

Edelstein v Matuszwski

2009 NY Slip Op 31841(U)

August 17, 2009

Supreme Court, Suffolk County

Docket Number: 09-30093

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 8/12/09
ADJ. DATES 8/14/09
Mot. Seq. # 001 - Mot D

-----X
PAUL EDELSTEIN, :
: Petitioner, :
-against- :
LISA M. MATUSZCWSKI, KAREN :
KIRSCHBAUM and JOSH APRILE, being listed :
and named as the Committee to Receive Notices, :
-and- :
ANITA KATZ and CATHY L. RICHTER-GEIER, :
being the Commissioners of the Board of :
Elections in Suffolk County and the SUFFOLK :
COUNTY BOARD OF ELECTIONS, :
Respondents. :
For an Order invalidating and declaring null and :
void certain opportunity to ballot petitioners of :
the Working Family Party filed with the Board of :
Elections purporting to demand an opportunity to :
ballot for the public office of County Legislator, :
6th Legislative District, County of Suffolk, to be :
voted upon in the primary election to be held on :
September 15, 2009 and enjoining the Suffolk :
County Board of Elections allowing an opportunity :
to ballot in said primary election. :
-----X

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Upon the following papers numbered 1 to 17 read on this Election Law Proceeding; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 8 - Answer - Katz; 13 - 14 letter Memo and Answer; 15 - 16 Answer Richter-Geier; Replying Affidavits and supporting papers 9 - additional specs; 10 - amended aff.; 11 - amended additional specs.; Other 7 - Petitioner's Memo of Law; 12 - Further Memo of Law; 17 - Memo of Law; (and after hearing counsel in support of and in opposition to the special proceeding) it is,

ORDERED that this Election Law proceeding (#001) by petitioner seeking an Order invalidating and declaring null and void the Opportunity to Ballot Petition of the Working Families Party filed for the public office of County Legislator, 6th Legislative District, County of Suffolk is granted; and it is further

ORDERED AND ADJUDGED that the Opportunity to Ballot Petition filed with the respondent Suffolk County Board of Elections is invalid and null and void; and it is further

ORDERED AND ADJUDGED that the respondent Commissioners of the Suffolk County Board of Elections are enjoined and restrained from allowing voting machines and paper ballots to be used in the upcoming Primary Election to held on September 15, 2009 for an Opportunity to Ballot or write-in for the public office of County Legislator, 6th Legislative District, County of Suffolk.

Petitioner, a registered member of the Democratic Party, filed a verified petition and obtained an Order to Show Cause on August 3, 2009 (Spinner, AJSC) seeking to declare invalid an Opportunity to Ballot (OTB) Petition which provides for a write-in for the public office of County Legislator, 6th Legislative District, at the upcoming primary election to be held on September 15, 2009. The OTB Petition seeks to create a primary election against the designee of the Working Families Party. It was timely filed with the respondent Suffolk County Board of Elections (BOE). In order to cause such a primary, it is required that the OTB Petition contain 12 valid signatures from registered members of the Working Families Party registered to vote within the confines of the 6th Legislative District. The OTB Petition contains 26 signatures.

Petitioner timely filed general and specific objections to the OTB Petition with the BOE, pursuant to Election Law §6-153. On August 7, 2009 the bipartisan BOE team examined the specific objections and found that of the 26 signatures set forth on the OTB Petition, 13 were found to be invalid, 13 to be valid, but with five of the 13 valid signatures reserved for decision by the respondent Commissioners, who split on the validity of the five reserved specific objections. On August 10, 2009 the Commissioners, by split decision, found the OTB Petition to be valid.

Additionally, the Commissioners disagreed on the objection addressed to the validity of the Committee to Receive Notices set forth on the OTB Petition. That committee, set forth on the petition as the three named individual respondents, is required pursuant to Election Law §§ 6-164, 6-166, and 6-132. An OTB petition requires the appointment of at least three persons, "all of whom shall be enrolled voters of said party" (Election Law § 6-132), as a committee to receive notices (*see* Election Law §§ 6-164 and 6-166). It was conceded by all parties at the hearing that respondent, Karen M. Kirschbaum, is not an enrolled member of the Working Families Party, but of the Democratic Party.

The return date of the special proceeding was adjourned to August 13, 2009 for oral argument. Prior thereto, by fax on August 12, 2009, petitioner's counsel forwarded to all parties an affirmation of additional specifications. At the oral argument, it became obvious that a hearing would be necessary at the BOE in order to properly address the objections to the OTB Petition. That hearing was held at 1:00 p.m. on August 14, 2009. Once again, prior thereto, by fax on August 13, 2009, petitioner's counsel forwarded to all parties an affirmation of amended additional specifications. Prior to the commencement of the hearing at the BOE, petitioner's counsel withdrew the additional specifications and proceeded to only address the five objections that the respondent Commissioners had previously split upon.

