Appellate Division, Fourth Department Case No. CA 23-01332
Supreme Court, Onondaga County Index No. 007623/22

Court of Appeals of the State of New York

GARY J. LAVINE,

Appellant,

v.

STATE OF NEW YORK, KATHY HOCHUL, AS GOVERNOR, ANDREA STEWART-COUSINS, AS TEMPORARY PRESIDENT OF THE SENATE, ROBERT ORTT, AS SENATE MINORITY LEADER, CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, WILLIAM BARCLAY, AS ASSEMBLY MINORITY LEADER, AND THE INDEPENDENT REVIEW COMMITTEE,

Respondents.

MEMORANDUM OF LAW FOR RESPONDENT CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

The New York State Commission on Ethics and Lobbying in Government is a New York state agency tasked with administering, enforcing, and interpreting the State's ethics and lobbying laws. Under Executive Law § 94, state executive and legislative officials, including defendant Carl E. Heastie, the Speaker of the Assembly, are responsible for nominating persons to serve on the Ethics Commission. The statute provides, however, that persons who are nominated to serve on the Ethics Commission shall not be appointed as members unless and until they are first confirmed by the Independent Review Committee, a non-partisan body comprised of the deans of New York's accredited law schools. Gary Lavine, an Ethics Commission nominee whom the Independent Review Committee rejected, sued the State, the Independent Review Committee, and certain of the officials entrusted with the nomination and appointment process, including Speaker Heastie, in Supreme Court, alleging that § 94 violates the New York State Constitution insofar as it

provides that nominees must be approved by the Independent Review Committee—rather than by the Senate—before they may be appointed.[1]

In a memorandum and order issued on July 26, 2024, the Appellate Division, Fourth Department unanimously held that Lavine lacked standing to bring the lawsuit (2024 NY App Div LEXIS 4026, at *3 [4th Dept, July 26, 2024, Case No. CA 23-01332]). The court explained that "[a] plaintiff has standing to maintain an action upon alleging an injury in fact that falls within their zone of interest" (*id.* at *4, quoting *Silver v Pataki*, 96 NY2d 532, 539 [2001] [alteration marks omitted]). An injury in fact, in turn, entails "an actual legal stake in the matter being adjudicated" (*id.*, quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). Further, standing, including the injury-in-fact requirement, "must be considered at the outset of [the] litigation" (*id.* at *3–4, quoting *Society of Plastics Indus.*, 77 NY2d at 769). Undertaking that consideration, the court concluded that Lavine did not have standing

[1] Lavine's constitutional challenge to Executive Law § 94 is distinct from the constitutional challenge to § 94 involved in *Cuomo v New York State Commission on Ethics and Lobbying in Government* (Case No. APL-2024-00076), which is currently pending in this Court on the merits.

to bring the lawsuit because he "did not suffer an injury-in-fact" from the rejection of his nomination (*id.* at *4).

Although the Fourth Department did not recite in detail its rationale for finding that the rejection of the nomination did not cause Lavine to experience an injury in fact, it referred to the briefs filed in that court by Governor Hochul and by the Independent Review Committee, which addressed the issue in detail (*see* 2024 NY App Div LEXIS 4026, at *2). Those parties explained that (1) at the time Lavine commenced this litigation, he was statutorily ineligible to become a member of the Ethics Commission because he had served as a commissioner of an executive agency—the now-defunct Joint Commission on Public Ethics, often called "JCOPE"—within the previous two years, and that (2) in any event, because Lavine was not entitled as of right to be named a member of the Ethics Commission, he was not concretely and legally harmed by the rejection of his nomination (4th Dept Brief for Respondent Hochul, at 29–31; 4th Dept Brief for Respondent Independent Review Committee, at 11–18). Speaker Heastie advanced those same arguments by adopting,

in his Fourth Department brief, the arguments made by Governor Hochul (*see* 4th Dept Brief for Respondent Heastie, at 14 n 3).[2]

As explained more fully herein, the Fourth Department's sound, unanimous decision does not warrant this Court's review. In holding that Lavine lacked standing to sue, the Fourth Department faithfully applied this Court's case law in a manner that reaches the correct result and that breaks no new jurisprudential ground. Lavine's motion for leave to appeal should be denied.

REASONS FOR DENYING LEAVE TO APPEAL[3]

A. The Fourth Department's Decision Unanimously Holding That Lavine Lacked Standing To Commence This Lawsuit Is Not Leaveworthy

The Fourth Department's unanimous decision holding that Lavine lacked standing to bring this litigation does not warrant this Court's

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[2] Speaker Heastie followed that same course in Supreme Court, adopting the arguments that Governor Hochul made in support of dismissal of Lavine's lawsuit (*see* 4th Dept Record on Appeal 669 [Speaker Heastie's Supreme Court memorandum of law in support of his cross-motion to dismiss Lavine's complaint]).

