

his complaint. We fail to see how plaintiff can support his claim against defendants for intentional interference with a prospective contractual relation. Therefore, defendants' Motion for Summary Judgment as to Count V of plaintiff's Complaint is also granted.

ORDER OF COURT

NOW, this 14th day of October, 1983, Motion for Summary Judgment on Count IV is denied. All other motions are granted.

Exceptions are granted all parties.

ZERVOS V. FRANKLIN COUNTY BOARD OF ELECTION,
C.P. Franklin County Branch, A.D. 1983 No. 284

Mandamus - Write-in Candidate - Failure to File Loyalty Oath - Notice to Plead on Complaint

1. For the name of a write-in candidate in a primary election to appear on the ballot he must file a loyalty oath 85 days prior to the general election.
2. While the Election Code may raise an ambiguity when it excuses school directors from certain acts, the Loyalty Act, 65 P.S. Sec. 224 is a separate law and will prevail.
3. The Election Board has no duty to seek out and determine whether a write-in candidate wants to be on the ballot.
4. Pa. R.C.P. 1098 gives the Court power to enter judgment after a complaint is filed without proper notice to all parties when the exigency of the case requires it.

Richard Lewis Bushman, Esquire, Attorney for the Plaintiff

Thomas H. Humelsine, Esquire, Attorney for the Defendant

OPINION

EPPINGER, P.J., November 2, 1983:

Nicholas Zervos received enough write-in votes in the Democratic primary May 17, 1983, to be a candidate for school director in the Fannett-Metal School District. The district is composed of two Franklin County Townships and one Perry County Township.

On October 26, 1983, Mr. Zervos filed an action in Mandamus to compel the Franklin County Election Board (board) to print his name on the ballot as a candidate for school director at the municipal election to be held November 8, 1983. The board declined to place his name on the ballot saying he had failed to file the loyalty oath under the act requiring write-in candidates for public office to file a loyalty oath within sixty days after the Primary Election in which he is nominated, Pennsylvania Loyalty Act, 65 P.S. Sec. 224. Under the Election Code, 25 P.S. Sec. 2938.1, every person nominated other than a candidate for school director, among others, who has not paid the filing fee, nor filed the loyalty oath, shall pay the amount of such fee and file such oath with the County Board of Elections at least eighty-five days previous to the day of the General Election, which would have been August 15, 1983.

Zervos knew that he was nominated to the office, but didn't file his loyalty oath until October 20, 1983. He learned that he was not to be included among the candidates for school director sometime before that. On the 20th he appeared at the board's office with a written request that his name be placed on the ballot. The board met the next day and denied the request. He filed this action in Mandamus asking us to compel the election board to place his name on the Democratic ballot in the two districts in Franklin County that are within the school district.¹ We set a hearing for October 28 which was the first convenient time.

At the hearing Zervos appeared with his lawyer. The three members of the election board appeared with the Chief Clerk and the County Solicitor. The solicitor's first objection was that the matter was not properly before the court. Pa. R.C.P. 1091 provides that actions in mandamus must conform to the rules of assumpsit. The complaint filed did not contain a notice to plead. Under Pa. R.C.P. 1026 no pleading need be filed unless the

¹Zervos has taken no similar action to compel the placement of his name on the ballot in the Perry County District.

preceding pleading contains a notice to defend or is endorsed with a notice to plead. However, the solicitor felt obliged to appear with his clients at the hearing.

Two cases that reached the Supreme Court, *County Commissioner Substitute Nomination Case*, 383 Pa. 372, 118 A.2d 750 (1955) and *The Altoona Mayor Substitute Nomination Case*, 413 Pa. 305, 196 A.2d 371 (1964), both dealing with substitute nominations one following the death of a nominee, and the other following a withdrawal were not in mandamus but on petitions to the lower Court to direct the County Board of Elections to allow substitute nominations.

Another case cited to us, *Geyer v. Ausherman*, 32 D&C 2d 405, (C.P. Franklin County, 1963), which permitted a write-in candidate's name to be placed on the ballot before they were printed was in mandamus. The complaint was filed August 30, 1963, with notice to plead in twenty days. An answer was filed on September 6. A hearing was held September 16, and the court handed down its opinion September 26. That is the kind of time schedule that the defendant thought was appropriate in this case. The election in that case was held on November 5.

We set aside his objection for later consideration and proceeded with the evidence in the case, most of which was stipulated.

We hold that despite the wording of the Election Code Sec. 2938.1, *supra*, which may raise an ambiguity when it excuses school directors from certain acts, the provisions of the Pennsylvania Loyalty Act, 65 P.S. Sec. 224, *supra*, must prevail. The loyalty Act is a separate law, not a part of the Election Code. It would be absurd to conclude that all candidates for election must take a loyalty oath except borough, township, and school district candidates, for if loyalty is important in the other offices, it is equally important in local offices. In passing laws, the legislature does not intend an absurd result. The Statutory Construction Act, 46 P.S. Sec. 552(1).

But even if this was not so, the election board should receive some kind of notice that a write-in candidate intends to become a serious candidate. In this day when "Mickey Mouse" may receive enough write-in votes to be nominated the board has no duty to seek out and determine whether a write-in candidate wants to be

on the ballot, *Geyer v. Ausherman, supra*.² The easiest way for a write-in candidate to give notice of his intention is to file the loyalty oath.