Preliminarily, the Court must address the seventh affirmative defense set forth in the answer submitted by the individual respondents, that is, the claim of lack of standing of the petitioner, as an enrolled member of the Democratic Party, to object to a petition of the Working Families Party. The defense must be rejected. Although an objector must be a registered voter in order to file objections, he or she does not

have to be enrolled in the political party of a candidate for public office in order to file objections against the candidate (*see* Election Law § 6-154[2]; *see also* ***Matter of Decatur v Board of Elections of Albany County***, 47 Misc2d 647, 263 NYS2d 808 [Sup Ct Albany County 1965], *aff'd* 24 AD2d 735, 262 NYS2d 808 [3d Dept 1965], *aff'd* 16 NY2d 848, 263 NYS2d 329 [1965]; ***Matter of Bonelli v Bahren***, 196 AD2d 866, 602 NYS2d 62 [2d Dept 1993]; *compare* ***Matter of MacKay v Johnson***, 54 AD3d 428, 863 NYS2d 85 [2d Dept 2008] [no standing to challenge internal functioning of a political party]; ***Application of Hyman v Previte***, 51 AD2d 948, 381 NYS2d 504 [1st Dept 1976] [lack of standing to object to party position]).

The Court will address the five objections that resulted in split decisions before the respondent Commissioners, as asserted during the hearing by the petitioner.

First Objection: The Court agrees that this signature (Sheet 1, line 1) should be stricken as having previously signed a designating petition for this office (*see* ***Matter of Rabadi v Galan***, 307 AD2d 1014, 763 NYS2d 503 [2d Dept 2003]). The signature of Donald Trella appears on petition W09-20 on sheet 9, line 1. There is only one individual registered at the address listed and, while hard to read, the “D” in “Donald” is distinctively similar. The Court had examined the buff cards and finds the signatures to be similar (*see generally* ***Matter of Jaffee v Kelly***, 32 AD3d 485, 819 NYS2d 485 [2d Dept 2006]). Respondent Cathy L. Richter-Geier is overruled. Overall Total - minus one (1) signature.

Second Objection: The Court disagrees with the objection. The signature of Josephine Mojica Licata (Sheet 1, line 3) appears to be that which is set forth on the petition. The fact that the “M” is missing from the signature does not change the finding that, upon an examination of the buff cards, the signatures appear to be similar (*see* Election Law § 6-134[5]; *see generally* ***Matter of Jaffee v Kelly***, 32 AD3d 485, *supra*]). Respondent Anita Katz is overruled. Overall Total - minus one (1) signature.

Third Objection: The Court agrees that this signature (Sheet 2, line 4) should be stricken. A review of the buff cards for Dean Tiseo reveal a very distinctive signature, particularly in 2004 and 2006, which does not compare to the one found on sheet 2, line 4 (*see* ***Matter of Rabadi v Galan***, 307 AD2d 1014, *supra*). That signature possesses the characteristics of the signature of Pamela Tiseo, who resides at the same address. The Court had examined the buff cards and finds the signature to be different than that found on the buff cards (*see generally* ***Matter of Jaffee v Kelly***, 32 AD3d 485, *supra*]). Respondent Cathy L. Richter-Geier is overruled. Overall Total - minus two (2) signatures.

Fourth Objection: The Court disagrees that this signature (Sheet 4, line 5) should be stricken as having previously signed a designating petition for this office. The printed name of Peter Kirschbaum appears on petition W09-20 on sheet 6, line 1. A signature appears on sheet 4, line 5. The Court has examined the buff cards and finds the signature on the buff card to be different than the signatures set forth on the two petitions. However, the challenged signature does not appear to be that of either Karen Kirschbaum or Douglas Kirschbaum, who also reside at that address. Since the designee petition, that is W09-20, is unchallenged, it is presumed to be proper, under normal circumstances, and the objection should be sustained.

However, the Court can not ignore the general rule that a printed signature should be ruled invalid unless the voter’s signature is similarly printed on the voter registration card (*see* ***Matter of Hall v Heffernan***, 185 Misc 742, 744, 59 NYS2d 229 [Sup Ct. Richmond County 1945], *aff'd* 269 App Div 953, 59 NYS2d 271 [2d Dept 1945], *aff'd* 295 NY 599 [1945]; ***Matter of Henry v Trotto***, 54 AD3d 424, 862 NYS2d 605 [2d Dept 2008]; *see also* Election Law §6-134[13] [“In addition to the requirement for the signature...”]). Here, petitioner has placed the prior signature in issue with the objection that same was prior to the challenged signature. To sustain that objection, the Court must believe that the prior signature was that of the challenged voter. Under these circumstances, and in light of the fact that no objection was raised

of invalid signature as to Sheet 4, line 5, this Court must conclude that the objection, as advanced, can not be sustained. Respondent Anita Katz is overruled. Overall Total - minus two (2) signatures.

Fifth Objection: The Court agrees that this signature (Sheet 4, line 7) should be stricken as that voter previously signed a designating petition for this office. Upon a review of the buff cards for all the individuals who reside at that address, it appears that the signer, Lisa Vankesteren, previously signed the W09-20 petition, at sheet 2, line 4, under her maiden name. The signature of "Lisa" on both petitions is distinctive. The Court must conclude that the same individual signed the prior petition. Respondent Cathy L. Richter-Geier is overruled. Overall Total - minus three (3) signatures.

