

Matter of Reilly v Cadel
2008 NY Slip Op 32312(U)
August 11, 2008
Supreme Court, Suffolk County
Docket Number: 0025279/2008
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/28/08
ADJ. DATES 8/4/08
Mot. Seq. # 001 - MG; CDISP

-----X
In the Matter of the Application of DAVID T. :
REILLY and STEVE HACKELING, :
 :
 Petitioners, :
 :
 -against- :
 :
 WILLIAM A. CADEL, GARY F. FIELD and :
 PAUL M. HENSLEY, Candidates for the Public :
 Office of District Court Judge, Third District, :
 Town of Huntington, :
 :
 Respondents :
 :
 -and- :
 :
 ANITA S. KATZ and CATHY L. RICHTER- :
 GEIER, constituting the Board of Elections of the :
 County of Suffolk, :
 :
 Respondents :
 :
 For an Order pursuant to Section 16-100 and 16-102: :
 of the Election Law, declaring invalid certain :
 purported Independence Party designating petitions :
 for the candidates for the Public Office of District :
 Court Judge, Third District, Town of Huntington. :
 -----X

REILLY & REILLY, ESQS.
Attys. For Petitioners
170 Old Country Rd.
Mineola, NY 11501

LAWRENCE H. SILVERMAN, ESQ.
Atty. For Resps. Cadel and Field
350 Veterans Memorial Hwy.
Commack, NY 11725

GAIL M. LOLIS, ESQ.
Deputy County Attorney
Atty. For Resp. Board of Elections
P.O. Box 6100
Hauppauge, NY 11788

Upon the following papers numbered 1 to 16 read on this Election law proceeding
_____; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross
Motion and supporting papers _____; Answering Affidavits and supporting papers 4-5; 6; 7; 10; 11; Replying
Affidavits and supporting papers _____; Other 8-9 (proposed amended petition); 12 (memorandum); 13 (memorandum);
14 (return); 15 (memorandum); 16 (supplemental memorandum) _____; (~~and after hearing counsel in support and opposed to~~
~~the motion~~) it is,

ORDERED that this proceeding seeking to declare null and void the designating petition of the Suffolk County Independence Party (I08-2 and I08-3) filed on July 10, 2008 in support of the respondent candidates William A. Cadel and Gary F. Field as candidates for the Independence Party for District Court Judge, 3rd District, Town of Huntington, is granted, and it is further

ORDERED AND ADJUDGED that the respondent Suffolk County Board of Elections is directed to remove the names of the respondent candidates William A. Cadel and Gary F. Field from the ballot to be voted on at the Primary Election to be held on September 9, 2008, as candidates for the Independence Party for District Court Judge, 3rd District, Town of Huntington.

Respondent candidates William A. Cadel and Gary F. Field filed petitions on July 10, 2008 with the respondent Suffolk County Board of Elections (Board) designating each as candidates for the Independence Party for District Court Judge, 3rd District, Town of Huntington at the Primary Election to be held on September 9, 2008. Objections and specifications were subsequently filed by the petitioner, David T. Reilly, on July 21, 2008. By order to show cause dated July 22, 2008, petitioners David T. Reilly, as an objector, and Steve Hackeling as a candidate-aggrieved, commenced this special proceeding, pursuant to Election Law §16-102(1), to invalidate the challenged designating petitions, based upon previously filed specific objections. Candidate Paul M. Hensley was made a party respondent to the proceeding, but no challenge was brought against his separate petitions. The last day to commence a special proceeding, pursuant to Election Law §16-102(2) was July 24, 2008. The original return date was July 28, 2008, but was adjourned to July 31, 2008.

On July 24, 2008 respondent Paul M. Hensley served a verified answer with counterclaim and cross petition by express mail overnight delivery upon the petitioners, the individual respondent candidates, William A. Cadel and Gary F. Field, and the Board. Said respondent claims that since overnight mail was one of the methods of service permitted by the Court in instituting the original proceeding on July 22, 2008, he is authorized to do so (*see* verified answer, par 24). The papers before the Court does not reveal that the cross petition was ever filed with the Suffolk County Clerk. The counterclaim merely joined in the request of the petitioners, but the cross petition seeks to commence an invalidating proceeding against the designating petitions of co-respondents, William A. Cadel and Gary F. Field.

