STATE OF MICHIGAN

COURT OF APPEALS

GLENN R. BRISSON,

Plaintiff-Appellee,

v

WARREN ELECTION COMMISSION and RICHARD PAUL SULAKA,

Defendants-Appellants.

UNPUBLISHED
February 8, 2005

No. 250809
Macomb Circuit Court
LC No. 03-003602-AW

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order denying their claim for the costs incurred in having to reprint ballots for the September 9, 2003, primary election. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who sought election to the Warren City Council, filed suit to compel defendants to place him on the ballot after defendants decided to remove his name for failure to satisfy the city's residency requirements. The trial court ultimately agreed with defendants' decision to remove plaintiff's name from the ballot after reviewing testimony taken at hearings held by defendant Warren Election Commission and reviewing the materials presented by the parties in support of their positions.

The trial court also held that defendants were not entitled to recover costs incurred as a result of having to print a second ballot that did not list plaintiff as a candidate. Due to the timing of plaintiff's claim and the imminent election, however, this case was reviewed in an expedited manner. As a result, defendants never filed a formal counterclaim against plaintiff for these costs. Defendants maintain that the trial court erred when it decided this issue without having been presented with a written counterclaim in response to plaintiff's writ of mandamus. We disagree.

Defendants provide no authority directly on point in support of their position that they were prejudiced by the trial court's failure to allow them the opportunity to file a counterclaim. They simply cite to MCR 2.203(C), 2.203(E) and 2.108(A)(1) and state that, under the court rules, they had twenty-one days to answer the plaintiff's complaint and file a counterclaim for damages. Defendants assert that they were denied the opportunity to file an unspecified counterclaim due to the timing of the trial court's intermediate orders and its premature decision.

More importantly, defendants do not disclose under what theory they would be entitled to recover the printing costs. They provide a citation to § 13.15(7) of the Warren City Charter that empowers the commission to "make complaint and to prosecute any person whom the commission shall have good cause to believe has been guilty of violation of the election laws." This section may provide the commission with the standing to seek relief in the criminal courts for a candidate's alleged misconduct, and perhaps recover these costs in any future criminal prosecution. However, defendants do not explain how this provides them with a specific civil cause of action to seek recovery of the ballot printing costs due to the erroneous inclusion of plaintiff's name. An appellant may not simply announce a position or assert error then leave it up to this Court to discover and rationalize the basis of his claim and uncover authority to sustain or reject his position. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). In any event, we have found no support for such a claim.

In addition, defendants' claim of error ignores the language of MCR 2.118(C)(1), which provides in pertinent part that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings." Here, defendants incorrectly state that the court improperly based its assumption that defendants would seek the reimbursement of printing costs on allegations in newspaper articles. Prior to plaintiff's decision to file a claim for relief, defendant commission passed a resolution to seek reimbursement of the printing costs from plaintiff and to pursue criminal penalties if possible. It is clear then that the issue of costs was raised as an issue, despite the lack of a formal counterclaim.

Further, defendants' counsel expressly consented to the trial court deciding the issue of costs going so far as to say, "Your honor, we'll accept whatever ruling you make on that issue." Counsel did not move to amend the pleadings to conform to the evidence or raise any other issue he thought would be viable. MCR 2.118(C)(1). Instead, counsel went so far as to suggest that defendants return plaintiff's application fee that the court ordered. Counsel's knowing waiver and consent bind defendants. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Moreover, even if defendants had presented this Court with a possible theory on which they could have recovered the printing costs, defendants cannot show that the trial court's factual decision was clearly erroneous. Having reviewed the trial court proceedings and those held before the hearing commission, we agree with the trial court's findings. It is evident that defendants failed to communicate to plaintiff whether the two-year residency requirement contained in Section 4.2 of the Warren City Charter would apply to defendant's candidacy, as opposed to the thirty-day requirement contained in MCL 168.492, or whether it had ever been enforced prior to plaintiff's application to be a city counsel candidate. We therefore affirm the trial court's decision that defendants are not entitled to recover the ballot printing costs in this civil action.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper