

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1100 CD 2020

IN RE: MOTION FOR INJUNCTIVE RELIEF OF NORTHAMPTON COUNTY
REPUBLICAN COMMITTEE

Appeal of: NORTHAMPTON COUNTY REPUBLICAN COMMITTEE

BRIEF FOR APPELLEE NORTHAMPTON COUNTY BOARD OF
ELECTIONS

Appeal from the Order of November 3, 2020 in the Northampton County Court of
Common Pleas at No. C-48-CV-2020-6915.

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I. ORDER IN QUESTION

AND NOW, this 3rd day of November, 2020, upon consideration of the oral motion of the Northampton County Republican Committee to Enjoin the Northampton County Board of Elections from disclosing the identity of cancelled ballots during pre-canvassing, and upon consideration of the arguments presented thereon, it is hereby ordered that the motion for injunctive relief is hereby DENIED.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

This matter is an appeal from an order of a trial court involving an election law matter. The “scope of review in election contest cases is limited to examination of the record to determine whether the trial court committed errors of law and whether the court's findings were supported by adequate evidence” Dayhoff v. Weaver, 808 A.2d 1002, 1005 n. 4 (Pa. Cmwlth. 2002).

The standard of review on appeal from the grant or denial of a preliminary injunction does not require an inquiry into the merits of the controversy. City of Reading v. Firetree, Ltd., 984 A.2d 16, 22 (Pa. Cmwlth. 2009) (citations omitted). Rather, the appellate court examines the record to determine if there was any apparently reasonable grounds for the action of the court below. Id. The appellate court will only interfere with the decision of the trial court if it is plain that no

grounds exist to support the decision of the trial court or that the rule of law relied upon was palpably erroneous or misapplied. Id.

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the trial court correctly deny a motion for injunctive relief filed by a political party to restrain a county board of elections from disclosing information concerning voters whose ballots were set aside during the pre-canvass of the November 3, 2020, General Election to political parties because the political party failed to show irreparable harm and the disclosure was in accordance with law?

Suggested Answer: Yes.

IV. STATEMENT OF THE CASE

This is an appeal from an order of the Northampton County Court of Common Pleas dated November 6, 2020, which denied the motion for injunctive relief applied for by the Northampton County Republican Committee.

A. Procedural History

On November 3, 2020, the Northampton County Republican Committee presented an oral motion in the Northampton County Court of Common Pleas “to enjoin the Northampton County Election Board and/or pre-canvassing operation from disclosing to the parties or anyone else information prior to 8:00 p.m. [November 3, 2020] concerning ballots that were set aside during the pre-canvass process as being...non-legitimate votes because of whatever reasoning, including

the most common, which was naked ballots, also signing secrecy envelopes.” (N.T. 54). Counsel for the Northampton County Board of Elections and Pennsylvania Democratic Party appeared. No testimony was offered. Guidance provided via e-mail dated November 2, 2020 from Jonathan M. Marks, Deputy Secretary for Elections and Commissions, was entered into evidence. The trial court entered an order denying the Northampton County Republican Committee’s motion.

B. Prior Determination of the Trial Court

On November 3, 2020, the trial court entered an Order denying the Northampton County Republican Committee’s Motion for Injunctive Relief at Northampton County Docket No. C-48-CV-2020-6915.

C. Name of Judge Whose Determination is to be Reviewed

Honorable Michael J. Koury, Jr.

D. Statement of Facts

On November 2, 2020, Jonathan M. Marks, Deputy Secretary for Elections and Commissions, issued guidance via e-mail which stated:

The Department of State has been asked whether county board of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters whose absentee and main-in [sic] ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or main-in[sic] ballots are rejected by the county board for reasons unrelated to voter

qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of election should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

(Order of Court dated November 5, 2020, p. 2). The Northampton County Board of Elections began its pre-canvass on November 3, 2020 at 7:00 a.m. Pursuant to this guidance, the Northampton County Board of Elections provided lists of names, addresses, and reasons for ballot rejection to representatives from both political parties. Ballots were set aside during the pre-canvass for various reasons pursuant to the Election Code, such as failing to have a secrecy envelope (naked ballot), having improper writing on the secrecy envelope, or not having a completed declaration.

The pre-canvass ended at approximately 6:30 a.m. on Wednesday, November 4, 2020. No further disclosures of information regarding voters whose ballots were set aside were made subsequent to 8 p.m. on Election Day. No political party requested the disclosure of information after 8 p.m. on Election Day.