[3] In addition to the arguments expressly set forth herein, Speaker Heastie adopts the arguments made by Governor Hochul in her separate submission opposing Lavine's leave motion.

review. The Fourth Department's decision follows directly from this Court's precedent on standing.

As this Court has explained, "[a] plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest" (*Silver*, 96 NY2d at 539). An injury in fact entails "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus.*, 77 NY2d at 772). And the determination of whether the plaintiff possesses that requisite legal stake "must be considered at the outset of [the] litigation" (*id.* at 769).

A part of Executive Law § 94 that is not challenged here provides that anyone "who is currently, or has within the last two years * * * been * * * a commissioner of an executive agency appointed by the governor" is prohibited from serving on the Ethics Commission (Executive Law § 94 [3] [e] [ii]). Persons who served on JCOPE within the relevant two-year period fall within that prohibition, because, during its existence, JCOPE was an agency in the Department of State with a membership that was, in part, gubernatorially appointed (*see* Public Officers Law § 73-a [1] [b] [defining "state agency" as "any department, or division, board, commission, or bureau of any state department, any public benefit

corporation, public authority or commission at least one of whose members is appointed by the governor"]). Lavine thus was statutorily prohibited from joining the Ethics Commission at the time he commenced this litigation in 2022 because he had been a member of JCOPE as recently as earlier that same calendar year (*see* 4th Dept Record on Appeal ["R"] 20 [January 2022 letter from Lavine in which he stated "I am not acting on behalf of the Commission"], 23–24 [June 2022 letter from JCOPE identifying Lavine as a member]).

Plainly, then, as a matter of this Court's well-settled standing jurisprudence, Lavine lacked standing to bring this lawsuit. At the time he filed his complaint, Lavine had no "legal stake in the matter being adjudicated" (*Society of Plastics Indus.*, 77 NY2d at 772) because he was barred, by statute, from assuming the role for which he had been nominated. And Lavine, in his motion for leave to appeal to this Court, does not argue otherwise. Nor does Lavine contend that any other decisions of this Court or of the Departments of the Appellate Division render the statutory bar inapplicable or would allow him to maintain his lawsuit notwithstanding the bar's application.

Instead, Lavine takes issue only with the second of the two standing arguments raised by the defendants in the Fourth Department: the argument that, even putting the statutory bar to one side, Lavine was not concretely and legally harmed by the rejection of his nomination because he was not entitled as of right to be named a member of the Ethics Commission. That argument, however, is squarely supported by this Court's cases, which hold that "public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in the office" (*Lanza v Wagner*, 11 NY2d 317, 324 [1962], *appeal dismissed*, 371 US 74 [1962], *cert denied*, 371 US 901 [1962]). *A fortiori*, a mere nominee has no legal interest in the position, either. Rejection of a nomination—even a nomination that (unlike here) the nominee is *not* statutorily barred from accepting—thus does not cause the nominee an injury in fact for standing purposes.

Lavine does not cite any case from this Court to the contrary. Nor does he demonstrate that any Appellate Division Department outside the Fourth Department would find that (ignoring the statutory bar) the rejection of his nomination caused him to suffer an injury in fact. The

only decision Lavine cites from another Department, *Urban Justice Center v Pataki* (38 AD3d 20 [1st Dept 2006]), does not address the standing of a nominee for a state agency position to challenge the rejection of his nomination (Valentino Aff in Support of Motion, at ¶ 21). *Urban Justice Center* addresses the standing of advocacy organizations and legislators to contest certain practices of the Legislature and of the Governor that allegedly impaired certain legislators' ability to participate in the legislative process (38 AD3d at 22).

Lavine asserts that the Fourth Department itself has, on two prior occasions, recognized standing on the part of litigants similarly situated to him in this case: *Dekdebrun v Hardt* (68 AD2d 241 [4th Dept 1979]) and *Phelan v City of Buffalo* (54 AD2d 262 [1976]) (Valentino Aff in Support of Motion, at ¶ 20). Thus, according to Lavine, there is a conflict between those prior Fourth Department decisions and the Fourth Department's decision here (Valentino Aff in Support of Motion, at ¶ 20). Lavine is incorrect, and his reliance on those two prior Fourth Department decisions is unavailing.

