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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1901-21**

MICHAEL D. BYRNE,

Plaintiff-Appellant,

v.

**APPLICATION FOR RECOUNT
OF VOTES CAST IN THE
JUNE 8 REPUBLICAN PRIMARY
ELECTION,**

Defendant-Respondent.

Submitted January 31, 2023 – Decided February 10, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Docket No. L-5109-21.

Michael D. Byrne, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for
respondent (Sookie Bae-Park, Assistant Attorney
General, of counsel; Craig S. Keiser, Deputy Attorney
General, on the brief).

PER CURIAM

In the June 2021 primary election to select a male representative from Essex County to serve on the Republican State Committee for a four-year term, plaintiff finished a distant second in a two-candidate race.¹ In the two-man race, he had 4,174 less votes than the first-place finisher.²

Questioning the election results based on the assertion that twelve votes in Ward 3 District 4 in Montclair were not counted, plaintiff filed a "verified petition" seeking: a recount under N.J.S.A. 19:28-1 of all ballots, including rejected and spoiled mail-in and provisional votes; sealing of all voting materials and records; verification of the roster of voters; and a recheck of the voting machines under N.J.S.A. 19:52-6 and -6.1. Plaintiff's filing was supported with certifications by three voters from Ward 3 District 4 in Montclair stating they had voted for plaintiff, despite the Essex County Clerk's Office reporting zero votes being cast in that voting district.

The trial judge informed plaintiff in a letter sent via eCourts and email that the court would not consider his application "absent a proposed [o]rder to

¹ A State Committee of each political party is "elected at the primary for the general election of the year in which a Governor is to be elected." N.J.S.A. 19:5-4.

² <https://results.enr.clarityelections.com/NJ/Essex/109583/web.285569/#/detail/599> (last updated Mar. 1, 2022).

[s]how [c]ause including an identification of all necessary parties and an indication that there has been or will be supplied proof of service on those parties." Plaintiff did not submit proof of service but filed a "Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Be Entered" seeking to enjoin the Essex County Board of Elections (Board) from "certifying or finalizing the 2021 Republican Primary election without first conducting an examination and re-check of voting machines and a conducting recount of votes." Plaintiff's proposed order stated the trial court would "entertain argument, but not testimony, on the return date."

Following a virtual hearing on plaintiff's application, the trial judge dismissed the application. In his oral ruling, the judge stated plaintiff had not cured any of the deficiencies noted in his letter to plaintiff. The judge further explained a recount application "requires some threshold to show a basis for recounting the votes," and since the alleged twelve unaccounted for votes would not alter the election results, the request was inappropriate. The trial judge further rejected appellant's assertion that he was entitled to a recount as of right.

In his appeal, plaintiff argues:

POINT I

THE TRIAL COURT ERRED IN NOT ABIDING BY
THE RULES OF THE COURT CONCERNING

EMERGENT MATTERS, CASE MANAGEMENT,
AND SCHEDULING.

POINT II

THE TRIAL COURT ERRED IN NOT PERMITTING
PLAINTIFF TO INTRODUCE EVIDENCE OF ANY
KIND AND BUILD A RECORD. (Not Raised Below.)

POINT III

THE TRIAL COURT ERRED IN NOT GRANTING
THE REQUESTED RELIEF BECAUSE A
STATUTORY REMEDY IS PROVIDED FOR SUCH
SITUATIONS.

POINT IV

THE TRIAL COURT ERRED IN NOT GRANTING
THE REQUESTED RELIEF BECAUSE THE PUBLIC
INTEREST WARRANTS IT. (Not Raised Below by
Plaintiff; raised by the Trial Court.)

POINT V

THE TRIAL COURT ERRED IN BEING
UNPREPARED FOR THE HEARING AND
DISMISSIVE OF THE INFORMATION GIVEN BY
PLAINTIFF CONCERNING THE SAME.

POINT VI

THE TRIAL COURT ERRED IN TRYING TO PROD
OPPOSING COUNSEL TO STIPULATE TO A
PREDETERMINED CONCLUSION. (Not Raised
Below.)

POINT VII

THE TRIAL COURT ERRED IN TREATING
PLAINTIFF AS A THIRD-CLASS LITIGANT
MERELY FOR EXERCISING HIS RIGHT TO
APPEAR PRO SE.

Having considered plaintiff's arguments and the applicable law, we conclude his appeal is without sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(1)(E). We therefore affirm substantially for the reasons stated by the trial judge, adding the following comments.

"Our election laws provide . . . the framework within which our Legislature has directed an election contest must proceed,' including 'both the grounds on which an election may be contested, and the manner in which the contest may be brought and decided.'" In re Election for Atl. Cty. Freeholder Dist. 3 2020 Gen. Election, 468 N.J. Super. 341, 353 (App. Div. 2021) (quoting In re Contest of Nov. 8, 2005 Gen. Election for Mayor of Parsippany-Troy Hills, 192 N.J. 546, 559 (2007)). Nevertheless, as this court recently stated, "[t]he candidate seeking a recount under N.J.S.A. 19:28-1 must present the court with sufficient competent, credible evidence showing there is reason to believe there was an error in the count. If the claimed error could alter the results of the election, the court should order a recount." In re Fernandez, 468 N.J. Super. 377, 390 (App. Div. 2021) (emphasis added).

Plaintiff finished a distant second in the two-candidate race for Essex County's male representative on the Republican State Committee. Indeed, at argument, he acknowledged his inability to prevail, stating, "I'm not expecting the election results to reverse I'm not expecting to have won the election . . . but there are votes that are missing, period, and they should be found." He added that, because twelve votes are "missing" from Montclair's Ward 3 District 4, without any indication how they voted, it is "a matter of concern to those [twelve] people. It's a matter of concern to me as a candidate. It's a matter of concern to my running mates. And it's a matter of concern to the public at large." This is not a basis for a recount.

Given plaintiff's sound election defeat, he cannot and does not expect to be elected to the State Committee. Therefore, the issue of a recount, certifying the election results, and re-checking voting machines to conduct a recount of votes is moot. See Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 221-22 (App. Div. 2011) (holding an issue is moot when "our decision sought in a matter, when rendered, can have no practical effect on the existing controversy") (quoting Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)). There is no legal basis for the relief sought by

plaintiff because of public concern. See Fernandez, 468 N.J. Super. at 390. No error occurred in dismissing plaintiff's complaint and application for restraints.

Our review of the record does not support plaintiff's contention that his due process rights were violated because the judge did not allow him to present evidence and was "unprepared" and "dismissive" of him. In addition, we do not consider plaintiff's arguments that were not raised before the trial judge because they do not challenge "the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION