

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
KATHERINE R. DUFFUS
PRESIDING JUDGE - CHANDERY



COURTHOUSE
ELIZABETH, NEW JERSEY
07207-6001

March 27, 2019

David L. Minchello, Esq.
Rainone Coughlin Minchello, LLC
555 US Highway One South, Suite 440
Iselin, NJ 08830

Louis Rainone, Esq.
Rainone Coughlin Minchello, LLC
555 US Highway One South, Suite 440
Iselin, NJ 08830

Jarrid Kantor, Esq.
Antonelli Kantor, PC
1000 Stuyvesant Ave., Suite 1
Union, NJ 07083

Daniel Antonelli, Esq.
Antonelli Kantor, PC
1000 Stuyvesant Ave., Suite 1
Union, NJ 07083

RE: Linden Democratic Committee and Paul Coates v. City of Linden and City of Linden Municipal Council

Docket No: UNN C-19-19

Dear Counsel:

Councilwoman Michelle Yamakaitis resigned from the Eighth Ward council seat on December 28, 2018 to assume the responsibilities as President of the Council. The City Clerk wrote to the Democratic Committee requesting a list of three nominees on December 31, 2018. The Linden Democratic Committee submitted a list of three nominees, including Plaintiff Mr. Coates to the City Council on January 15, 2019. On January 15, 2019, the Linden City Council adopted Resolution No. 2019-73, stating that former Councilwoman Yamakaitis' seat would be kept vacant. On February 6, 2019, the Linden Democratic Committee appointed Plaintiff, one of the three nominees, as the 8th Ward Council member. Plaintiff was immediately sworn in by Senator Scutari. On February 8, 2019, the

City Attorney, David Antonelli Esq., sent a letter referring to the resolution and denying a request to seat Mr. Coates.

Plaintiffs brought this action in the Chancery Division to declare Mr. Coates the Eighth Ward Councilman, declare Resolution No. 2019-73 void ab initio, to enjoin the defendants from keeping the seat open, granting Mr. Coates access to City Hall as well as all books and records and prohibit any interference therewith. They contend that Linden did not fail to act but affirmatively acted to prevent the vacancy from being filled.

The court denied the initial application for temporary restraints on February 14, 2019 and set the return date for the Order to Show Cause. The court heard argument and this opinion follows:

Plaintiffs argue the denial of the February 14, 2019 temporary restraints was incorrect and urge that the restraints be imposed. Plaintiffs argue that N.J.S.A. 40A:16-11 specifically prohibits the vacancy that the City of Linden resolved to maintain. Plaintiffs further contend the ruling of the court allows a majority to allow a Governing Body to leave a seat formerly held by a minority party member vacant and increase its majority.

In its March 11, 2019 brief plaintiffs concede defendants have a right to decline to fill a vacancy under N.J.S.A. 40A:11-5. They contend N.J.S.A. 40A:16-11 is applicable where, as here, the governing body fails to fill the vacancy.

In order to obtain injunctive relief, a party must show that first, absent a preliminary injunction, the party will suffer irreparable harm, second, the claim is based upon a settled legal right, third, the party has a reasonable probability of ultimate success on the merits and the facts are uncontroverted, and fourth, that the party will suffer the greater hardship if injunctive relief is denied than the opponent will if it is granted. Crowe v. De Gigia, 90 N.J. 126, 132-35 (1981).

Plaintiffs must first prove the failure to issue a preliminary injunction would cause irreparable harm. Ibid. Harm is considered irreparable if it cannot be redressed adequately by monetary damages. Id. at 133. Plaintiffs assert that without injunctive relief, Plaintiff Coates and his constituents would be disenfranchised and that such harm would be irreparable. The court agrees. The right to be properly represented is a right vital to the citizens of Linden. Plaintiff will suffer irreparable harm if their candidate Mr. Coates is not seated.

Second, Plaintiff must now convince the court that they have a reasonable likelihood of success on the merits.

The parties agree there are two statutes at issue.

