

Kutner v Nassau County Bd. of Elections

2009 NY Slip Op 31878(U)

August 12, 2009

Supreme Court, Nassau County

Docket Number: 09-015423

Judge: Jeffrey S. Brown

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**SUPREME COURT OF THE STATE OF NEW YORK
NASSAU COUNTY**

P R E S E N T : HON. JEFFREY S. BROWN
Justice of the Supreme Court

-----X
STEPHEN D. KUTNER,

Petitioner,

-against-

**NASSAU COUNTY BOARD OF ELECTIONS
and CHANI MARKS, DAVID WOLFENSON
and BETH FIELDS (collectively the Members of
the Committee to Receive Notices),**

Respondents.

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TRIAL/IAS PART 26

DECISION - ORDER

Index No: 09-015423

**Motion Submitted 8/3/09
Motion Sequence: 001**

The following papers were read on this motion:

Order to Show Cause, Emergency Affirmation and Verified Petition	1
Answering Papers.	2

Pending before the Court is a Petition seeking an order: (1) declaring invalid and legally ineffective a petition of the Independence Party for an Opportunity to Ballot for the nomination of County Legislator for the 3rd Legislative District, County of Nassau, to be voted for at a Primary Election on September 15, 2009; (2) directing the Commissioners of Nassau County Board of Elections (hereinafter "the Commissioners") not to provide an Opportunity to Ballot on the official voting machines to become the nominee of the Independence Party; and (3) declaring the petition to be a legal nullity and reversing any contrary determination of the Commissioners.

A hearing on the instant Petition was held on August 10, 2009, and marked into evidence was the determination of the Commissioners dated August 6, 2009, declaring that of the 108

signatures submitted, 47 were found to be invalid, leaving a total number of 61. Since only 59 signatures were required, the Commissioners declared the petition valid. The gravamen of the instant application is that the failure of notaries public to obtain from signatories "any statements . . . as to the truth of the statements to which they subscribed their names" (*see, Imre v Johnson*, 54 AD3d 427 [2nd Dept]; *see, also, Liebler v Friedman*, 54 AD3d 697 [2nd Dept]) rendered null and void at least nine additional signatures. To that end, testimony was taken from four notaries public: Thomas Falbo, Lawrence Nedelka, Joel Schechter and Kevin Rantz.

The Hearing Testimony

Also marked into evidence as Ct. Exh. 1 were the petitions filed with the Nassau County Board of Elections.

Falbo testified that, in addition to asking the signatories to raise their right hands and swear that they were who they said they were, he asked them to swear to the accuracy of the statements contained at the top of the signature page. On cross-examination, he stated that he had the instruction sheet which directed that he ask them to raise their right hand and to swear to the truth of the statements.

Nedelka testified that he had the signatories sign the petition before swearing them in. He stated that he asked them to swear or affirm that they were who they said they were. He did not ask them to swear to the truth of the statements at the top of the document. On cross-examination, Nedelka stated that he had with him a list of the procedures which he was supposed to follow and the oath he was to administer, and that he had followed the procedures. Further, Nedelka testified, "I showed them the sheet. I gave them an opportunity to look at it. I specifically didn't direct their attention to the wording. I just asked if they had any questions

about the petition and my being there to ask for their signature.” Nedelka also testified that the signatories saw the “walk list.” Further, he testified, “I didn’t actually show them specifically unless they were questioning whether or not they were an Independence voter. I would say, ‘Yes, according to this you’re an Independence voter’ and I would show them.” When asked whether they agreed with him, Nedelka answered, “Correct”.

Schechter testified that he had asked each signatory if he/she was the person on his contact list and if they would like to sign the signature sheet. He asked each person to raise their right hand and to read the statement at the top of the sheet. On cross-examination Schechter, too, said that he had followed the instructions on the procedures list.

