

Matter of Rettalita-Tepe v Katz
2007 NY Slip Op 34113(U)
December 4, 2007
Supreme Court, Suffolk County
Docket Number: 0036450/2007
Judge: Emily Pines
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
I. A. S. PART 23 SUFFOLK COUNTY

Present:

HON. EMILY PINES
 JUSTICE

Action One
MOTION DATE: 11-29-2007
SUBMIT DATE: 11-29-2007
MOTION NO.: 001 MOTD

Action Two
MOTION DATE: 11-29-2007
SUBMIT DATE: 11-29-2007
MOTION NO.: 001 MOTD

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

In the Matter of the Application of
 Toni P. Rettalita-Tepe, Chair of the Huntington Republican
 Committee.

Petitioner, Defendant Collins' Attorney
 Index Number 36450-2007 Annette M. Totten, Esq.
 Action One PO Box 1907
 Riverhead, New York 11901

- 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 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.

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

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

Petitioner, Defendant Commissioner Geier's Attorney
 Index Number 36624-2007 Ryan, Brennan & Donnelly, LLP
 Action Two 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.

_____ X

Petitioner, Chair of the Republican Committee of the Town of Huntington,
 commenced this Special Proceeding, pursuant to **New York State Election Law**

Article 16, seeking an Order declaring the validity of affidavit and absentee ballots cast for the public office of Councilperson, Town of Huntington, in the 2007 General Election. In addition, Petitioner Tepe asks the Court to order the inspection of a voting machine in Election District 33 on the ground that such machine either malfunctioned or was the subject of malfeasance since it recorded 40 more votes than those able to be cast for the position of Town Council, based of the number of voters who signed the poll roster book for that Election District. Finally, Petitioner Tepe seeks this Court's order declaring William J. Dowler as elected to the office of Town Council for the Town of Huntington. Petitioner Collins, Chair of the Democratic Committee of the Town of Huntington, subsequently commenced a Special proceeding, pursuant to **New York State Election Law Article 16**, seeking an Order directing the Board of Elections to preserve all absentee and affidavit ballots, objected to by various parties during the canvass process, and following ruling on the various objections, directing the Board of Elections to count the ballots and certify the proper parties as elected to the Town Council for the Town of Huntington. In its Petition, Chairperson Collins does not specifically address the issue of the voting machine for Election District 33.

Based on the agreement of counsel representing the two Petitioners, as well as those representing candidates, Glenda Jackson, William J. Dowler and Susan Berland, all candidates for the elected office set forth, hearings were held during November 30 and December 3, 2007 before this Court, at the Suffolk County Board of Elections. Upon consultation with counsel, the Court allowed all parties to set forth evidence first concerning whether the objections to the various paper ballots should be sustained or overruled. With regard to the paper ballots, counsel agreed to admission

into evidence of the original envelopes containing absentee and affidavit ballots to which both Petitioners had objected. Two custodians of Board of Elections records, who testified under oath that the records they were retrieving were kept in the ordinary course of business of the Suffolk County Board of Elections, projected on a large screen and then printed out copies of the voter registration cards. Each copy of the registration card was placed in evidence in conjunction with the original paper ballot. Counsel representing all parties were permitted to argue and to submit evidence to support their arguments in favor and against such objections.

Thereafter, counsel for parties agreed to the admission into evidence of those opened paper ballots for which objections had been raised during the canvass process. Again all parties were permitted to submit evidence and legal arguments with regard to each of these opened paper ballots. The Court agreed, as a matter of procedure, that no ballots would be opened until rulings were made on all of the objections.

In following the above described procedure, the Court overruled two original objections set forth by counsel on behalf of respondent Jackson. First, with regard to the Court's jurisdiction over the proceeding, the Court accepted the stipulation on the record by counsel for all parties that Petitioner Tepe and Petitioner Collins were the properly certified Chairpersons of constituted Committees, and therefor entitled to commence special proceedings regarding objections to paper ballots. **see, Election Law Article 16.** Second, the Court found that while a party raising objection to a paper ballot signature has the burden of demonstrating that it differs substantially from signatures of voters on voter registration cards, there is no specific requirement that such be proved by expert testimony. **see, Kolb v.**

*Case*lla, 270 AD 2d 964, 705 NYS 2d 746 (4th Dept 2000). The following constitutes the rulings of the Court upon the evidence submitted.

