ORDER ON EMERGENT MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003178-21T1
MOTION NO. M-005785-21
BEFORE PART E
JUDGE(S): ALLISON E. ACCURSO
CATHERINE I. ENRIGHT

IN THE MATTER OF THE SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT PUBLIC QUESTION, STEPHEN BERGENFELD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A WEST AMWELL TOWNSHIP COMMITTEEMAN, JAMES CALLY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A WEST AMWELL TOWNSHIP COMMITTEEMAN, GARY HOYER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A WEST AMWELL TOWNSHIP COMMITTEEMAN, JOHN DALE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A WEST AMWELL TOWNSHIP COMMITTEEMAN, MICHAEL SPILLE, KRISTINA SPILLE, JENNIFER BATCHELLOR, EVAN BATCHELLOR, JENNIFER ANDREOLI, JESSICA FENNIMORE, JENNIFER BERGENFELD, ROBERT J. BALAAM, JR., CATHERINE URBANSKI, CHESTER URBANSKI, EDWARD ADAMS, MARILEE ADAMS, CRAIG READING, AND SHARON BLACK,
PLAINTIFFS,
VS.
HUNTERDON COUNTY BOARD OF ELECTIONS, HUNTERDON COUNTY CLERK, AND SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT,
DEFENDANTS.

MOTION FILED: 06/22/2022

BY: STEPHEN BERGENFELD, JAMES CALLY, GARY HOYER, JOHN DALE, MICHAEL SPILLE, KRISTINA SPILLE, JENNIFER BATCHELLOR, EVAN BATCHELLOR, JENNIFER ANDREOLI, JESSICA FENNIMORE, JENNIFER BERGENFELD,

ET AL

ANSWER(S) FILED: 06/24/2022 BY: SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT

06/27/2022 BY: HUNTERDON COUNTY BOARD OF ELECTIONS

SUBMITTED TO COURT: June 27, 2022

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 6TH day of JULY, 2022, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT-CROSS RESPONDENT

MOTION FOR STAY DENIED

SUPPLEMENTAL:

In this action, plaintiffs Stephen Bergenfeld, James Cally, Gary Hoyer, John Dale, Michael Spille, Kristina Spille, Jennifer Batchellor, Evan Batchellor, Jennifer Andreoli, Jessica Fennimore, Jennifer Bergenfeld, Robert J. Balaam, Jr., Catherine Urbanski, Chester Urbanski, Edward Adams, Marilee Adams, Craig Reading, and Sharon Black seek an emergent stay as they continue to challenge the results of a public referendum approving the issuance of $33.4 million in bonds. The referendum passed by a margin of only two votes out of 3,544 votes cast.

Without prejudice to the merits panel's ultimate disposition of the appeal and based on the submissions presented on the emergent application, the motion for stay is denied. Reviewing the facts presented through the prism of the Crowe[1] factors, we conclude plaintiffs have not demonstrated any reasonable probability of success on the merits. See Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (application for a stay requires consideration of the soundness of the trial court's ruling and the effect of a stay on the parties and the public).

I.

In January 2022, pursuant to N.J.S.A. 19:29-1, plaintiffs filed an election contest petition against defendants Hunterdon County Board of Elections, the Hunterdon County Clerk, and the South Hunterdon Regional School District (district). Count one of the complaint alleged illegal votes were accepted and legal votes were rejected as to specific ballots and that the district illegally used taxpayer monies to

[1] Crowe v. De Gioia, 90 N.J. 126 (1982).

influence voters. Count two requested a declaratory judgment, and count three alleged violations of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2.

Defendants moved to dismiss the complaint and on January 27, 2022, Judge Michael F. O'Neill granted defendants' motion "without prejudice to the extent . . . [plaintiffs] purport[ed] to allege a viable cause of action under . . . N.J.S.A. 19:29-1." The judge noted plaintiffs' complaint failed to specify "what payment or promise to pay or expenditure was not authorized by this statute or was in excess of what is permitted by" Title 19.

In February 2022, plaintiffs amended their complaint to allege a violation of the New Jersey Campaign Contributions and Expenditures Reporting Act (Reporting Act), N.J.S.A. 19:44A-1 to -26. Judge O'Neill granted defendants' motion to dismiss that claim with prejudice in March 2022, finding the New Jersey Election Law Enforcement Commission (ELEC) had exclusive jurisdiction over that matter.