N.J.S.A. 40A:16-5 provides:

Whenever a vacancy occurs as provided in N.J.S.A. 40A:16-3 in the office of a mayor or in the membership of the governing body of a municipality holding general elections, the vacancy shall be filled in the following manner:

a. if the vacancy occurs any time subsequent to September 1 of the next-to-the last year and up to the expiration of the term of the officer whose office has become vacant, the office may be filled for its unexpired term by appointment by the governing body as hereinafter provided;

b. if the vacancy occurs at any other time, the vacancy shall be filled for its unexpired term at the next general election to be held not less than 60 days after the occurrence of the vacancy. The governing body may fill the vacancy temporarily by appointment as hereinafter provided.

The parties agree section b is applicable.

N.J.S.A. 40A:16-11 provides:

If the incumbent whose office has become vacant was elected to office as the nominee of a political party, the municipal committee of the political party of which the incumbent was the nominee shall, no later than 15 days after the occurrence of the vacancy, present to the governing body the names of three nominees for the selection of a successor to fill the vacancy. The governing body shall, within 30 days after the occurrence of the vacancy, appoint one of the nominees as the successor to fill the vacancy. If the governing body fails to appoint one of the nominees within the time prescribed herein, the municipal committee that named the three nominees shall, within the next 15 days, appoint one of the nominees as the successor to fill the vacancy, and such person shall be sworn in immediately. If the municipal committee which nominated the incumbent fails to submit the names of the nominees within the time prescribed herein, the governing body may, within the next 15 days, fill the vacancy by the appointment of a successor from the same political party which had nominated the incumbent whose office has become vacant.

"The words and phrases of the statute should have the same meaning throughout the statute in the absence of a clear indication to the contrary." Poswiatowski v. Standard Chlorine Chem. Co., 96 N.J. 321, 329-30 (1984).

N.J.S.A. 40A:16-5b provides that the vacancy shall be filled for the unexpired term at the next general election. The governing body may fill the appointment pending the next general election "as hereinafter provided." ²What follows thereafter is N.J.S.A. 40A:16-11.

In N.J.S.A. 40A:16-11 the Legislature provides when as here, the incumbent was the nominee of a political party, the political party shall present three names within 15 days to the governing body. Thereinafter within 30 days "the governing body shall . . . appoint," one of the three names. If they fail to do so the municipal committee shall appoint one of the three names.

² emphasis added to statutes

It is clear that the Legislature knows the difference between the words may and shall. There is an apparent tension between the use of the word "may" in N.J.S.A. 40A:16-5 and "shall" in N.J.S.A. 40A:16-11. "May" manifests the discretionary nature of the authority of the governing body to appoint or not appoint an interim successor. Galloway Twp. Republican League v. White, 171 N.J. Super. 576 (App. Div. 1982). Here the Linden Municipal Council did not appoint and instead passed a resolution to keep the seat vacant. Plaintiffs argue that when the governing body has failed to act under N.J.S.A. 40A:16-5, then N.J.S.A. 40A:16-11 comes into play. Defendants disagree.

The court will look to the legislative history of the 1990 Amendment to NJSA 40A:16-11. If there is ambiguity in the statutory language that leads to more than one plausible interpretation, courts may turn to "legislative history, committee reports, and contemporaneous construction." Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004).

The legislative history of the 1990 Amendment to N.J.S.A. 40A:16-11 refers to the fact that the governing board cannot prevent an appointment.

Under [the former] law, within 30 days of the occurrence of such a vacancy, the governing body of the municipality has the option of selecting one of the three persons recommended to fill the office by the municipal committee of the political party that nominated the incumbent. If the governing body does not choose one of the persons recommended within the allotted time period, the office remains unfilled until the next election.

This bill requires the municipal governing body, within thirty days of the occurrence of the vacancy, to select one of the three persons recommended by the municipal committee. The bill removes the ability of the remaining members of the governing body to preserve the vacancy and allow the governing body to be composed of fewer members than the law authorizes.

Assembly statement to Bill 2592 (1990); Senate statement to Assembly Bill 2592 (1990).

