

<b>Matter of Tepe v Katz</b>
2007 NY Slip Op 34058(U)
December 12, 2007
Supreme Court, Suffolk County
Docket Number: 0036450/2007
Judge: Emily Pines
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SHORT FORM ORDER

Index Number 36450-2007

Index Number 36624-2007

**SUPREME COURT - STATE OF NEW YORK**I. A. S. PART 23 SUFFOLK COUNTY*Present:*HON. EMILY PINES  
JUSTICE

\_\_\_\_\_ X  
In the Matter of the Application of  
Toni P. Tepe,  
Petitioner,

Plaintiff Tepe's Attorney  
Reilly & Reilly, LLP  
170 Old Country Road, Suite 308  
Mineola, New York 11501

- against -

Anita S. Katz and Cathy L. Richter Geier, constituting the  
Board of Elections of the County of Suffolk, William J.  
Dowler, Deborah Poulos, Glenda A. Jackson, Susan A.  
Berland, each being rival candidates in the General Election  
held on November 6<sup>th</sup>, 2007 for the Public Offices of  
Copunselman for the Town of Huntington,

Defendant Berland's Attorney  
Dickstein Shapiro LLP  
1177 Avenue of Americas  
New York, New York 10036-2714

Defendant Commissioner Katz' Attorney  
Jaspan Schlesinger Hoffman LLP  
300 Garden City Plaza  
Garden City, New York 11530

Respondents,

For an order for an order, pursuant to Sections 16-100, and  
16-106 of the Election Law.

Defendant Jackson's Attorney  
Lawrence Silverman, Esq.  
350 Veterans Memorial Highway  
Commack, New York 11725

\_\_\_\_\_ X  
In the Matter of the Application of  
Mary Collins, Chair of the Huntington Democratic Committee,

Petitioner,

Defendant Commissioner Geier's Attorney  
Ryan, Brennan & Donnelly, LLP  
131 Tulip Avenue  
Floral Park, New York 11001

- against -

Anita S. Katz and Cathy L. Richter Geier, constituting the  
Board of Elections of the County of Suffolk, Susan A.  
Berland, Glenda A. Jackson, Deborah Poulos and William J.  
Dowler each rival candidates for the public office of Council  
for the Town of Huntington in the general election of  
November 6, 2007,

Defendant Dowler's Attorney  
Walter Long, Esq.  
490 Wheeler Road, Suite 165K  
Hauppauge, New York 11788

Respondents,

For an order for an order, pursuant to Sections 16-100, and  
16-106 of the Election Law.

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**CORRECTED DECISION**

In these joined proceedings, commenced under **Article 16** of the  
**New York State Election Law**, Petitioner Tepe has requested that

this Court, after determining the validity of paper ballots submitted for the office of Town Council for the Town of Huntington, take the following actions: 1) Order the testing and inspection of a voting machine in ED 33, which has either malfunctioned or has been the subject of tampering and make findings in that regard; 2) Order the canvass of the votes made by the Board of Elections be corrected and adjusted to reflect a proper tally of the votes for that public office; 3) Order the Suffolk County Board of Elections to certify the name of William J. Dowler as elected to the public office of Councilman, Town of Huntington; or, in the alternative, 4) Declare the results for such office cannot be determined absent a new election; and 5) in such instance, Order a new election for the position of Town Council in the Town of Huntington. Petitioner Collins sought an Order of the Court, after completing its review of all objections to the paper ballots, Ordering the Board of Elections to certify the results of the election for Town council for the Town of Huntington, naming Glenda Jackson as the winning candidate for the office.

Following a two day hearing held at the Board of Elections, this Court issued a written Decision, containing its rulings on the paper ballots to which objections were raised both by Petitioner Tepe and by Petitioner Collins. After the two Commissioners of Elections opened and tallied the ballots based on the Court's rulings, they informed the Court that candidate Glenda Jackson thereafter lead candidate William Dowler by 23 votes. The tally on the voting machine for ED 33, which was thereafter impounded by this Court's order, was stated to be 109 votes for Jackson and 88 votes for Dowler. In her Petition, Tepe argues that a statistical review of all other election districts for the Town demonstrates that all 40 extra votes were somehow improperly allocated to Jackson.

Thereafter, counsel for all parties appeared before this Court for purposes of legal argument on the question of this Court's authority to proceed under the Election Law on the issues raised concerning the voting machine for ED 33. It was agreed at such conference that the machine recorded 40 more votes than the maximum number based on both the poll roster book and the voting machine's public counter. A bi-partisan team of voting machine mechanics were directed to examine the subject machine forthwith. This Court ordered all counsel to appear with the results of the inspection with all due speed. Upon return to this Court on Tuesday, December 11, 2007, the attorneys for both Commissioners of

Elections reported that it was the consensus of the Commissioners that there was no evidence the subject machine had indeed malfunctioned or had been the subject of tampering. However, while this leads to the inescapable conclusion that as a result of human error the machine had not been properly set at zero ("zeroed out") for this office, neither was able to say whether the extra votes favored one particular candidate or all, and in what proportion.