As noted, a total of 12 signatures are required to support the OTB Petition. After review by the Board, 13 signatures were found to be valid. That total included five split decisions by the respondent Commissioners. After a review of the evidence presented at the hearing, this Court agrees with petitioner that an additional three (3) signatures must be stricken. That leaves just ten (10) valid signatures, an insufficient number to support the OTB Petition. Therefore, this special proceeding must be granted.

The Court must reject the attempt by the individual respondents to restore signatures previously invalidated by the BOE. No petition to validate was ever commenced. In fact, no counterclaim or affirmative defense was set forth in the answer of the individual respondents 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 Halloway v Blakely*, 77 AD2d 932, 431 NYS2d 119 [2d Dept 1980]). As a matter of fair notice to the adversary, a candidate, or in this case, a Committee to Receive Notices, who have not filed a validating petition must, in his or her answer, assert an affirmative defense or counterclaim if they wish to validate signatures invalidated by the BOE, even if the BOE has found a sufficient number to be valid (*see Matter of Suarez v Sadowski*, 48 NY2d 620, *supra*).

While the BOE delayed in rendering a decision after the running of the 14-day statute of limitations for the commencement of a special proceeding, thereby precluding a timely answer from setting forth a showing of where the BOE erred, here, the answer from the individual respondents is dated after the decision by the respondent Commissioners. No attention was drawn therein to the validity of any signatures. 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]).

In any event, based upon the circumstances of this case, the claim by the respondents seeking to restore the two signatures set forth on Sheet 5, lines 6 and 7, is without merit. The BOE invalidated the two signatures on the ground that the overwriting of the date the signatures were obtained constituted a material alteration that was uninitialed (*see Election Law* § 6-134[6]; *see generally Matter of White v McNab*, 40 NY2d 912, 913, 389 NYS2d 359 [1976]).

At the hearing, in reliance upon caselaw that permits a subscribing witness to show that uninitialed alterations were made by her or him (*see Matter of Mastantuano v Meisser*, 180 Misc 667, 43 NYS2d 677 [Sup Ct Queens County 1942], *aff'd* 266 AD 910, 43 NYS2d 752 [2d Dept 1943], *aff'd* 266 AD 919, 43 NYS2d 864 [2d Dept 1943]; *Roman v Sharipe*, 42 NY2d 986, 398 NYS2d 410 [1977]; *Matter of Gartner v Salerno*, 74 AD2d 958, 426 NYS2d 169 [3d Dept 1977]), the notary public who obtained the two

signatures, Kellianna Sacchitello, testified that she wrote over the date that the signers placed on the petition, to make it clear that the signatures were obtained on July 16, 2009 (*compare Matter of Henry v Trotto*, 54 AD3d 424, *supra*). Where an overwriting does not change what was originally written, it is not an alteration (*see Matter of MacShane v Coveney*, 37 NY2d 789, 791, NYS2d [1975]; *Matter of Schroeder v Smith*, 21 AD3d 511, 800 NYS2d 224 [2d Dept 2005]).

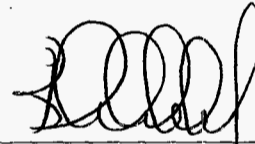
On cross examination, the witness stated that she did not initial the change, but more importantly, admitted that she “did not swear them in.” She stated that she did not know that she had to. On redirect, she did say that she knew the two individuals.

The failure to take the oaths of these signatories or follow the mandate of CPLR 2309(b), necessitates the invalidation of these two signatures (*see Matter of Imre v Johnson*, 59 AD3d 427, 863 NYS2d 473 [2d Dept 2008]; *Gravagna v Board of Elections of City of New York*, 22 AD3d 776, 803 NYS2d 137 [2d Dept 2005]; *Matter of Leahy v O'Rourke*, 307 AD2d 1008, 763 NYS2d 508 [2d Dept 2003]; *Matter of Boyle v New York City Bd. of Elections*, 185 AD2d 953, 587 NYS2d 123 [2d Dept 1992]; *Matter of Zunno v Fein*, 175 AD2d 935, 573 NYS2d 527 [2d Dept 1991]; *Matter of Andolfi v Rohl*, 83 AD2d 890, 442 NYS2d 402 [2d Dept 1981]; *compare Matter of Liebler v Friedman*, 54 AD3d 697, 863 NYS2d 719 [2d Dept 2008]). The individual respondents can not restore the two signatures on Sheet 5 at lines 6 and 7.

In light of the fact that the OTB Petition has been declared to be invalid, there is no reason to determine the issue concerning the validity of the Committee to Receive Notices, since that claim has been rendered moot.

Accordingly, the special proceeding is granted and the challenged OTB Petition is declared invalid. The respondents BOE and the Commissioners are enjoined from allowing voting machines and paper ballots to be used in the upcoming Primary Election to held on September 15, 2009 for an Opportunity to Ballot for the public office of County Legislator, 6th Legislative District. This constitutes the decision, short form order, and judgment of the Court.

DATED: 8/17/09



THOMAS F. WHELAN, J.S.C.