

Establishing a New Position Too Late for a Primary Election

Shapiro v. Berger

(*Colleen McMahon, S.D.N.Y. 7:04-cv-5895*)

A prospective candidate for a new judicial position filed a federal complaint alleging that the position was purposely established too late for a primary election. The district judge denied the candidate a preliminary injunction, concluding that the complaint stated no valid federal constitutional claim.

Subject: Filling vacancies. *Topics:* Primary election; getting on the ballot; party procedures; matters for state courts.

A prospective candidate for Greenburgh town justice in the November 2, 2004, general election and three supporters of his candidacy filed a federal complaint in the Southern District of New York on July 29 alleging state and federal constitutional improprieties in the town council's delay in creation of a newly authorized judicial position so that party nominees could not be chosen by primary election.¹

Judge Colleen McMahon heard the case on August 5 and denied the plaintiffs relief later that day.² The new position was authorized by legislation signed by the governor on June 30.³ For candidates to participate in the September 14 primary election, the town would have to create the authorized position by July 8, but the town did not create the position until July 14.⁴ Because there is no federal constitutional right to a primary election, however, the plaintiffs were without a valid federal claim.⁵

On August 23, the plaintiffs sought reconsideration by letter.⁶ Reviewing the letter upon returning from vacation, Judge McMahon denied the request.⁷ Observing “that if a motion to dismiss this action had been made when the preliminary injunction papers were filed and responded to, I would have granted it,”⁸ Judge McMahon dismissed the case sua sponte.⁹ An appeal was dismissed for lack of prosecution.¹⁰

1. Complaint, *Shapiro v. Berger*, No. 7:04-cv-5895 (S.D.N.Y. July 29, 2004), D.E. 1; *Shapiro v. Berger*, 328 F. Supp. 2d 496, 497–501 (S.D.N.Y. 2004); see Joseph Ax, *Hastings Lawyer Claims Greenburgh, Democrats Conspired in Decision*, Westchester Cty. J. News, Aug. 5, 2004, at 1B.

2. *Shapiro*, 328 F. Supp. 2d 496; see Joseph Ax, *U.S. Judge Challenges Lawyer for Candidate*, Westchester Cty. J. News, Aug. 6, 2004, at 3B; Bill Hughes, *Suit Seeking Primary for Judgeship Is Tossed*, Westchester Cty. J. News, Aug. 7, 2004, at 8B.

3. *Shapiro*, 328 F. Supp. 2d at 498; see Ax, *supra* note 1.

4. *Shapiro*, 328 F. Supp. 2d at 498–500; see Hannan Adely, *No Primary Frustrates Candidate for Town Judge*, Westchester Cty. J. News, July 8, 2004, at 3B.

5. *Shapiro*, 328 F. Supp. 2d at 502–05.

6. Letter, *Shapiro*, No. 7:04-cv-5895 (S.D.N.Y. Aug. 23, 2004, filed Sept. 14, 2004), D.E. 24.

7. Letter, *id.* (Sept. 13, 2004, filed Sept. 14, 2004), D.E. 23.

8. *Id.*

9. Judgment, *id.* (Sept. 15, 2004), D.E. 27.

10. Docket Sheet, *Shapiro v. Weinstein*, No. 04-5522 (2d Cir. Oct. 18, 2004).