

FILED OCT 26 2009

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILIP HARRY, CLERK
BY: 

PAUL KATAN, an individual,) No. 1 CA-CV 09-0611 EL
)
Plaintiff/Appellee,) DEPARTMENT D
v.) Yavapai County
) Superior Court
CITY OF PRESCOTT, a municipal) No. P1300CV200901611
corporation; LIZ BURKE, in her)
official capacity as the) **ORDER**
Prescott City Clerk,)
)
Defendants/Appellants.)
_____)

The court, Judges John C. Gemmill, Jon W. Thompson, and Patrick Irvine participating, has considered this expedited election appeal. As explained below, we conclude that the trial court erred and therefore reverse.

Paul Katan seeks to be included on the City of Prescott 2009 general election ballot as a candidate for the City Council. Katan does not dispute that he received the seventh highest number of votes in the City primary. Nevertheless, he argues that he moved into sixth place when the person receiving the fifth highest number of votes, Bob Bell, withdrew.

We conclude that Katan is not entitled to be on the general election ballot. The official canvass of the primary election on September 8, 2009, found that he was not one of the primary election candidates entitled to be placed on the general election

ballot. Arizona Revised Statutes § 16-674 (2006) required any contest of this determination to be filed within five days. Katan failed to file a contest within five days, so the superior court should not have ordered him added to the ballot.

We further conclude that neither Bell's withdrawal nor the City's preparation of the ballots without including Bell as a candidate gave the superior court cause to order Katan to be included on the general election ballot. Article IX, Section 7 of the City Charter provides that the only candidates at the general election will be the six primary election candidates with the highest number of votes. Bell may have withdrawn as a general election candidate, but his status as one of the top six in the primary was fixed by the official canvass. The failure of the City Clerk to issue certificates of nomination to Bell and the other five top candidates does not alter the conclusiveness of the canvass. In any event, whether or not the City could legally remove Bell from the ballot, there is no authority to recreate, restore or renew Katan's candidacy, or to substitute him for Bell.

Therefore, we reverse the judgment of the trial court and vacate the temporary restraining order/preliminary injunction prohibiting the City from conducting its general election and the writ of mandamus directing the City Clerk to place Katan's name on the ballot. A formal decision setting forth the Court's reasoning will follow in due course.

DATED this 26th day of October, 2009.

A handwritten signature in black ink, appearing to read 'P. Irvine', written over a horizontal line.

PATRICK IRVINE, Judge

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Yavapai County Superior Court
P1300CV200901611

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was mailed October 26, 2009 to:

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