By letter dated July 30, 2008, petitioner David T. Reilly faxed and mailed to counsel for all respondents, four newly discovered objections to the designating petitions, not set forth on the specifications of objections previously filed with the Board or set forth in the invalidation proceeding.

Also on July 30, 2008, respondent candidates William A. Cadel and Gary F. Field served an answer, with five affirmative defenses, with no cross-claim or counterclaims. Not one of the affirmative defenses

stated that there were sufficient signatures on the designating petition or challenged the line-by-line specific objections filed by petitioners with the Board.

At the July 31, 2008 return date, despite this Court's insistence to counsel for the Board that the review of the specific objections should be completed before the return date, no action was taken by the Board of the objections filed ten days earlier. With a direction that the Board will complete the line-by-line review that day, the matter was adjourned to August 4, 2008. Finally, on the afternoon of July 31, 2008, the Board, by a split decision, failed to approve a resolution finding the specifications of objections sufficient and by virtue of that split decision, the challenged designating petitions were declared valid. After that determination, counsel for the Board served a verified answer, noting that the designating petitions were valid.

Additionally on July 31, 2008, petitioner David T. Reilly served a proposed amended petition to invalidate which seeks to incorporate into the proceeding the four newly discovered objections set forth in his letter of July 30, 2008.

On August 1, 2008, the Board prepared and served its respondent's Return, which contains the objections work sheets, the objections, the petitions and the minutes of the determination by the respondent Commissioners. By letter the same date, August 1, 2008, petitioner David T. Reilly faxed to all counsel an amended objection, since the Board did not agree with the original objection during its review, due to a mistake as to the proper petition sheet objected to.

In the morning of the adjourned hearing date, August 4, 2008, counsel for respondent Paul M. Hensley, faxed a letter to all counsel raising a new objection to a single signature on the designating petitions, based upon the Board's rejection of the previously filed specification of objection. Prior to the commencement of the hearing at 2:00 p.m., the Board served and filed an amended verified answer and a verified answer to counterclaim and cross petition.

A review of the petition at issue reveals a total of 255 signatures. A total of 203 is required to support a valid designation. The Board found 52 signatures to be invalid, leaving the exact amount needed, that is, 203 valid signatures. However, five (5) signatures were found to be valid by split decision by the respondent Commissioners, with agreement by the Commissioners as to the validity of a sixth signature.

At the hearing on August 4, 2008 and August 11, 2008, petitioners challenged various rulings made by the Board and set forth additional new objections as noted above which were set forth in faxed letters to all counsel.

However, the Court must make some initial determinations. With regard to the July 24, 2008 cross petition by respondent Paul M. Hensley, in light of the determination of the Board, respondent Paul M. Hensley, is, in essence, asserting a cross claim against the co-respondent Board, seeking to overturn the determination that validated the designating petitions. This issue was answered by the Second Department in *Matter of Koplen v Austin*, 5 AD3d 515, 772 NYS2d 829 (2d Dept 2004), wherein the court held that a cross claim is not permitted in a special proceeding without leave of court. "The appellants did not seek leave

to serve a cross claim, and thus, the cross claim was not properly before the Supreme Court” (*Matter of Koplén v Austin*, 5 AD3d at 516). Since leave of court was not sought prior to the attempted service of the invalidating cross claim pleading, it must be dismissed (*see Matter of White v Bilal*, 21 AD3d 573, 800 NYS2d 596 [2d Dept 2005]; *Matter of Zenosky v Graziani*, 288 AD2d 843, 735 NYS2d 436 [2d Dept 2001]; *Matter of O’Connor v D’Apice*, 156 AD2d 610, 549 NYS2d 610 [2d Dept 1989]). The failure to file the cross petition with the County Clerk is fatal (*see Matter of White v Bilal*, 21 AD3d 573, *supra*).