UNOPENED BALLOTS

Petitioner Tepe asserted that several paper ballots were invalid and should not be opened and/or counted on the ground that the signatures on the ballot envelopes did not match the voter registration signature. Based upon the Court's review of each paper ballot objected to for this reason, the Court finds that Petitioner Tepe demonstrated that such signatures were substantially different from the signatures on the various absentee and affidavit ballots with regard to Petitioner Tepe's **Exhibits A-3, A-22, A-29, A-43, A-37, and A-49**. The Court finds that Petitioner Tepe was unable to demonstrate that such signatures were substantially different with regard to the unopened paper ballots admitted into evidence as **Exhibits A-2, A-4, A-5, A-12, A-23, A-31, A-38, A-41, A-42, A-46, A-48, A-50, and A-58**. *See, Hosley v. Valder*, 160 AD2d 1094, 553 NYS 2d 251 (3d Dept 1990).

Counsel for all parties stipulated that all objections were withdrawn and that unopened paper ballots under the following exhibit designations could be opened for purposes of canvas: **A-1, A-7, A-9, A-10, A-13, A-14, A-15, A-16, A-17, A-18, A-19, A-20, A-25, A-26, A-27, A-28, A-30, A-32, A-33, A-34, A-35, A-45, A-47, A-52, A-53, A-55, and A-56**. It was therefore, the direction of the Court that such paper ballots be opened following the hearing and canvassed so that they could be counted and so that any objections, once opened, could be brought to the attention of this Court.

The Courts have held that paper ballots delivered to the Board of Elections wherein the voter has failed to fill out the affidavit ballot envelope with statutorily required information must not be counted. (*see, Kolb v. Casella*, 270 AD2d 964, 705 NYS 2d 746 (4th Dept 2000)). Accordingly, the failure of a voter to comply with the provisions of **Election Law § 8-302(e)(ii)** will invalidate such ballot. *see, also, McClure v. D'Apice*, 116 AD2d 721, 497 NYS2d 770 (2d Dept 1986). Therefore, the Court finds that Petitioner Tepe has sustained her objections to the paper ballots set forth in **Exhibits A-6, A-20, A-21, A-36 and A-39**. However, the restrictions contained in **Election Law § 8-302(e)(ii)** do not apply to absentee ballots and therefore the objection to **Exhibit A-40** is overruled. It was the direction of the Court that the ballot designated as **Exhibit A-40** be opened.

Election Law § 11-302 allows poll workers to vote by special ballot as long as they provide a written statement indicating that they will be unable to appear at the polling place for the election district on the date of an election because of their duties as election workers. (*see, Panio v. Sundreland*, 4 NY 3d 123, 824 NE 2d 488, 791 NYS 2d 57 (2005)). Thus, the Court finds that Petitioner Tepe has not sustained her objection to the ballot cast by the poll worker designated as **Exhibit A-24** and such ballot should be opened.

Pursuant to **Election Law § 8-302(c)**, a voter who seeks to vote under a name that is different from that on the registration poll card must follow a procedure setting forth both the prior and the new name. In three instances, Petitioner Tepe sustained

her objection to three paper ballots where the voters failed to comply with the provisions of the State Law. Such objections are sustained. They are contained in the ballots within **Exhibits A-8, A-11 and A-44.**

The Court finds that Petitioner Tepe has sustained her objection to three paper ballots containing no postmark. It has been held that where the date of a postmark on an absentee ballot cannot be ascertained without extrinsic evidence, such ballot should be invalidated. *see, Carney v. D'Avignon*, 282 AD2d 1026, 735 NYS 2d 263 (4th Dept 2001): **Election Law §8-412(1)**. The Court sustains to objections to **Exhibits A-51, A-54 and A-57.** However, the Court does not sustain the objection to the ballot designated by **Exhibit A-38** since it was stipulated by counsel that such was hand-delivered to the polls, contained a receipt date of November 5, 2007, was signed as received by two poll inspectors and was agreed by counsel to have been provided by a disabled voter. Such ballot shall be opened.