The statutory scheme provides that if the governing body leaves a vacancy under N.J.S.A. 40A:16-5 the municipal committee shall act pursuant to N.J.S.A. 40A:16-11 to fill the vacancy. The court finds the Linden Democratic Committee and Mr. Larken have demonstrated there is a substantial possibility of success on the merits.

Thirdly, Plaintiffs must convince the court that material facts are not in controversy. The facts as to resignation, the council's actions and the committee's actions are not in dispute. Defendants have questioned whether the notice was sent to all seventy-two members of the Linden Democratic Committee. They have produced three certifications, one from an affidavit from Councilwoman Cleadel Way, representing Ward Four, a second affidavit from Ms. Danie Orelan and a third from Mr. James Larken, all stating that they had not received notice of the meeting, that they would have attended had they received notice, and that they would have voted against Mr. Coates. In response, Plaintiff submits

certifications of Mr. Nicholas Scutari, Chairman of the Linden Democratic Committee, and Mr. Kurt Sigmund, Mr. Scutari's aide. Mr. Scutari did not contact the community board. He certifies there are seventy-two seats, but that there are five vacancies. Mr. Sigmund certifies he contacted Committee members by phone, text message, and email address, including that he left a voicemail for Ms. Way on February 4, 2019. Twenty committee members met and all voted for Mr. Coates.

The Constitution and by-Laws of the Linden Democratic Committee provide that the parliamentary rules of order and Roberts Rules of Order control. As a result, all active members of the committee should have been noticed. Roberts' Rules Article VIII, § 47. The certifications of Mr. Scutari and Mr. Sigmund are contradicted by the certifications of Ms. Way, Ms. Orefin and Mr. Larkin.

There are significant facts in dispute, thus barring the court from entering a restraining order at this time. However, the court believes the dispute is as to one issue which can be resolved in short order by way of a plenary hearing.

Defendant contends that the Council may maintain a vacancy, citing Galloway v. While 171 N.J.S. 576(1980). Galloway dealt with N.J.S.A. 40 A:16-5. It did not rule with regard to the 1990 amendment and N.J.S.A. 40 A:16-1.

The fourth Crowe factor is whether that the moving party will suffer the greater hardship if injunctive relief is denied than the opponent will if it is granted. Crowe, 90 N.J. 135. Mr. Coates has been appointed by the Committee and has been prevented from taking his seat. Plaintiffs argue this is effectively disenfranchising citizens of the Eighth Ward. Defendants claim that it would be detrimental to the City if Mr. Coates were seated, because he would then be able to vote on resolutions and because the Council was within its right not to seat him. The court finds the balance of the hardships weigh in favor of the Plaintiff.

There shall be a Case Management Conference on April 2, 2019 at 11:45 a.m. to discuss the schedule of the hearing.

Very Truly Yours,



Hon. Katherine R. Dupuis, P.J.Ch.

KRD/dw

ORDER PREPARED BY COURT

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GENERAL EQUITY PART
UNION COUNTY
DOCKET NO.:UNN-C-19-19

LINDEN DEMOCRATIC COMMITTEE
AND PAUL COATES, JR.,
Plaintiff,

Vs.

CITY OF LINDEN AND CITY OF
LINDEN MUNICIPAL COUNCIL,
Defendant.

CIVIL ACTION

ORDER

FILED

MAR 27 2019

KATHERINE R. DUPUIS
P.J.Ch.

THIS MATTER having been before the Hon. Katherine R. Dupuis, P.J.Ch., on March 19, 2019 by way of order to show cause, with David L. Minchello, Esq. and Louis Rainone, Esq. appearing on behalf of the plaintiffs and Jarrid H. Kantor, Esq. and Daniel Antonelli, Esq. appearing on behalf of the defendants and for good cause shown existing for entry of this order.

IT IS ON THIS 27 DAY OF MARCH, 2019

1. Plaintiffs' application for injunctive relief is denied without prejudice.
2. There will be a plenary hearing on the issue of notice to the Committee Members.
3. There will be a case management conference on April 2, 2019 at 11:45 AM.



HON. KATHERINE R. DUPUIS, P.J.Ch.