Court Supervision Over Absentee-Ballot Procedures

Willingham v. County of Albany (Norman A. Mordue, 1:04-cv-369) and Hoblock v. Albany County Board of Elections (Lawrence E. Kahn, 1:04-cv-1205) (N.D.N.Y.)

A federal complaint sought an emergency injunction against absentee-ballot fraud in an ongoing special-election cycle, but the district judge determined that the plaintiffs did not establish a need for immediate federal relief beyond the relief provided by the state court. At the end of approximately three years of litigation, the case was resolved by consent decrees. Meanwhile, a different federal judge in the same district resolved a dispute over the counting of some absentee ballots by overruling the state high court's rejection of absentee ballots cast by voters who received them because of errors by the election board.

Subject: Absentee and early voting. *Topics:* Absentee ballots; matters for state courts; case assignment; primary election; enjoining certification; class action; attorney fees; intervention; malapportionment.

On April 2, 2004, three candidates, six other voters, and two organizations filed a federal complaint in the Northern District of New York challenging absentee-voting procedures in an ongoing election cycle for a special election made necessary by the redistricting of Albany County's legislature.[1] An amended complaint filed four days later added one candidate and five other voters as plaintiffs.[2] A primary election was held on March 2, a replacement primary election was scheduled for April 8 in one district, and the general special election was scheduled for April 27.[3]

The special elections were ordered by federal courts to remedy voting rights violations for the thirty-nine-member legislature's districting after the 2000 census.[4] The court reassigned the new case from Judge Frederick J.

1. Complaint, Willingham v. County of Albany, No. 1:04-cv-369 (N.D.N.Y. Apr. 2, 2004), D.E. 1 [hereinafter *Willingham* Complaint]; *see* Cathy Woodruff, *Lawsuit Aims to Protect Ballots*, Albany Times Union, Apr. 2, 2004, at B1.

2. Amended Complaint, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Apr. 6, 2004), D.E. 3.

3. *See Willingham* Complaint, *supra* note 1, at 7; Cathy Woodruff, *Vote to End Ballot Crisis*, Albany Times Union, Mar. 20, 2004, at A1 (reporting that the replacement primary election was agreed on by the two leading candidates in the very close original primary election in light of allegations of absentee-ballot fraud).

4. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 357 F.3d 260 (2d Cir. 2004); Order, Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, No. 1:03-cv-502 (N.D.N.Y. Feb. 2, 2004), D.E. 81; *see* Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 183–84 (2d Cir. 2008) ("the district court may adjust [the base hourly rate in a fee award] to account for a plaintiff's reasonable decision to retain out-of-district counsel"); Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 369 F.3d 91 (2d Cir. 2004) (determining that the plaintiffs were

Scullin, Jr., to Judge Norman A. Mordue, who was presiding over the earlier litigation.[5]

On April 14, 2004, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[6] At 3:00 p.m. that day, Judge Mordue conducted a telephonic conference.[7] At a second conference two days later, hedenied the plaintiffs immediate relief.[8] The plaintiffs' concerns in some of the districts had already been remedied by a state-court settlement, and the plaintiffs had not submitted evidence of improprieties in other districts or demonstrated a federal question.[9]

The litigation was resolved over the course of three years by consent decrees.[10]

Meanwhile, the April 27, 2004, special general election resulted in two races only three or four votes apart and the validity of a few dozen absentee ballots in question.[11] Following state-court litigation, New York's court of appeals ruled on October 14 that the county board of elections, apparently misinterpreting Judge Mordue's orders, wrongfully issued absentee ballots to voters who requested them for the canceled November 2003 election, even if the voters did not make a new request for the April 2004 election, and ballots cast by those voters should not be counted.[12] Two candidates and seven vot-

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entitled to attorney fees on appeal, but at the market rate for attorneys in the Northern District of New York, not in Manhattan where the court of appeals typically sits); Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 419 F. Supp. 2d 206 (N.D.N.Y. 2005) (awarding the plaintiffs $160,763.07 in fees and costs).

5. Order, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Apr. 8, 2004), D.E. 6.

Judge Mordue died on December 29, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6. Motion, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Apr. 14, 2004), D.E. 9.

7. Minutes, *id.* (Apr. 14, 2004), D.E. 10.

8. Opinion, *id.* (Apr. 16, 2004), D.E. 21 [hereinafter Apr. 16, 2004, *Willingham* Opinion]; Minutes, *id.* (Apr. 16, 2004), D.E. 20.

9. Apr. 16, 2004, *Willingham* Opinion, *supra* note 8.

10. Consent Decrees, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. Feb. 3, 2005, and Jan. 22, 2007), D.E. 55, 143 to 146; *see* Willingham v. County of Albany, 593 F. Supp. 2d 446 (N.D.N.Y. 2006) (magistrate judge opinion discussing allegations that one or more defendants filled out absentee ballots for voters or influenced absentee votes through intimidation); Magistrate Judge Opinion, *Willingham*, No. 1:04-cv-369 (N.D.N.Y. July 12, 2005), D.E. 85, 2005 WL 1660114 (same); *see also* Default Judgment, *id.* (May 11, 2005), D.E. 80 (enjoining five defendants from enumerated activities involving absentee ballots); Second Amended Complaint, *id.* (Mar. 15, 2005), D.E. 67.

11. Hoblock v. Albany Cty. Bd. of Elections, 341 F. Supp. 2d 169, 172 & n.2 (N.D.N.Y. 2004) (noting twenty-seven absentee ballots at issue according to the plaintiffs and forty at issue according to the defendants); *see* Complaint at 8–9, Hoblock v. Albany Cty. Bd. of Elections, No. 1:04-cv-1205 (N.D.N.Y. Oct. 19, 2004), D.E. 1 [hereinafter *Hoblock* Complaint]; Carol DeMare, *Federal Court to Rule on Legislature Elections*, Albany Times Union, Sept. 28, 2005, at B8; *see also* Carol DeMare, *Legislature at Full Strength*, Albany Times Union, Nov. 9, 2004, at B1 (reporting that incumbents continued to serve until the elections were resolved).