Additionally, the Court notes that the requirement for leave of the court to commence a cross petition permits a court to direct service of the pleading in a manner calculated to give notice to the necessary parties so that receipt or actual delivery of such notice would normally be expected within the applicable statute of limitations (*see* Election Law §16-116; *see also Matter of Contessa v McCarthy*, 40 NY2d 890, 891, 389 NYS2d 349 [1976]). Here, without leave of court, counsel for respondent Paul M. Hensley attempted to serve the pleading by overnight mail on the last day to commence a special proceeding. Such service is untimely (*see Matter of Radda v Acito*, 54 AD2d 531, 386 NYS2d 14 [1976]; *Matter of Floyd v Coveney*, 83 AD2d 897, 442 NYS2d 531 [2d Dept 1981]; *Matter of Buhlmann v LeFever*, 83 AD2d 895, 442 NYS2d 529 [1981], *aff’d* 54 NY2d 775, 443 NYS2d 154 [1981]; *Matter of Yellico v Ringeret*, 185 AD2d 965, 586 NYS2d 836 [2d Dept 1992]; *Matter of Butler v Gargiulo*, 77 AD2d 939, 431 NYS2d 126 [2d Dept 1980]; *see also Matter of Cheevers v Gates*, 230 AD2d 948, 646 NYS2d 726 [3d Dept 1996]).

With regard to the additional objections set forth in the letter of July 30, 2008, offered by petitioner David T. Reilly, the Court finds that due to the delay attributable to the respondent Board, the respondent candidates were sufficiently apprised of the grounds for the objection and same will be considered by the Court (*see Matter of Brotherton v Suffolk County Bd. of Elections*, 33 AD3d 944, 824 NYS2d 322 [2d Dept 2006]; *Matter of Edelstein v Suffolk County Bd. of Elections*, 33 AD3d 945, 824 NYS2d 321 [2d Dept 2006]). The Court has reviewed on the record the Order of the Hon. Jeffrey Spinner, dated October 3, 2006 in *Matter of Brotherton*, *supra*, wherein over 60 additional objections were received, verbal and by fax, after commencement of the invalidation proceeding but before the hearing.

The August 1, 2008 letter objection by petitioner David T. Reilly, which challenges a signature previously challenged at the Board but under an inaccurately identified petition sheet number, is easier to address. The delay by the Board in ruling on the specific objections precluded petitioners from incorporating the altered objection in their pleading. Upon receipt of the Board’s return, petitioners immediately notified all parties of the corrected objection. As such, particularly in the Second Department, such objections should be considered (*see Matter of Smith v Marchi*, 143 AD2d 325, 532 NYS2d 389 [2d Dept 1988]; *Matter of Venuti v Westchester County Bd. of Elections*, 43 AD3d 482, 842 NYS2d 30 [2d Dept 2007]; *Matter of Starr v Board of Elections of City of New York*, 89 AD2d 978, 454 NYS2d 131 [2d Dept 1982]; *Matter of Flowers*, 57 AD2d 636, 394 NYS2d 33 [2d Dept 1977]; *Matter of Maxwell v Hill*, 225 AD2d 947, 640 NYS2d 280 [3d Dept 1996]; *cf Matter of Mazza v Board of Elections of County of Albany*, 196 AD2d 679, 601 NYS2d 508 [3d Dept 1993] [limited to specifications]; *Matter of Molly v Scaringe*, 153 AD2d 782, 545 NYS2d 217 [3d Dept 1989] [same]; *Matter of Belak v Rossi*, 96 AD2d 1011, 467 NYS2d 100 [3d Dept 1983] [limited to pleading]; *Matter of Thomas v Blackwell*, 219 AD2d 795, 632 NYS2d 989 [4th Dept 1995] [limited to pleading]; *Matter of Levitt v Mahoney*, 133 AD2d 516, 520 NYS2d 290 [4th Dept 1987] [same]).

With the above caselaw in mind, the Court will address the following objections asserted during the hearing by petitioners.

First Objection: The Court agrees that the signature on line 5, sheet 34, petition I08-2, should be stricken since the signature appears on line 1, sheet 11, petition SU08-160 on the same date, that is, June 17, 2008. The Board had found this objection false, since the specific objection stated that it was a prior signature and not one signed on the same date. Same date signatures are invalid pursuant to Election Law § 6-134(3). Overall Total - minus one (1) signature.

Second Objection: The Court agrees that the signatures on lines 1 and 4, sheet 25, petition I08-3, dated July 6, 2008, should be stricken since the signatures appear on lines 1 and 2, unnumbered sheet 4, petition SU08-173, on a prior date, that is, June 30, 2008. The Court has examined the signatures and agrees that they are the same (*see generally Matter of Jaffee v Kelly*, 32 AD3d 485, 819 NYS2d 485 [2d Dept 2006]). This was two (2) of the five (5) split decisions by the respondent Commissioners and respondent Anita Katz is overruled. Overall Total - minus three (3) signatures.