At the time of our hearing the ballots had been printed and twenty-one absentee ballots had been mailed out. Absentee ballots must be postmarked before 5:00 o'clock p.m. on the Friday before the election (November 4, 1983). Election Code, *supra* Sec. 3146.6(a). We note that to reprint the ballots and to get them in the mail for postmark before that date is problematical. Some who expected their ballots to count may already have voted and left their homes never to receive the new ballot. The election is November 8.

In arguing the case, the board's solicitor pointed out that though this is an isolated case, if the law permits persons who know they are nominated to ask to be included on the ballot at such a late date, even though they negligently or by oversight failed to file their loyalty oaths as plaintiff contends, confusion may reign. Where there are large numbers of write-in candidates what is contemplated could very well be a problem.

In *Geyer v. Ausherman, supra*, the court held that the election board could be required to place the name on a ballot *before the ballots were printed*. (emphasis supplied). In *County Commissioners Substitute Nomination Case, supra*, a candidate for county commissioner died October 24, after the last day for filing substituted nomination papers. The court authorized the substitution of another name by applying stickers over the entire office block. We note that the substituted candidate's absence on the ballot was not the result of his negligence or oversight. Similarly in the *Altoona Mayor Substitute Nomination Case*, a candidate was permitted to be a substitute candidate at a late date after the nominated candidate had withdrawn and a previous substitute candidate had also withdrawn. He was the third candidate. Again, there was no negligence or oversight on the part of the candidate that caused the last minute ballot changing.

The facts in all of the cited cases are very different from those presented to us. What the plaintiff is requesting is that he be rescued from his own neglect and oversight. This we feel is

²If there was such duty, it would not be material in this case because the plaintiff knew that he had been nominated.

inappropriate and if we so ordered, our precedent could authorize such last minute action where it could have and should have been easily avoided. There was an element of that in *Geyer v. Ausherman*, but Geyer acted in a more timely way. He allowed some time for the wheels to turn. Under the circumstances we do not feel that the board should be required to reprint the ballots in the districts, send out new absentee ballots and expect that they will be postmarked on or before Friday.

At the time of all of the cases discussed the law required that the envelopes in which absentee ballots were to be returned had to be postmarked on election day under then Sec. 3149.5 of the Election Code dealing with absentee ballots. That act also permitted time, until the second Friday following the election, for the absentee ballots to arrive. The canvass followed that. Now the election board is required to receive the absentee ballots and distribute them to the respective district concurrent with the distribution of election supplies which must occur before election day. Absentee ballots are to be canvassed immediately and continuously without interruption at the close of the polls on the day of the election in each election district. Election Code, *supra*, Sec. 3146.8.³

We deferred defendant's objection that it was summarily brought before the court without notice and the right to plead. Answering now, we note that Pa. R.C.P. 1098 gives the court

³While we have discussed the absentee ballot situation to some length our decision is not based on that problem alone. Apparently, without ordering the reprinting of the absentee ballots, we could order the other ballots reprinted, if we chose to do so and time was available, and invoke the provisions of Sec. 3146.3(d) of the Election Code, which provides:

(d) In cases where there is not time, in the opinion of the county boards of election to print on said (absentee) ballots, the names of the various candidates for district, county and local offices, the ballots shall contain blank spaces only under the titles of such offices in which electors may insert the names of the candidates for whom they desire to vote, and in such cases the county boards of election shall furnish to (absentee) electors lists containing the names of all candidates named in nomination petitions or who have been regularly nominated under the provisions of this act, for the use of such electors in preparing their ballots.



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LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS OF
THE 39th JUDICIAL DISTRICT OF
FRANKLIN COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: May 3, 1984.

DEARDORFF First and final account, statement of proposed distribution and notice to the creditors of Nancy D. Hughes and Barbara D. Kelly, executors of the estate of Mildred S. Deardorff, late of Quincy Township, Franklin County, Pennsylvania, deceased.

PHENICIE First and final account, statement of proposed distribution and notice to the creditors of Lois J. Mouse Phenicie Stoshitch, Kay D. Mouse Phenicie, executors of the estate of Joseph G. Phenicie late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SMITH Second and final account, statement of proposed distribution and notice to the creditors of Nancy A. Wagner and C. Richard Smith, executors of the estate of Clarence H. Smith late of the Borough of Chambersburg, Franklin County, Pa. deceased.

Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, Pa.

4-13, 4-20, 4-27, 5-4

power at any time after the filing of the complaint to enter judgment if the right of the plaintiff thereto is clear. Such judgment shall not be entered prior to notice to all parties unless the exigency of the case requires it. So we find that the defendant was properly brought before the court. There is no question that this matter had to be decided before the pleading stage could be completed.

This opinion is filed in support of our order dated November 2, 1983.

ORDER OF COURT

November 2, 1983, the decision of the Court is that the Franklin County Election Board is not required to reprint the Democratic party ballots in the Franklin County election districts in the Fannett-Metal School District to include the name of Nicholas Zervos as a candidate for school director. A written opinion will be filed promptly.

The costs shall be paid by the plaintiff.

SHAW ESTATE V. SLAYTON, C.P. Franklin County Branch,
No. A.D. 1983 - 172

Declaratory Judgment - Defeasible life estate - Mortgage payments - Vested Interest - Joinder of Indispensable Party

1. Unless otherwise provided by will, a life tenant of property subject to encumbrances must pay the interest accruing during the continuance of his estate.
2. A remainderman with a vested interest is an indispensable party to an action to determine whether the life tenant or remainderman is responsible for payment of principal on a mortgage.
3. The absence of an indispensable party goes to the courts jurisdiction and the question should be raised sua sponte by the court.

David C. Cleaver, Esquire, Attorney for Plaintiff