1-22-1979

Amaya v. District Court In and For Pueblo County

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

Case No. 28513

GEORGE AMAYA,

Petitioner,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF PUEBLO, THE HONORABLE PHILLIP J. CABIBI,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF THE RULE TO SHOW CAUSE

Petitioner prays this Court make the Rule to Show Cause Absolute and submits this Brief in Support.

STATEMENT OF ISSUE

Did the Respondent Court abuse its discretion and proceed without jurisdiction in ruling it had no authority to require the cost bond required by C.R.S. '73, 1-10-110(2) be sufficient to cover all expenses of an election contest including attorneys' fees, travel expenses, deposition expenses, telephone costs and document costs?

STATEMENT OF CASE

This order to show cause arises out of the second election contest brought by the defeated incumbent candidate challenging the residency of Petitioner George Amaya. Petitioner Amaya filed a Motion requesting the cost bond of $250 be increased to an amount not less than $25,000. The Respondent Court denied the Motion, ruling it had no authority to order the cost bond be sufficient to cover all costs of litigation, including attorneys' fees, travel expenses, deposition expenses, telephone costs and document costs.

STATEMENT OF FACTS

George Amaya (the Respondent below), William Gradishar (Plaintiff below) and Tony Buck were nominated by the Democratic County Convention to seek that party's nomination for Pueblo County Commissioner. The primary for this seat was a hotly-contested race. On September 12, 1978, the voters named George Amaya their nominee. Receiving over 50 percent of the vote, Mr. Amaya resoundingly defeated the incumbent Gradishar who tallied only 32 percent of the vote.

After being defeated at the polls, Gradishar instituted an election contest, alleging that George Amaya was not a resident of Pueblo County. Discovery in that case was completed on an expedited basis and the trial began on October 3, 1978. Midway through that trial, the Court dismissed the action. George Amaya was elected County Commissioner at the General Election on November 7, 1978. Gradishar then commenced this second contest, challenging again Mr. Amaya's residency, and posted a $250 cost bond. Petitioner herein requested the court below to increase the bond to an amount not less than $25,000 and herein presented evidence that he had incurred costs in excess of $5,000 as a result of the prior unsuccessful contest. These costs included attorneys' fees, travel costs, deposition costs, copying costs, document costs and telephone costs. The Respondent Court denied that motion, ruling that it had no authority to anticipate attorneys' fees, travel costs, deposition costs, and other costs as a possible award of costs. It is this question of the sufficiency of a $250 cost bond that is before this Court.

APPLICABLE STATUTE

C.R.S. '73, Section 1-10-110(2) provides that:

> "Before the district court is required to take jurisdiction of the contest, the contestor must file with the clerk of said court a bond, with sureties, to be approved by said judge, running to said contestee and conditioned to pay all costs in case of failure to maintain his contest."

ARGUMENT

I. THE COST BOND REQUIRED BY C.R.S. 1973, 1-10-110 COVERS ALL EXPENSES OF LITIGATION INCLUDING ATTORNEYS' FEES, DEPOSITION COSTS, TRAVEL COSTS, TELEPHONE COSTS AND DOCUMENTS COSTS. THE RESPONDENT COURT ABUSED ITS DISCRETION AND EXCEEDED ITS JURISDICTION IN RULING IT HAD NO AUTHORITY TO INCLUDE SUCH ANTICIPATED COSTS IN THE COST BOND.

The real question before this Court is whether a defeated candidate should be allowed to carry his political vendetta into the courts at great expense to the duly elected official without being required to provide adequate surety to make that official whole when the contest is dismissed. The question of what should be covered by the cost bond in an election contest appears to be of first impression in this state. Petitioner's position is straightforward: George Amaya will defeat this third frivolous contest but the Courts should provide some protection to the voter's choice, Mr. Amaya, and to the electorate themselves. A defeated and disgruntled candidate should not be allowed to use the courts to force a duly elected official to repeatedly expend large sums of money to defend against frivolous challenges unless the contestor posts a bond

sufficient to cover all costs of the contest, including attorneys' fees, travel expenses, and deposition costs.

The only Colorado case dealing with cost bonds in election contests appears to be Nicholls v. Barrick, 27 Colo. 432, 62 P. 202 (1900). At p. 438, in that case, the Supreme Court held:

> "The bond for costs required by the statute in proceedings of this character is for the benefit of the contestee. . .The bond in cases of this character should be conditioned for the payment of all costs, and not in any specified penalty."

If all that the Legislature envisioned the bond should cover was the filing fee, the legislature could have said that, rather than use the words, "all costs." It is interesting to note that the bond posted in the Nicholls case was in the amount of $200. Seventy-eight years later, the contestor here posts a $250 bond which is nowhere near adequate to cover the costs of litigation.

No legislative history on this issue exists. A thorough reading, however, of Articles 9 and 10 of Title I of the Colorado Revised Statute (which deal with election contests and recounts) indicate the force and intent of those statutes is to place the economic burden of a recount or contest on the party requesting it in almost all cases. See, e.g. 1-9-196(6). The Statutes provide that neither the taxpayers nor the successful candidate, but the party challenging the recount or contesting the election must bear the costs of the recount. There is no reason why the appeal to the courts should be treated any differently. It is the challenger who must be prepared to pay all costs of a contest.