Third Objection: The Court agrees with the objection that the notary, on sheet 31, petition I08-2, containing three (3) signatures, failed to set forth his or her official title. Such omission renders the entire sheet invalid (*see Matter of Fuentes v Lopez*, 264 AD2d 490, 694 NYS2d 166 [2d Dept 1999]; *Matter of Burgess v D'Apice*, 112 AD2d 1059, 493 NYS2d 44 [2d Dept 1985]; *Matter of Hunter v Compagni*, 74 AD2d 1000, 427 NYS2d 327 [4th Dept 1980]). While courts have tended to view the formal requirements of the information provided by the notary somewhat liberally (*see Matter of MacKay v Cochran*, 264 AD2d 699, 695 NYS2d 113 [2d Dept 1999]), the title is still required. This was three (3) of the five (5) split decisions by the respondent Commissioners and respondent Anita Katz is overruled. Overall Total - minus six (6) signatures.

Fourth Objection: The Court agrees that the signature on line 5, sheet 8, petition I08-2, dated June 20, 2008, should be stricken since the signature appears on line 3, sheet 22, petition SU08-159, on a prior date, that is, June 19, 2008. The Board had found this objection false, since the specific objection mistakenly stated that the signature was located on sheet 23 and not sheet 22. The August 1, 2008 letter objection by petitioner David T. Reilly is sustained and the signature is declared invalid. Overall Total - minus seven (7) signatures.

Fifth Objection: These four (4) additional objections are set forth in the letter of July 30, 2008, offered by petitioner David T. Reilly (*see* Petitioners' Ex. No. 1), outside the specification of objections filed with the Board. As noted above, the Court will consider these additional objections. The Court finds that in examining petition I08-2, the signatures on sheet 15, line 3, sheet 16, line 2, sheet 17, line 3, and sheet 17, line 5, all signed an earlier petition, that is, petition SU08-160, at sheet 50, line 4, sheet 38, line 1, sheet 39, line 4, and sheet 39, line 5, respectively. Overall Total - minus eleven (11) signatures.

Sixth Objection: The Court disagrees with the claim that the signer on petition I08-2, sheet 23, line 2, signed the signature set forth on line 1 of the same sheet. The Court has examined the buff cards (*see* Petitioners' Ex. 3 and Ex. 4) and finds that such a determination is not apparent from the signatures offered

(see generally *Matter of Jaffee v Kelly*, 32 AD3d 485, *supra*). Overall Total - minus eleven (11) signatures.

Seventh Objection: The Court disagrees with the claim that signature on petition 108-3, sheet 4, line 4, is a different signature than that on file with the Board for Michael J. Kerns. While the “M” for the first name appears slightly different, the “K” in Kerns appears similar. The Court has examined the buff cards (see Petitioners’ Ex. 5 and Ex. 6) and finds that such a determination is not apparent from the signatures offered (see generally *Matter of Jaffee v Kelly*, 32 AD3d 485, *supra*). Overall Total - minus eleven (11) signatures.

Eight Objection: The Court disagrees with the claim that the cover sheet for the two volumes remained defective after the submission of an appropriate amended or master cover sheet (see Court Ex. 6; Petitioners’ Ex 6). The master cover sheet clearly delineates the two volumes that it is referencing, that is, I08-2 and I08-3. No confusion or prejudice to the petitioners was shown by the failure to submit amended cover sheets for the individual volumes. Substantial compliance with the rules of the Board has been shown (see Petitioners’ Ex 6). Overall Total - minus eleven (11) signatures.

As stated above, the Court has rejected the cross petition by respondent Paul M. Hensley. Therefore, no consideration is given to the August 4, 2008 letter from counsel for respondent Paul M. Hensley, faxed the morning of the first day of the hearing, raising a new objection to a single signature on the designating petitions. Fundamental notions of due process require that a candidate be given some notice of which signatures on his petition are being challenged. Here, notice on the day of the hearing fails to fairly apprise the parties as to which signatures were being contested. In any event, upon review of the offered documentation from the Board (see Respondent Hensley Ex. B), the Court cannot agree that the signature set forth on petition I08-2, sheet 26, line 2, of Lorelei Dzen was not ascertainable at the time of the filing of the specifications of objections and the appropriate objection could have been made at that time.