V. SUMMARY OF ARGUMENT

Northampton County Board of Elections adopts the position of the trial court with respect to the Northampton County Republican Party's failure to satisfy its burden to prevail on a request for preliminary injunctive relief. The Northampton

County Republican Party failed to offer any evidence that it would suffer irreparable harm or that the injunction sought would not harm other parties.

This matter is not ripe for decision. The Northampton County Republican Committee can challenge a provisional voter who was notified as a result of the information disclosed during the pre-canvass on the basis that disclosure of the information was not proper. The Election Code provides a remedy for the issues raised by the Northampton County Republican Committee.

Disclosure of the information of voters whose ballots were set aside during the pre-canvass does not violate the Election Code. The Northampton County Republican Party failed to establish how the disposition of a ballot constitutes a “result” contemplated by the Election Code.

VI. ARGUMENT

The Northampton County Board of Elections incorporates by reference and adopts the Pennsylvania Rule of Appellate Procedure 1925(a) Statement issued by Judge Koury on November 5, 2020, as if the same were set forth fully herein. The Northampton County Republican Committee failed to create an evidentiary record which would permit it to obtain preliminary injunctive relief. In fact, the only evidence offered at the November 3, 2020 hearing before the trial court was the guidance issued by Jonathan Marks on November 2, 2020. The Northampton County Republican Committee did not create any evidentiary record to support its

claims. On this basis alone, the Northampton County Board of Elections respectfully requests that this Court dismiss the appeal and affirm the decision of the trial court.

The Pennsylvania General Assembly authorized county boards of election to conduct a “pre-canvass” of mail-in and absentee ballots. The “pre-canvass” is defined as:

[T]he inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602. The pre-canvass is permitted to start at seven o’clock A.M. on Election Day. 25 P.S. § 3146.8(g)(1.1). “No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls. Id.

The polls closed at 8:00 p.m. on Election Day. The Northampton County Board of Election’s pre-canvass ended at approximately 6:30 a.m. on November 2, 2020. The Northampton County Board of Election’s canvass of all votes began on November 6, 2020, at 9:00 a.m. There is no live controversy for this Court to address, and this matter is not ripe. The Northampton County Republican Committee has an adequate remedy at law under the Election Code.

Pursuant to the guidance issued by the Department of State, a voter whose ballot is set aside or cancelled because of a defect – such as a “naked ballot” or missing declaration – is permitted to cast a provisional ballot if notified of the cancellation of the mail-in or absentee ballot. Provisional ballots are not reviewed until the canvass pursuant to 25 P.S. §3050(a.4). Representatives of political parties and candidates are permitted to challenge provisional ballots. Id. Representatives of the Northampton County Republican Committee have the opportunity to challenge provisional ballots during the canvass. Since there is an adequate remedy under the Election Code, injunctive relief is improper. See Starkey v. Smith, 283 A.2d 700, 701 (Pa. 1971) (holding that there is no cause of action cognizable in equity when the Pennsylvania Election Code provides an adequate remedy).

The disclosure of the information concerning voters whose ballots were set aside during the pre-canvass is not a “result” as contemplated by 25 P.S. §3146.8(g)(1.1). The word “result” is not defined in the Election Code. However, the definition of pre-canvass set forth in 25 P.S. §2602(q.1) is instructive for what the legislature intended by the word “result.” The definition of pre-canvass specifically excludes “the recording or publishing of the votes reflected on the ballots.” Id. There is no reference to the disposition of individual ballots in the definition of pre-canvass.

Reading the prohibition of “recording or publishing the votes reflected on the ballots” as set forth in the definition of pre-canvass along with the prohibition of disclosure of any “portion of the results” set forth in 25 P.S. §3146.8(g)(1.1), it appears the legislature wanted to ensure that no vote totals were released prior to the close of the polling places. The legislature did not intend to prohibit the disclosure of information pertaining to the disposition of individual ballots during the pre-canvass; it would have said so if it did.

The Court must interpret the Election Code in a constitutional manner. The Court should also construe the Election Code in a manner which favors the right of voters to vote. Permitting the disclosure of information at issue during the pre-canvass to permit voters an opportunity to cure a defective ballot lawfully supports the right of voters to cast a vote in an election. The guidance issued by the Secretary of the Commonwealth on November 2, 2020 gives voters a due process right to cure their ballot subject to challenge under the Section 3050 of the Election Code. The Northampton County Republican Committee cannot establish that Section 3146.8 prohibits the disclosure of information regarding voters whose ballots are set aside during the pre-canvass.