II. THE COURTS OF COLORADO HAVE INHERENT POWER TO AUTHORIZE THE PAYMENT OF ALL COSTS OF LITIGATION INCLUDING ATTORNEYS' FEES AND OTHER COSTS IN VARIOUS CLASSES OF LITIGATION.

The long-standing rule in Colorado is that the Court has discretion and authority to authorize attorneys' fees and other costs of litigation in several classes of litigation. Gradishar would have this Court ignore the term "all costs" and rule that "all costs" means only filing and docket fees. In so urging, Gradishar misplaces his reliance on Colorado cases which hold that attorneys' fees and the expenses of litigation are usually not allowed in an action in tort or contract unless there is a contractual or statutory liability. This is clearly neither an action in tort or contract.[1] However, even in those

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[1]Even this general rule has been changed. C.R.S. 13-17-101 now allows for recovery of attorneys' fees in these cases which, like this one, are groundless.

cases resting exclusively on tort or contracts, the Colorado courts have recognized exceptions. See, for example, International State Bank of Trinidad vs. Trinidad Bean and Elevator Company, 79 Colo. 286, 245 P. 489 (1926). There, the Court ruled at p. 287:

> "When the natural and probable consequence of a wrongful act has been to involve plaintiff in litigation with others, the general rule is that the reasonable expenses of the litigation may be recovered from the wrongdoer."

An election contest is an action directed to the equity powers of the Court. See generally, Carey vs. Elrod, 49 Ill. 464, 275 N.E.2d 367 (1971). It has also been a long-standing rule in Colorado that attorneys' fees are allowed in actions at equity. Williams vs. Fidelity and Deposit Company, 42 Colo. 118, 93 P. 120 (1908). In distinguishing the Court's refusal in that case to award attorneys' fees, the Court reviewed the law in Colorado and stated at p. 120:

> "The reason usually given for awarding as damages counsel fees incurred for services rendered in dissolving injunctions and writs of attachment is that they are provisional or extraordinary remedies, ancillary to the main purpose of the suit and as the granting of the writ secures to the applicant some privilege or right not incident to ordinary remedies, it is but reasonable to hold that 'damages', as used in the bond upon which the granting of the writ is conditioned, embraces attorneys' fees."

C.R.S. 13-16-114 provides:

> ". . .and in all other cases in equity not otherwise directed by law, it is in the discretion of the court to award costs or not."

In summary, this is an extraordinary proceeding in neither contract nor tort but an action addressed to the equity powers of the Court. The lower court had the duty and jurisdiction to authorize the posting of a bond which must be sufficient to cover all costs, including attorneys' fees and other costs attendant to the litigation. Nothing in Colorado law prohibits this Court from using its inherent powers to see that the express language of the Legislature is given full force and effect. More particularly, this case specifically calls for use of these equitable powers so that substantial litigation expenses and repeated election contests do not become a judicially sanctioned method of driving middle- and low-income public officials from office in Colorado.[2]

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[2]Respondent's reliance on Walters vs. Bartel, 254 N.W.2nd 321, ___ Iowa ___ (1977), is inadequate since the Iowa statutory scheme governing elections and election contests is not identical to that of Colorado. Moreover, the question did not arise in Walters in the context of repeated election contests seeking to litigate the same issue.

CONCLUSION

It becomes more of a burden every year for a citizen to run for office. The economic and psychological expenses are heavy. A citizen who is willing to so serve should not be harrassed in the Courts by a litigious and stubborn defeated candidate unless that defeated, candidate wishes to pay for his vindictiveness. Only Gradishar out of all the electors in Pueblo County, the defeated candidate, has seen fit to bring this contest. Gradishar raised the question of George Amaya's residency throughout the campaign, claiming that owning a ranch in Huerfano County should bar Amaya from seeking office in Pueblo County. The voters rejected this position and chose George Amaya as their Commissioner. This is and was essentially a political issue. After being defeated at the polls, Mr. Gradishar now seeks to use the Courts to breathe life into a dead political issue.[3] Petitioner does not ask that Contestor Gradishar be denied even repeated access to the Courts. Petitioner merely asks that the duly elected official and the electorate be afforded some protection from frivolous lawsuits and that Gradishar be required to post a bond in a realistic amount sufficient to cover all costs of this apparently interminable litigation.

ROTHGERBER, APPEL & POWERS

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF IN SUPPORT OF THE RULE TO SHOW CAUSE was placed in the United States mail, postage prepaid, on this 22nd day of January, 1979, addressed to Darol Biddle, 525 West 11th Street, Pueblo, Colorado 81003.

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[3]The political nature of this contest can best be demonstrated by Respondent's own brief. At p. 5 counsel makes accusations that are best left in paid-for political commercials. These allegations have no place in pleadings and should be stricken.