As noted, a total of 203 is required to support a valid designation. After review by the Board, the exact amount needed, that is 203 signatures, were found to be valid. This Court agrees with petitioners that an additional eleven (11) signatures are invalid, leaving only 192 valid signatures, which is insufficient to designate. Therefore, the special proceeding must be granted.

The Court must reject the respondent candidates attempt to restore signatures previously invalidated by the Board. No petition to validate was ever commenced. In fact, no counterclaim or affirmative defense was set forth in the respondent candidates answer asserting that the petition was valid or that the specifications of objections were erroneous (see *Matter of Suarez v Sadowski*, 48 NY2d 620, 421 NYS2d 50 [1979]; *Matter of Holloway v Blakely*, 77 AD2d 932, 431 NYS2d 119 [2d Dept 1980]). As a matter of fair notice to the adversary, a candidate who has not filed a validating petition must, in his answer, assert an affirmative defense or counterclaim if the candidate wishes to validate signatures invalidated by the Board, even if the Board has found a sufficient number to be valid (see *Matter of Suarez v Sadowski*, 48 NY2d 620, *supra*).

While the Board delayed in rendering a decision long after the running of the 14-day statute of limitations for the commencement of a special proceeding, thereby precluding the answer from setting forth a timely showing of where the Board erred, here, without instituting a timely validation proceeding or


asserting an affirmative defense, no vehicle exists to permit this Court to review the claims of the respondent candidates (see *Matter of Rodriguez v Nieves*, 242 AD2d 350, 661 NYS2d 663 [2d Dept 1997]; *Matter of Dickerson v Daly*, 196 AD2d 610, 601 NYS2d 704 [2d Dept 1993]; *Matter of Jackson v Stevens*, 185 AD2d 960, 587 NYS2d 668 [2d Dept 1992]; *Matter of Ford v D'Apice*, 133 AD2d 191, 518 NYS2d 697 [2d Dept 1987]; *Matter of Krueger v Richards*, 59 NY2d 680, 463 NYS2d 413 [1983]; *Matter of Starr v Board of Elections of City of New York*, 89 AD2d 991, 454 NYS2d 848 [2d Dept 1982]; *Matter of Gadsen v Board of Elections of City of New York*, 57 NY2d 751, 454 NYS2d 982 [1982]).

Moreover, while the respondent candidates argue unique circumstances existed due to the delay in action by the Board, unlike the petitioners, who well before the hearing date and immediately upon receipt of the Board's Return notified all parties of their new claims, the respondent candidates failed to respond to the actions of the Board prior to the commencement of the hearing (compare *Matter of Halloway v Blakely*, 77 AD2d 932, *supra*). The facts herein are unlike those found in *Matter of Bodkin v Garfinkle*, 21 AD3d 571, 800 NYS2d 590 (2d Dept 2005), wherein this Board failed to specify what objections were invalid but then invalidated the designating petitions, thereby permitting a conclusory but timely filed validation proceeding to permit judicial review. Therefore, contrary to the wishes of the respondent candidates, this Court cannot restore signatures deemed invalid by the Board.

In any event, the claim by respondent candidates seeking to restore the eleven (11) signatures obtained by subscribing witness F. Dana Tschirch, is without merit. Where a subscribing witness previously or on the same day signed another candidate's designating petition for the same office, any subsequent signatures taken by him as a subscribing witness are invalid (see *Matter of Bergmann v Berger*, 219 AD2d 599, 631 NYS2d 183 [2d Dept 1995]; *Matter of McLiverty v Lefever*, 133 AD2d 720, 519 NYS2d 886 [2d Dept 1987]; *Lavelle v Gonzalez*, 93 AD2d 896, 461 NYS2d 433 [2d Dept 1983], *aff'd* 59 NY2d 670, 463 NYS2d 412 [1983]; *Matter of Carroll v McNab*, 59 AD2d 727, 398 NYS2d 549 [2d Dept 1977]; see also Election Law §6-132[3] ["in lieu of the signed statement of a witness who is a duly qualified voter of the state *qualified to sign the petition. . .*"] [emphasis added]). Having previously signed the designating petition for the other candidates, this witness is not qualified to sign the petition.

Accordingly, the special proceeding is granted and the challenged designating petition is declared invalid. The Board shall forthwith remove the names of the respondent candidates for the primary election ballot to be held on September 9, 2008. This constitutes the decision and judgment of the Court.

DATED: 8/10/08



 THOMAS F. WHELAN, J.S.C.