VII. CONCLUSION

The Northampton County Board of Elections respectfully requests that this Court affirm the decision of the trial court entered on November 3, 2020, which

denied the Northampton County Republican Committee's oral motion for injunctive relief.

Respectfully Submitted,

Date: 11/06/2020

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Pa. R.A.P. 2135 CERTIFICATE OF COMPLIANCE

I, Richard Eugene Santee, Esquire, counsel for the Appellant, herein certify that on the date indicated below, the foregoing Brief was written utilizing Microsoft Word. A word count function was performed and the foregoing Brief is less than 14,000 words (2,097 words) in compliance with Pa. R.A.P. 2135.

Date: 11/06/2020

/s/ *Richard E. Santee*

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APPENDIX “A”

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

IN RE: MOTION FOR INJUNCTIVE
RELIEF OF NORTHAMPTON COUNTY
REPUBLICAN COMMITTEE

No.: C-48-CV-2020-6915

FILED
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COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

ORDER OF COURT

AND NOW, this 3rd day of November, 2020, upon consideration of the oral motion of the Northampton County Republican Committee to Enjoin the Northampton County Board of Elections from disclosing the identity of cancelled ballots during pre-canvassing, and upon consideration of the arguments presented thereon, it is hereby ordered that the motion for injunctive relief is hereby **DENIED**.

The court reporter shall immediately transcribe the November 3, 2020 hearing in anticipation that the Northampton County Republican Party will file a Notice of Appeal to the Pennsylvania Commonwealth Court.

BY THE COURT:



**MICHAEL J. KOURY, JR.,
PRESIDENT JUDGE**

APPENDIX “B”

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION – LAW**

**IN RE: MOTION FOR INJUNCTIVE
RELIEF OF NORTHAMPTON COUNTY
REPUBLICAN COMMITTEE**

No.: C-48-CV-2020-6915

**PENNSYLVANIA RULE OF APPELLATE PROCEDURE
1925(a) STATEMENT**

AND NOW, this 5th day of November, 2020, the court issues the following statement:

BACKGROUND

On November 3, 2020, the Northampton County Republican Committee presented on oral motion seeking an injunction against the Northampton County Board of Elections to prohibit the Board from disclosing the names and identifying information of voters whose mail-in ballots were cancelled during pre-canvassing on November 3, 2020. These ballots were deemed to be invalid for reasons ranging from missing a signature, to lacking the necessary privacy envelope. The Northampton County Board of Elections set aside certain ballots and provided the names of addresses associated with the affected ballots to both the Democratic and Republican Parties so that both parties would have the ability to contact these voters and direct them to the polls and vote by provisional ballot. The Northampton County Republican Committee argues that such disclosure is

prohibited by statute because it constitutes "results" pursuant to 25 Pa.C.S.

§ 3146.8(g)(1)(ii)(1.1):

The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

Id. However, the County Board of Elections were told by Jonathan M. Marks, the Pennsylvania Deputy Secretary for Elections and Commissions, that such disclosure is valid:

The Department of State has been asked whether county board of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters whose absentee and main-in ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or main-in ballots are rejected by the county board for reasons unrelated to voter qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

E-mail from Jonathan M. Marks, Deputy Secretary for Elections and Commissions (Nov. 2, 2020, 8:38 EST). The Northampton County Republican Committee argues that that the Department of State's

guidance violated 25 Pa.C.S. § 3146.8(g)(1)(ii)(1.1) and that this information cannot be disclosed. In contrast, the Northampton County Board of Elections and the Northampton Democratic Party stated that these names and addresses did not constitute “results” under the statute, and that the information was public information. For the reasons set forth below, we deny the Northampton County Republican Committee’s motion for injunctive relief.

DISCUSSION

A petitioner seeking a preliminary injunction must establish every one of the following prerequisites; if the petitioner fails to establish any one of them, there is no need to address the others. First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Duquesne Light Co. v. Longue Vue Club, 2013 PA Super 8, 63 A.3d 270, 275 (2013) (quoting *Kessler v. Broder*, 851 A.2d 944, 947 (Pa.Super.2004)). To qualify for injunctive relief, the Northampton County Republican Committee

must show both irreparable harm to itself and that there would be no substantial harm to other interested parties. Because the Northampton County Republican Committee has failed to show “that an injunction is necessary to prevent immediate and irreparable harm,” this Court will not address the other requirements. *Id.*

