

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-002769

04/02/2013

HONORABLE LISA DANIEL FLORES

CLERK OF THE COURT
D. Glab
Deputy

GERALD C FREEMAN

TIMOTHY A LASOTA

v.

RICHARD ESSER, et al.

JEFFREY M BLILIE

COLLEEN CONNOR
JEFFREY T MURRAY

UNDER ADVISEMENT RULING

On April 1, 2013, the Court held an Order to Show Cause hearing on Petitioner Gerald C. Freeman's Petition for Special Action and Application for Order to Show Cause, filed March 27, 2013. After considering the evidence and arguments presented at the hearing, the Court finds as follows.

This is a priority election matter which affects the Town of Cave Creek's General Election set May 21, 2013. The question presented is whether a candidate who qualifies for the general election ballot can withdraw from the election pursuant to ARS § 16-343, and then rescind the withdrawal and have his name appear on the ballot.

The Court has jurisdiction of this Special Action because Plaintiff alleged that Defendant Carrie Dyrek, Clerk of the Town of Cave Creek, proceeded without legal authority to place Defendant Richard Esser's name on the ballot for election to the Town Council. See Arizona Constitution Article 6, § 14, ARS § 12-123, as well as Rules 3 and 4, Rules of Procedure for Special Actions. Plaintiff has no other adequate remedy because the General Election ballots must be printed beginning no later than 5 pm, April 3, 2013.

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Factual Findings¹

- Petitioner Gerald Freeman is a registered voter in Maricopa County and is eligible to vote in the Town of Cave Creek.
- Defendant Richard Esser was a candidate in the March 12, 2013 election for a seat on the Cave Creek Town Council.
- Esser received enough votes to qualify as a candidate for Town Council in Cave Creek's General Election, set May 21, 2013.
- On March 19, 2013, Esser submitted to the Cave Creek Town Clerk a signed, notarized document called a Statement of Withdrawal, which was admitted as Exhibit 1.
- The Statement of Withdrawal was accepted March 19, 2013 by the Cave Creek Town Clerk, as shown at the bottom of Exhibit 1.
- The Court presumes the withdrawal was voluntary, based on the lack of evidence to the contrary.
- On March 21, 2013, Esser filed another copy of the same Statement of Withdrawal, but at the bottom, it says "Rescinded this Statement of Withdrawal on 3-21-2013 Rick Esser AKA Richard K. Esser..." which was admitted as Exhibit 2.
- The Town Clerk accepted the second "Rescinded" Statement of Withdrawal on March 21, 2013, as shown in handwriting added at the bottom of Exhibit 2.
- The General Election is scheduled May 21, 2013.
- The Maricopa County Elections Department, under the direction of County Recorder Helen Purcell, acts as a vendor for Cave Creek's elections, which includes responsibility for printing and tabulating ballots.
- Ballots for the Town of Cave Creek General Election must go to the printer no later than 5 pm, April 3, 2013.
- Ballots for the General Election must be mailed to Military and Overseas Voters no later than 5 pm, April 6, 2013.

Legal Conclusions

Arizona Revised Statutes § 16-343 is part of Title 16 ("Elections and Electors"), Chapter 3 ("Nominating Procedures"), Article 5 ("Nomination Other Than By Primary"). The context is

¹ Although the factual stipulations were not clearly stated on the record, at the Order to Show Cause hearing on April 1, 2013, Defendants did not dispute any of the factual allegations in the Petition for Special Action. All parties agreed that the issue was one of law.

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important for an understanding of the statutory scheme that governs candidate elections. Subsection A of § 16-343 prescribes how to fill a vacancy caused by death, mental incapacity or voluntary withdrawal of the qualified candidate when the vacancy occurs after the deadline for filing of nomination petitions but before the election is held. Most of the detail in this statute is directed at federal, state and county offices which are partisan elections; filling the vacancies requires participation by the qualified candidate's political party officials. However, the third sentence of subsection F makes clear that ARS § 16-343(A) also applies to municipal elections, which are non-partisan: "In the case of a city or town election, the city or town clerk shall notify the appropriate inspectors."

