Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Argued - May 26, 2020

MARK C. DILLON, J.P.
HECTOR D. LASALLE
FRANCESCA E. CONNOLLY
ANGELA G. IANNACCI, JJ.

2020-03910 DECISION & ORDER

In the Matter of Dao Yin, et al., appellants,
v Andrew M. Cuomo, etc., et al., respondents.

(Index No. 705013/20)

Aaron Foldenauer, New York, NY, for appellants.

Letitia James, Attorney General, New York, NY (Anisha S. Dasgupta and Matthew W. Grieco of counsel), for respondent Andrew M. Cuomo.

James E. Johnson, Corporation Counsel, New York, NY (Devin Slack, Stephen Kitzinger, and Elina Druker of counsel), for respondent Board of Elections in the City of New York.

In a proceeding, inter alia, for a judgment declaring that so much of Executive Order (Cuomo) No. 202.23 (9 NYCRR 8.202.23) as canceled the June 23, 2020, special election for the office of Queens Borough President is invalid, the petitioners appeal from an order and judgment (one paper) of the Supreme Court, Queens County (Robert I. Caloras, J.), entered May 18, 2020. The order and judgment denied the amended petition and dismissed the proceeding.

ORDERED that on the Court's own motion, the proceeding is converted into an action for a declaratory judgment and injunctive relief, the order to show cause is deemed to be the summons, the amended petition is deemed to be the complaint and a motion for summary judgment on the complaint and declaring that so much of Executive Order (Cuomo) No. 202.23 (9 NYCRR 8.202.23) as canceled the June 23, 2020, special election for the office of Queens Borough President is invalid, and the opposition papers of the respondent Andrew M. Cuomo are deemed to be a cross motion for summary judgment dismissing the complaint insofar as asserted against him and declaring that so much of Executive Order (Cuomo) No. 202.23 (9 NYCRR 8.202.23) as canceled

the June 23, 2020, special election for the office of Queens Borough President is valid (*see* CPLR 103[c]); and it is further,

ORDERED that the order and judgment is modified, on the law, by deleting the provision thereof, in effect, dismissing the declaratory judgment cause of action, and adding thereto a provision declaring that so much of Executive Order (Cuomo) No. 202.23 (9 NYCRR 8.202.23) as canceled the June 23, 2020, special election for the office of Queens Borough President is valid; as so modified, the order and judgment is affirmed, with one bill of costs to the respondents.

On April 24, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202.23 (9 NYCRR 8.202.23; hereinafter the Executive Order), one of many executive orders issued by the Governor in response to the growing concern over the spread of the coronavirus disease 2019 (hereinafter COVID-19) in this state. The Executive Order, among other things, canceled the special election which was to be held for the office of Queens Borough President on June 23, 2020 (hereinafter the special election), and directed that such office be filled at the general election. The petitioner Dao Yin, who was one of the candidates who had secured a place on the special election ballot, and the petitioner Jay Lee, a registered voter, commenced this proceeding seeking, inter alia, a judgment declaring that so much of the Executive Order as canceled the special election is invalid. The petitioners argued, among other things, that the Governor lacked the statutory authority to cancel the special election. The petitioners also sought a permanent injunction enjoining the cancellation of the special election. The Governor opposed the petition and argued, inter alia, that in response to the concerns presented by COVID-19, the canceling of the special election was a valid exercise of his authority under Executive Law § 29-a. In an order and judgment entered May 18, 2020, the Supreme Court denied the amended petition and dismissed the proceeding.

We note that although the petitioners commenced this matter as a special proceeding, the relief that they sought is cognizable only in an action (*see* CPLR 103[b]; *Matter of Baba Makhan Shah Lobana Sikh Ctr., Inc. v Singh*, 115 AD3d 948, 949). Accordingly, we exercise our authority pursuant to CPLR 103(c) to convert the proceeding into an action for a declaratory judgment and injunctive relief, and we deem the order to show cause to be the summons, the amended petition to be the complaint and a motion for summary judgment on the complaint and declaring that so much of the Executive Order as canceled the special election is invalid, and the Governor's opposition papers to be a cross motion for summary judgment dismissing the complaint and declaring that so much of the Executive Order as canceled the special election is valid (*see Matter of Baba Makhan Shah Lobana Sikh Ctr., Inc. v Singh*, 115 AD3d at 949).

We agree with the Supreme Court's determination, although for reasons different from those relied upon by the court. Under the particular circumstances of this case, the Governor established his prima facie entitlement to judgment as a matter of law. Contrary to the petitioners' contentions, the Governor demonstrated, prima facie, that the canceling of the special election, which would have been held pursuant to New York City Charter § 81, was the minimum deviation necessary to assist or aid in coping with the COVID-19 pandemic, and was authorized pursuant to the emergency powers granted to the Governor by Executive Law § 29-a(1). Additionally, to the extent that New York City Charter § 81 required the special election to be held, pursuant to the language of Executive Order (Cuomo) No. 202.3 (9 NYCRR 8.202.3), those provisions of the New

York City Charter have been suspended (*see Matter of Council v Zapata*, ___ AD3d ___, 2020 NY Slip Op 02750 [2d Dept]). In any event, we agree with the court insofar as it found that the doctrine of laches applied here given the petitioners' delay of more than two weeks between the issuance of the Executive Order on April 24, 2020, and the filing of the petition on May 11, 2020, as that delay, if the petitioners were successful on the merits, would cause irreparable disruption to the ability of the Board of Elections in the City of New York to timely organize the special election, significant costs to the taxpayers, and disruption to other candidates who have been relying upon the Executive Order in the conduct of their campaigns (*see Matter of Gerges v Koch*, 62 NY2d 84, 94-95; *cf. Matter of Master v Pohanka*, 44 AD3d 1050, 1052). In opposition, the petitioners failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The petitioners' remaining contentions either are without merit or have been rendered academic in light of our determination.

Since this is now, in part, a declaratory judgment action, the order and judgment must include a provision declaring that so much of the Executive Order as canceled the special election is valid (*see Lanza v Wagner*, 11 NY2d 317, 334).

DILLON, J.P., LASALLE, CONNOLLY and IANNACCI, JJ., concur.

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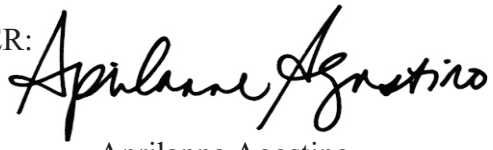

Aprilanne Agostino
Clerk of the Court