Two months later, plaintiffs presented the court with challenges to four ballots cast in the election. On May 12, 2022, Judge O'Neill conducted a testimonial hearing to consider those challenges. Fifteen days later, he rendered a decision on the record finding three of the votes were properly disallowed and a remaining vote — where a voter had both filled in the "yes" oval in favor of the referendum and placed an "X" over it — was properly counted. On June 1, 2022, the judge conducted another testimonial hearing to address plaintiffs' challenges to five remaining ballots; he denied each challenge, finding the ballots in question were cast by voters domiciled in Hunterdon County. On June 14, 2022, Judge O'Neill dismissed plaintiffs' complaint with prejudice and denied their motion for a stay pending appeal. Plaintiffs filed a notice of appeal and an emergent application for a stay. On June 16, 2022, we stayed the issuance of any bonds under the referendum pending our disposition of the motion for stay.

II.

Plaintiffs argue we should grant their emergent motion for a stay because they have satisfied the requirements under Crowe. We disagree. As a threshold matter, we observe:

> A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were."
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> [Garden State Equal., 216 N.J. at 320-21 (quoting

McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting)).]

The moving party has the burden to prove each Crowe factor by clear and convincing evidence. Id. at 320. "When a case presents an issue of 'significant public importance,'" as this one does, "a court must consider the public interest in addition to the traditional Crowe factors." Id. at 321 (quoting McNeil, 176 N.J. at 484).

Although plaintiffs are challenging the dismissal of two of their claims on a Rule 4:6-2 motion, they have not included the pleadings in the record on appeal. They have thus made their demand that "[t]his reviewing court . . . examine 'the legal sufficiency of the facts alleged on the face of the complaint,'" impossible. See Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 55 (2004) (affirming this court's refusal to address an issue based on appellant's failure to include documents necessary for its review in the appendix).

In addition, despite their allegation of the Board having engaged in a "months-long campaign at taxpayer expense to support a 'YES' vote and passage of the referendum," plaintiffs provide no evidence as to what the campaign consisted of or how public funds were misused. Boards of education are permitted, of course, to use public funds to educate the public about the need for improved school facilities. Parsippany-Troy Hills, 13 N.J. 172, 179-82 (1953). Leaving aside the utter lack of any specific allegation of illegal expenditure, and that the challenge to such needed to have been brought before the election, Borough of Kenilworth v. Raubiner, 15 N.J. 581, 590 (1954), the close vote suggests voters were well informed of both the positive and the negative aspects of the proposed project. Further, there is no question but that Judge O'Neill was correct to dismiss plaintiffs' Reporting Act claim, as it is beyond dispute that exclusive jurisdiction of that claim rests with ELEC. Nordstrom v. Lyon, 424 N.J. Super. 80, 97-98 (App. Div. 2012).

As to plaintiffs' claims of illegal votes cast, Judge O'Neill made detailed findings following two testimonial hearings during which witnesses appeared and were subject to cross-examination. Because those findings are well-supported in the record, they are binding on this appeal. See Seidman v. Clifton Sav. Bank, SLA, 205 N.J. 150, 169 (2011).

Finally, we reject plaintiffs' claims that the equities are in their favor. Although the sale of the bonds will almost certainly moot this appeal, Wisniewski v. Murphy, 454 N.J. Super. 508, 521 (App. Div. 2018), plaintiffs have failed to demonstrate any chance of it succeeding on the merits. Defendants assert plaintiffs' challenge to the bonds has already increased the costs of the borrowing by nearly six-and-a-half million dollars, which will likely increase in the face of rising interest rates should we enter a further stay. Plaintiffs' inability to demonstrate any likelihood of success on the merits of their appeal in light of the harm

to taxpayers by further delay in issuing the bonds renders the equities decidedly in defendants' favor.

In sum, because we conclude plaintiffs have not demonstrated any likelihood of success on the merits of either of their claims – they've put forth no evidence or even any specific allegations the district engaged in illegal electioneering in support of the referendum using public monies in violation of statute, and have failed to establish Judge O'Neill's findings following a bench trial on the specific ballots challenged were "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice," see Rova Farms Resort v. Invs. Ins. Co., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)) – and the district persuasively asserts a colorable claim of harm to the public interest in the form of increased costs of borrowing in this environment of rising interest rates, we deny plaintiffs' request for a stay pending appeal. Our decision is without prejudice to plaintiffs' right to file a motion to accelerate the appeal. R 2:9-2.

Catherine I. Enright

CATHERINE I. ENRIGHT, J.A.D.