The statute begins with these words: "A vacancy occurring due to death, mental incapacity or voluntary withdrawal of a candidate . . ." The meaning of the words is clear – a candidate's voluntary withdrawal causes a vacancy. Subsection A does not distinguish between vacancies caused by death and those caused by voluntary withdrawal². After a vacancy is created by voluntary withdrawal of a candidate, there is no statutory authority for that candidate to rescind his withdrawal and be reinstated on the ballot. Likewise, there is no statutory authority for the Town Clerk to accept the former candidate's attempt to be reinstated.

There are no reported appellate decisions in Arizona that discuss the question presented. While not precedent in Arizona, this Court agrees with the reasoning of the Kentucky Court of Appeals in a similar case, which stated:

Noticeably absent from the statute is any provision for rescission of a validly filed notice of withdrawal.

In *Beckham v. Board of Educ. Of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994) our Supreme Court reiterated the well-established principle of statutory construction that courts are not free to expand the scope of statutes beyond that which is evident from the language utilized by the legislature . . . Thus, . . . we are not free to amend an otherwise plain and unambiguous statute by adding a provision allowing a candidate to rescind an otherwise valid notice of withdrawal.

² In later subsections, the statute does distinguish between categories of vacancies that occur after the ballots have been printed. The distinction is unrelated to rescission, however. According to subsection D, for a vacancy due to voluntary or involuntary withdrawal of the candidate, write-in candidates have more time to file their nomination papers. According to the last sentence of subsection F, "[a] vacancy that occurs as prescribed in subsection D of this section due to the death or incapacity of the candidate shall not be filled and the secretary of state shall notify the appropriate county board of supervisors to post a notice of the death or incapacity of the candidate in each polling place along with notice that any votes cast for that candidate will be tabulated."

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Holsclaw v. Perkins, 268 S.W.3d 376, 377 (App. 2008).

Arizona courts follow the same rule when considering statutes. “As a rule of statutory construction, we will not read into a statute something that is not within the manifest intent of the legislature as indicated by the statute itself. . . Nor will we ‘inflate, expand, stretch or extend a statute to matters not falling within its express provisions.’” *City of Tempe v. Fleming*, 168 Ariz. 454, 457, 815 P.2d 1 (App. 1991) (internal citations omitted).

Because the Court found there is no statutory authority for the Cave Creek Town Clerk to have accepted Esser’s rescission of a valid withdrawal of his candidacy, the Court did not consider the claim of harm by Plaintiff’s witness Mike Chutz, a part-time Cave Creek resident who chairs a Political Action Committee called Cave Creek Election 2013 which was organized to influence the imminent town council election. If the Legislature chooses to consider amending ARS § 16-343 to allow a candidate to rescind a valid withdrawal from an election, it will, no doubt, hear about the possible consequences from supporters, opponents and elections professionals.

IT IS ORDERED granting Petitioner’s request for special action relief in his petition filed March 27, 2013.

IT IS FURTHER ORDERED declaring that Richard Esser voluntarily withdrew as a candidate for the Cave Creek Town Council, that the Town Clerk accepted his withdrawal, that Arizona law does not permit him to rescind the valid withdrawal of his candidacy, and that he is not entitled to have his name on the ballot as a candidate for Town Council in the May 21, 2013 municipal general election.

IT IS FURTHER ORDERED enjoining the Cave Creek Town Council, Cave Creek Town Clerk Carrie Dyrek, Maricopa County Board of Supervisors and Maricopa County Recorder Helen Purcell from including Richard Esser’s name on the May 21, 2013 general election ballot.

IT IS FURTHER ORDERED awarding Plaintiff his taxable costs, pursuant to ARS § 12-341.

IT IS FURTHER ORDERED awarding Plaintiff his reasonable attorneys’ fees, pursuant to ARS § 12-348

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Pursuant to Rule 54(b). Ariz. R. Civ. P., and Rule 8.1, A.R.C.A.P., this is a final, appealable order subject to expedited appellate review.

/S/ LISA DANIEL FLORES

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.