OPEN BALLOTS

With regard to open ballots for which objections were raised, all parties stipulated on the record that the counting of such ballots by the Suffolk County Board of Elections was indeed proper and all objections were withdrawn regarding the following **Exhibits: B- 60, B-62, B- 63, B- 64, B- 65, B- 67, B- 69, B- 72, B- 74, B- 75, B- 76, B- 77, B- 80, B- 81, B- 82, B- 83, B- 84, B-85, B- 86, B- 87, B- 88, B-90, B-91, B- 93, B- 94, B- 96, B- 97, B-98, B- 99, B- 100, B-101, B- 107, B- 109, B- 111, B-113, B-119 and B- 122.** Accordingly, the Court confirms the Board's counting of

such opened paper ballots. The parties also agreed that the paper ballot designated as **Exhibit B-123** improperly set forth the voter's name and that the Board Commissioners were correct in not counting such ballot.

With regard to those opened paper ballots that were still in contest, the Court makes the following findings. The courts have stated, in general, that the role of the Court in reviewing a paper ballot pursuant to its authority under the Election Law is limited to ascertaining obvious irregularities. Where the intent of the voter is clear, despite an extraneous mark or the failure to fill in a box completely, the appellate courts have ruled that such objections should not be sustained. Based upon the Courts' rulings in the cases of *Brilliant v. Gamache*, 25 AD 3d 605, 808 NYS 2d 728, (2d Dept 2006) and *Mondello v. Nassau County Board of Elections*, 6 AD 3d 18, 772 NYS 2d 693 (2d Dept 2004), the Court finds that neither party sustained objections to these kinds of objections and overrules objections to the following **Exhibits: B-59, B-61, B-66, B-71, B-73, B-89, B-92, B-95, B-102, B-108, B-115, B-116, B-117, B-120, and B-121**. However, where a mark on the ballot contained a distinguishing, as opposed to an inadvertent mark, containing the name and/or initials of the voter, the Court finds it is inappropriate to count such ballot. *see, Marraccini v. Balancia*, 182 AD2d 628, 582 NYS 2d 232 (2d Dept 1992). Accordingly, the Court sustains the objection to the ballots identified by **Exhibit numbers B-78 and B-104**.

A number of objections were raised, by Petitioner Tepe, claiming that the same candidate was voted for on more than one line. A voter's mark in more than one

voting space for the name of a candidate nominated by more than one party, should not, in this Court's opinion, invalidate the ballot as long as only one vote is counted for that particular candidate. *see, 1914 OP Attorney General 370.* Therefore, the Court overrules the objections made to the paper ballots designated under **Exhibits B- 103, B- 112, B- 114, and B- 106.**

In those instances where a true over vote occurred for the office of Town Council, on the other hand, the Court rules such ballots invalid and they should be removed from the canvas. Thus, the Court sustains the objections raised, as applied to the office of Town Council, to those ballots designated by **Exhibits B- 105 and B- 118.**

To the extent that any Counsel raised objections to any rips in the paper ballots, the Court finds that such “rips” were so “de minimus” as not to require rejection of such ballots. Therefore, the ballots represented by **Exhibits B- 70, B- 79 and B- 110** were properly counted and any objections therefore are overruled.

OBJECTIONS FOLLOWING CANVASS
OF NEWLY OPENED BALLOTS

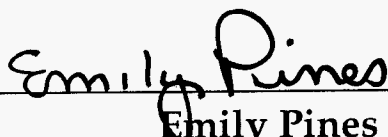
Following the opening of the paper ballots as set forth above, various counsel raised objections to a voter's mark in more than one voting space for the name of the same candidate . These objections were all overruled for the reasons set forth above. Thus, **Exhibits C-1 and C-2** were properly counted. Finally, objections by opposing counsel to the number marks on the back of **Exhibits C-3 and C-4** were overruled.

Such notations were, in this Court's view, completely inadvertent and bore no relation to the votes for Town Council. The Court, in consultation with counsel, determined that it will only cast aside paper ballots and order them not to be counted in an election when they contain derivative equations on blank side of the ballot.

The above constitutes the Court's rulings on all paper ballots objected to by the various parties to these joined proceedings. Both Petitioners are directed to canvass the votes of all paper ballots in accordance with the dictates of this determination. Counsel are directed to appear in this Part on December 5, 2007 at 10 a.m. to make legal arguments and applications concerning the subject voting machine in E. D. 33.

The foregoing constitutes the *DECISION* and *ORDER* of the Court.

Dated: December 4, 2007
Riverhead, New York



Emily Pines
J. S. C.