addition, indirectly affected by this delay are the five other candidates who might well have intervened in this proceeding to have their interests heard if given notice.

These other candidates have been aware, since April 24, 2020, that the Special Election was cancelled and in the interim, have certainly adjusted their campaigns in reliance thereon. Re-instituting the Special Election at this late stage, approximately 5 weeks prior to the June 23, 2020 election, would likely result in a hardship that borders on unfairness. Insofar as a determination in this matter must be made immediately to afford the New York City Board sufficient time to prepare ballots and voting machines, the ability of the other candidates to intervene or be heard at this stage is now all but non-existent.

The court is not unmindful of the facts and circumstances here that are distinguishable from those in *Yang*. Initially, the Special Election will serve only to fill a non-legislative and non-executive position for a period of approximately six months. Moreover, the Mayor has already duly-appointed an individual to function in this role until an election takes place. This is clearly unlike *Yang*, where the import of cancelling a Presidential Primary election would have excluded large numbers of delegates from the 2020 Democratic Party Convention. Furthermore, this Court cannot ignore the fact that, as Governor Cuomo's order to cancel the election indicates, by bringing more people into the polling places on June 23, 2020, there is an enhanced chance that more people will contract and spread COVID-19.

The determination whether to grant injunctive relief depends "not only on the party seeking it, as well as the appropriateness of its issuance in the circumstances in which it was sought." (*Gerges v Koch, supra* at 446.) In evaluating the instant circumstances, the Court finds that the totality of the equities balance in favor of the respondents, and that reinstatement of the Special Election during this pandemic emergency, which continues to date, is not warranted. Accordingly, the application for injunctive relief is denied.


The fourth branch of the petition which seeks that this court issue an injunction against the Campaign Finance Board's demand that Quinn immediately withdraw from the ballot and return the public funds for which he qualified, is denied. Petitioner's remaining issues with the Campaign Finance Board may be addressed in any further application by petitioner as he may deem necessary.

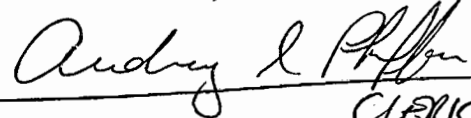
In light of the foregoing, any requests set forth in the Memorandum submitted by respondents Cuomo and the New York State Board of Elections are denied as moot.

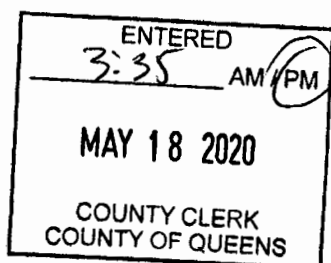
It is hereby

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: May 18, 2020


Robert I. Caloras, J.S.C


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