12. *In re* Gross v. Albany Cty. Bd. of Elections, 3 N.Y.3d 251, 819 N.E.2d 197, 785 N.Y.S.2d 729 (2004); Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 81–82 (2d Cir.

ers filed a federal class-action complaint in the Northern District on October 19, 2004, challenging the state high court's decision.[13]

With their complaint, the class action plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[14] Judge Lawrence E. Kahn issued a temporary restraining order to preserve the status quo until the motion for the preliminary injunction could be heard.[15]

On October 25, Judge Kahn dismissed the candidate plaintiffs pursuant to the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state-court proceedings.[16] Because the voters, however, were not parties to the state-court proceedings, Judge Kahn granted them preliminary relief by enjoining certification of the election in the two districts at issue.[17] "[B]y providing absentee ballots that voters rely upon in good faith to cast their vote, and then invalidating them, the Board has effectively taken away their guaranteed right to vote in the election. . . . The unfairness to the Plaintiff voters is unmistakenly clear . . . ."[18]

On September 2, 2005, the court of appeals reviewed Judge Kahn's injunction and ruled that the *Rooker-Feldman* doctrine did not apply to the voters' claims so long as the voter plaintiffs represented all voters who were similarly issued absentee ballots improperly and not just voters supporting and controlled by the candidate plaintiffs; so the court remanded the case to provide the voter plaintiffs with an opportunity to amend their complaint if their claims were really independent of the candidate plaintiffs'.[19] The plaintiffs filed an amended complaint on September 9.[20] On December 5, Judge Kahn determined that the candidate plaintiffs were entitled to intervene.[21]

Judge Kahn granted the plaintiffs summary judgment on May 24, 2006.[22] Following the June 12 counting of absentee ballots, one of the candidate

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2005); *Hoblock*, 341 F. Supp. 2d at 172; *see* Carol DeMare, *Court of Appeals Tosses Out Absentee Ballots*, Albany Times Union, Oct. 15, 2004, at B4.

13. *Hoblock* Complaint, *supra* note 11; *Hoblock*, 422 F.3d at 82–83; *Hoblock*, 341 F. Supp. 2d at 171–72.

14. Injunction Brief, *Hoblock*, No. 1:04-cv-1205 (N.D.N.Y. Oct. 19, 2004), D.E. 10.

15. *Hoblock*, 341 F. Supp. 2d at 172; *see* Carol DeMare, *Ballot Counting Halted in County Races*, Albany Times Union, Oct. 21, 2004, at B4.

16. *Hoblock*, 341 F. Supp. 2d at 172–75; *see* D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see also* Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

17. *Hoblock*, 341 F. Supp. 2d at 175–78; *see* Carol DeMare, *Legislature Races Remain on Hold*, Albany Times Union, Nov. 2, 2004, at B4.

18. *Hoblock*, 341 F. Supp. 2d at 176–77.

19. Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 92, 98 (2d Cir. 2005).

20. Amended Complaint, Hoblock v. Albany Cty. Bd. of Elections, No. 1:04-cv-1205 (N.D.N.Y. Sept. 9, 2005), D.E. 27.

21. Hoblock v. Albany Cty. Bd. of Elections, 233 F.R.D. 95 (N.D.N.Y. 2005).

22. Hoblock v. Albany Cty. Bd. of Elections, 487 F. Supp. 2d 90 (N.D.N.Y. 2006); *see* Carol DeMare, *Court Orders Ballots to Be Counted*, Albany Times Union, May 26, 2006, at B9.

plaintiffs prevailed by four votes.[23] The other candidate plaintiff remained tied with his opponent, and two absentee ballots remained in dispute because they were faxed to the board.[24] On June 14, Judge Kahn overruled the last-minute challenge to those two ballots and ordered them counted because they were covered by the terms of previous orders.[25] The last two ballots in question went to the candidate plaintiff, who was certified the winner of the election.[26]

On November 7, Judge Kahn awarded the voter plaintiffs $46,038.68 in attorney fees and costs and awarded the candidate plaintiffs $19,529.50.[27]

In 2015, Judge Kahn found that the 2011 redistricting of the legislature impermissibly diluted the voting strength of Black voters and approved a substitute districting plan for use in 2015 elections.[28]

23. Hoblock v. Albany Cty. Bd. of Elections, 488 F. Supp. 2d 163, 164 (N.D.N.Y. 2006) (noting that the vote was 706 to 702); *see* Carol DeMare, *Elections Resolved After Two-Year Dispute*, Albany Times Union, June 13, 2006, at B1.

24. *Hoblock*, 488 F. Supp. 2d at 164–65 (noting that the candidates had 508 votes each).

25. *Id.* at 165–66; *see* Carol DeMare, *Judge Orders Ballots Opened in Deadlocked Election*, Albany Times Union, June 15, 2006, at B9.

26. *See* Carol DeMare, *Years Later, Election Is Over*, Albany Times Union, June 17, 2006, at B1.

27. Opinion, Hoblock v. Albany Cty. Bd. of Elections, No. 1:04-cv-1205 (N.D.N.Y. Nov. 7, 2006), D.E. 87, 2006 WL 3248402.

28. Pope v. Cty. of Albany, 94 F. Supp. 3d 302 (N.D.N.Y. 2015); Docket Sheet, Pope v. County of Albany, No. 1:11-cv-736 (N.D.N.Y. June 29, 2011) (Apr. 21, 2015, D.E. 437).