Rantz testified that he asked the signatories if they agreed to sign and if they were members of the Independence Party. He then asked them to raise their right hand. Some presented identification, and they all swore that theirs were the names on the sheet. He indicated that he would present the document to them, and he would explain it. Some people were cautious. When asked by the petitioner’s counsel whether he had asked the signatories as to the truth of the statements at the top of the sheet, Rantz replied that he was not sure how to answer the question. He was then asked whether he had used the word “true.” He responded that he was not sure he “used that terminology.” However, when asked about the procedures he followed after knocking at the door, Rantz testified that he “. . . asked for the particular person I was looking for or the registered voter. If they were at home, I was telling them I was circulating a petition for an opportunity to ballot in the Independence Party. I would ask if they would sign it. If they agreed to sign it, I would tell them that I was a notary, you know, my name. I would ask if they were registered in the Independent (sic) Party eligible to vote in the next upcoming primary,

and I would tell them as a notary I'm required to ask you to either swear or affirm to say you are who you say you are." The testimony also revealed that he asked them to swear or affirm, "That their name was the name on the sheet, that they were registered in Independence Party, and eligible to vote in the next primary election." He testified that he identified himself as Kevin Rantz, a notary, and that he was ". . . required to ask these questions, otherwise I could get in trouble"

At the close of the hearing, counsel for the petitioner, citing *Imre v Johnson, supra*, contended that the Petition for an Opportunity to Ballot should be invalidated because it was clear that two of the notaries, Nedelka and Rantz, had only required the signatories to swear as to their identity and never required them to swear to the truth of the statements at the top of the signature page. Counsel stated that, in light of the fact that they had notarized nine of the 61 signatures found valid by the Commissioners, those nine signatures should be invalidated resulting in less than the 59 signatures required for the Petition for an Opportunity to Ballot.

In response, counsel for the Members of the Committee to Receive Notices took the view, referring to *Liebler v Freidman, supra*, that the record showed that the notaries followed the procedures list requiring the conclusion that there was substantial compliance with Election Law § 6-132 (3).

In the cases in which there was held to have been substantial compliance, the courts found that the "signatures . . . were witnessed by . . . a notary public who obtained a statement from each of the signatories affirming the truth of the matter to which they subscribed their

names" (*Liebler v Freidman, supra*, 697-698, citing *Matter of Brown v Suffolk County Board of Elections*, 264 AD2d 489, and *Matter of Quintyne v Canary*, 104 AD2d 473). Substantial compliance does not require that each notary follows the same procedures.

In the *Quintyne* case, the Second Department noted that "... the signature sheets contained the notarial statement required by subdivision 3 of section 6-132 of the Election Law, and the signatories read the statement and understood that they were affirming the statement in the petition as true" (*id.* at 475).

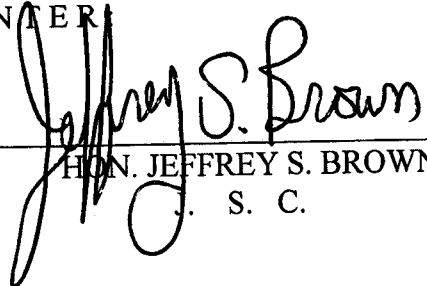
This record does support the conclusion that those signatories whose signatures were witnessed by Nedelka or Rantz read the statement, or were swearing or affirming that the statement was true. It is clear that all the signatories took an oath "in a form calculated to awaken the conscience and impress the minds" of the signatories (*see*, CPLR 2309[b]), albeit in a different manner.

This Court determines that the Petition for the Opportunity to Ballot does satisfy the requirements of Election Law § 6-132.

Accordingly, the Petition to invalidate is dismissed and the Commissioners of Nassau County Board of Elections are directed to provide an Opportunity to Ballot on the official voting machines to become the nominee of the Independence Party

This Decision constitutes the Order of this Court.

Dated: Mineola, New York
August 12, 2009

ENTER


HON. JEFFREY S. BROWN
J. S. C.

ENTERED
AUG 12 2009 5
NASSAU COUNTY
COURT CLERK

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