There is no conflict between the Fourth Department's prior decisions in *Dekdebrun* and *Phelan* (neither of which were reviewed by

this Court) and its decision below. Only *Dekdebrun* involves a challenge made by a rejected nominee to a state agency; *Phelan* involved a candidate for elected office (54 AD2d at 263). And the standing issue litigated in *Dekdebrun* was highly idiosyncratic and completely unlike the standing issue here. The Fourth Department framed the question presented in that case as "whether plaintiff has standing to bring this declaratory judgment action notwithstanding that plaintiff has not recorded [certain documentation] with the office of the Secretary of State" (68 AD2d at 245). It was a case about paperwork.

Moreover, any potential conflict between or among decisions of the Fourth Department of the sort that Lavine (incorrectly) posits would affirmatively counsel *against* leave to appeal to this Court. That sort of supposed intra-departmental inconsistency would suggest that the issues that are the subject of the alleged conflict are not yet ripe for review in this Court, and that they instead should be allowed to further percolate within the Fourth Department so as to allow the Fourth Department to settle on a definitive position that this Court can then evaluate if necessary (*cf.* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.6 [10th ed. 2013] [explaining that the existence of conflicts between panels

of a single federal circuit court of appeals generally counsels against certiorari review by the United States Supreme Court]). If indeed the Fourth Department's position on the standing issue that Lavine discusses is unsettled (as Lavine suggests), then further percolation would give that court the opportunity to align itself with what Lavine considers to be the appropriate stance on the issue; and if the court ultimately did so, it would eliminate the need for this Court to intervene and prescribe that rule itself.

All of that said, regardless of the state of standing jurisprudence in the Appellate Division generally, in this case specifically the Court would have no legitimate occasion to reach the particular standing issue that Lavine discusses in his motion for leave, *i.e.*, whether a nominee to a state agency suffers an injury in fact if his or her nomination is rejected. Whatever the resolution of that question might be, Lavine still would lack standing due to the absence of an injury in fact because, at the time he initiated this case, he was statutorily barred from joining the Ethics Commission (*supra* 4–6). He suffered no injury in fact because his nomination could not lawfully have been accepted.

Finally on standing, adhering to the black-letter precedent under which Lavine lacked standing to commence this lawsuit does not run afoul of the intention this Court once stated (in a case involving taxpayer standing) "to recognize standing where * * * the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action" (Valentino Aff in Support of Motion, at ¶ 22, quoting *Boryszewski v Brydges*, 37 NY2d 361, 364 [1975]). As noted in the briefing below, insofar as Lavine's challenge complains of a purported usurpation of senatorial power, members of the Senate may well have standing to mount the challenge that Lavine did: to sue on the ground that Executive Law § 94 violates the New York State Constitution insofar as it provides that nominees must be approved by the Independent Review Committee—rather than by the Senate—before they may be appointed (*see* 4th Dept Brief for Respondent Hochul, at 30; 4th Dept Brief for Respondent Heastie, at 14 n 3).

B. The Fourth Department's Decision Is A Poor Vehicle For Reviewing Any Standing Issues That Might Be Perceived As Leaveworthy In The Abstract

In the event that this Court perceives any of the standing issues presented by the Fourth Department's decision to be leaveworthy in the

abstract—which, as shown above, it should not (*supra* 4–11)—Lavine's motion for leave to appeal still should be denied. This case is a poor vehicle for reviewing any such issues, because even if the case were accepted for plenary review and Lavine were found to have standing, the ultimate outcome of the case in this Court would still be the same: Lavine's constitutional challenge to Executive Law § 94's appointment process would fail, as Speaker Heastie demonstrated in his detailed discussion of the merits in his brief to the Fourth Department (4th Dept Brief for Respondent Heastie, at 15–45), and as Supreme Court, in its cogent opinion, so held (R 1.2–1.9). Accordingly, any ruling that this Court might make on the issue of standing would be relegated to *dicta*. The Court should adhere to its usual practice of reserving its scarce leave-docket resources for cases, unlike this one, in which the supposedly leaveworthy issues are likely case-dispositive.

CONCLUSION

Lavine's motion for leave to appeal should be denied.

September 3, 2024

Respectfully submitted,

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AFFIRMATION OF SERVICE

Appellate Division,
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I, Brian D. Ginsberg, an attorney admitted to practice in the courts of the State of New York and a partner in Harris Beach PLLC, counsel for respondent Carl E. Heastie, as Speaker of the Assembly, in the above-captioned case, hereby swear and affirm under penalty of perjury that, on September 3, 2024, I served one copy of the within Memorandum of Law for Respondent Carl E. Heastie, as Speaker of the Assembly, in

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