Based on all of the above, counsel for all parties concede that Glenda Jackson is, in fact, the winner of the Town Council seat based on the tabulations given to the Court. Even assuming, as argued, that all 40 extra votes were removed from Ms. Jackson's tally, she would still exceed the number of votes cast for William Dowler by 4 votes. There is no evidence, based on the review of the bi-partisan team of inspectors from the Nassau County Board of Elections, (Exh. E) of tampering.

This Court has, in fact, granted much of the relief sought in both Petitions. It has reviewed all paper ballots on which objections were raised and made rulings therefor and has ordered an examination and testing of the voting machine in question. This Court has found, based on both requests for relief that Glenda Jackson's vote tally exceeds that of William Dowler excluding the voting machine for ED 33 and that the machine exceeded the vote count by recording an excess over those signed at the roster of 40 votes. There is no evidence nor any credible offer of proof submitted that any more than 40 votes could have been improperly delegated to any of the candidates. Based thereon, the Court grants the ultimate relief of 1) lifting all restraining orders, preventing the Commissioners of Elections from certifying the election for Town Council for the Town of Huntington; and 2) lifting any Order securing the machine in question. In order to achieve finality, the Court also grants the relief requested of directing the Commissioner of Elections to certify the results of the election for the positions of Town Council for the Town of Huntington.

#### THE MALFUNCTION

Petitioner Tepe and counsel for William Dowler argued that whether the issue is one of malfunction or malfeasance, the Court must refrain from ordering the Commissioners certify the November 6, 2007 election for Town Council because the true results cannot be ascertained. Petitioner Collins and counsel for Glenda Jackson

assert that this Court is without authority to act under the Election Law since this situation is governed by the procedure set forth by the Court of Appeals in **Delgado v Sunderland**, 97 NY 2d 420, 767 NE 2d 662, 741 NYS 2d 171 (2002). In that case, an unsuccessful candidate for a city council election sought a declaration that the results of the local election could not be certified by the county elections board due to a voting machine malfunction. The Court of Appeals reversed the Orders of the lower courts directing a new election be held, on the grounds that no support for such action was found in the Election law for the reasons sought.

While each case has its own set of facts, the Court believes it is governed by the ruling in **Delgado, supra**. Despite counsels' arguments to the contrary, the issue here is not whether Glenda Jackson has already been certified as the winning candidate for office; but, rather, whether the Supreme Court is given the authority when a proceeding is brought before it under the Election Law, to order a new election based on a finding of machine overcount. The answer appears to be "no". The aggrieved candidate's option is limited to seeking the aid of the Attorney General through a "quo warranto" proceeding. **See, Executive Law § 63-b**. Moreover, the Appellate Division, Second Department reiterated this principle in **Flood v Schopper**, 20 AD 3d 417, 799 NYS 2d 232 (2d Dep't 2005), when it affirmed the Supreme Court's refusal to order a new election based on irregularities such as machine malfunction, stating that "(t)he proper vehicle for challenging the results and contesting title to the public office of a purported winner is a quo warranto action" commenced by the Attorney General. **Flood, supra**. In **Flood** as herein, the results had not yet been certified when the proceeding was originally commenced.


While Petitioner Tepe's counsel refers this Court to the 1968 determination in **Stella v O'Rourke**, 58 Misc 2d 1041, 298 NYS 2d 132 ( Sup Ct Bronx Co 1968), that case presented different facts than those at issue here. In **Stella, supra**, there was evidence that voting machines, after being tallied by election inspectors in police presence, were thereafter broken into and altered, changing the election result. In the case at bar, based on the court's rulings on the paper ballots, which were not opened or counted until all objections were ruled on, candidate Jackson lead William Dowler by 23 votes. Even if all 40 votes on the subject machine were removed from Jackson's tally, she remains the winner. Under the circumstances, it makes little sense to delay certification by the

Board. While counsel for Dowler and Tepe offered to present witnesses who would testify to the zeroing out procedures followed for the machine in question, it appears to the Court the only possible conclusion will be that the machine was not properly set at zero as a result of human error. This is not the situation set forth in **Stella, supra**.

Having determined the validity of the paper ballots and the priority of directing the Board of Elections to certify the results, the Court is left with the quandary of what further direction to give the Board of Elections. In this regard, the Court admits it has little, if any guidance from the available case law. However, as set forth by Commissioner Tepe's counsel, the Court did have authority under **Election Law § 16-112** to order the examination of any machine used in an election. Although the bipartisan team of mechanics did determine the subject machine properly functions, they were unable to state how the extra 40 votes were allocated. Counsel for both Commissioners of Elections also agree that a new expert will not be able to determine how to allocate the extra 40 votes. Accordingly, the Court directs the Board of Elections to certify the results of the election for the Huntington Town Council utilizing the results from ED 33.

This constitutes the **DECISION** and **ORDER** of the Court. In view of the very significant issues raised herein, the court stays execution of this Order for seven (7) days for the purpose of allowing any prospective appellant to seek a further stay from the Appellate Division, Second Department.

**Dated:** December 12, 2007  
Riverhead, New York

  
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**Hon. Emily Pines**  
J. S. C.