When an affected voter is notified that his/her mail-in ballot is deficient, the voter is able to cast a provisional ballot. Additionally, the Pennsylvania Department of State’s “Pennsylvania Provisional Voting Guidance” states that a voter may be issued a provisional ballot if a “[v]oter returned a completed absentee or mail-in ballot that was rejected by the county board of elections and the voter believes they are eligible to vote.” Pennsylvania Department of State, *Pennsylvania Provisional Voting Guidance*, Oct. 21, 2020 (discussing guidelines regarding provisional ballots under Act 77 of 2019). This guidance further supports the fact that provisional ballots may be used as method of curing deficient mail-in ballots. A provisional ballot records an individual’s vote while the county board of elections determines whether it can be counted. A provisional ballot may be challenged within seven days after the election, pursuant to 25 Pa.C.S. §3050(a.4)(4)(i)-(iv):

Within seven calendar days of the election, the county board of elections shall examine each provisional ballot envelope that is received to determine if the individual voting that ballot was entitled to vote at the election district in the election. One authorized representative of each candidate in an election and

one representative from each political party shall be permitted to remain in the room in which the determination is being made. Representatives shall be permitted to keep a list of those persons who cast a provisional ballot and shall be entitled to challenge any determination of the county board of elections with respect to the counting or partial counting of the ballot under this section. Upon challenge of any provisional ballot under this clause, the ballot envelope shall be marked "challenged" together with the reason for the challenge, and the provisional ballot shall be set aside pending final determination of the challenge according to the following procedure:

- (i) Provisional ballots marked "challenged" shall be placed unopened in a secure, safe and sealed container in the custody of the county board of elections until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all provisional electors thus challenged and to every attorney, watcher or candidate who made the challenge.
- (ii) The time for the hearing shall not be later than seven days after the date of the challenge.
- (iii) On the day fixed for the hearing, the county board shall proceed without delay to hear the challenges and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence.
- (iv) The testimony presented shall be stenographically recorded and made part of the record of the hearing.

25 Pa.C.S. § 3050(a.4)(4)(i)-(iv).

Even assuming, *arguendo*, that the Northampton County Republican Committee is correct in its position that the Deputy Secretary for Elections and Commissions' position is wrong and that the statute prohibits the disclosure of this information, the Northampton County Republican Committee would not be harmed in any way by allowing these votes to be cast by provisional ballot because they can be challenged after the election on the ground that disclosure was prohibited under the statute. In contrast,

preventing these affected individuals from casting provisional ballots would constitute substantial and irreparable harm because those individuals who took a number of affirmative steps in an effort to vote in this election would have their votes invalidated without any real opportunity to cure its deficiency. Although these affected votes may ultimately be invalidated, they have no chance of ever being valid if affected individuals are not given the opportunity to vote by provisional ballot. These voters would thereby be disenfranchised without any type of judicial review regarding the Northampton County Republican Committee's argument.

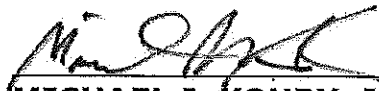
Notably, the record is devoid of any testimony regarding how this disclosure of information would cause the Northampton County Republican Committee immediate and irreparable harm. The petitioner failed to call a single witness or to produce any evidence supporting its oral motion for injunctive relief. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1002-03 (2003) (finding sufficient grounds to deny preliminary injunction where there was "no concrete evidence of harm" where arguments "rested almost entirely on speculation and hypothesis"); *see also Allied Env'tl. Serv., Inc. v. Roth*, 222 A.3d 422, 429 (2019) (holding that "there must still be some evidence of an immediate and irreparable harm to justify the entry of a preliminary injunction."). As a result, its request for an injunction must fail.

The Northampton County Republican Committee has failed to show both that the denial of its injunction will cause it immediate and irreparable harm and that the injunction it seeks will not substantially harm other parties. Because the Northampton County Republican Committee fails to fulfill these two requirements, this Court need not address the merits of whether the disclosure of the information violates the statute and need not address the remaining four prerequisites for a preliminary injunction. See *Duquesne Light Co.*, 63 A.3d at 275 (2013) ("A petitioner seeking a preliminary injunction must establish every one of the following [six] prerequisites[.]")

CONCLUSION

For the reasons set forth above, we respectfully suggest that the Northampton County Republican Committee's appeal lacks merit and should be dismissed.

BY THE COURT:


**MICHAEL J. KOURY, JR.,
PRESIDENT JUDGE**