[* 1]

SHORT FORM ORDER AND JUDGMENT

INDEX No. 29938-10

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 8/26/10
ADJ. DATES 8/31/10
Mot. Seq. # 001 - Petition Denied

In the Matter of the application of DEBRA HANDEL, MARY MAGNIFICO and MARIA RE-KILMARTIN, Citizen Objectors,

Petitioners,

-against-

JENNIFER J. MAERTZ, a candidate named on a certificate of substitution predicated on the invalid petitions of former candidate Regina M. Calcaterra for the public office of State Senator, First Senate District, County of Suffolk, State of New York, as a designee of the Democratic Party and the Working Families Party, REGINA M. CALCATERRA, a former candidate named on invalid petitions for the public office of State Senator, First Senate District, County of Suffolk, State of New York, as a designee of the Democratic Party and the Working Families Party, and ANITA S. KATZ and CATHY L. RICHTER GEIER, as Commissioners of and constituting the Suffolk County Board of Elections,

Respondents,

For an order invalidating and declaring null and void certain certificates of substitution pursuant to NY Election law section 16-102.

LEVENTHAL & SLINEY, LLP
Attys. For Petitioners
15 Remsen Ave.
Roslyn, NY 11576

HARRIS BEACH, PLLC
Attys. For Resps. Maertz & Calcaterra
333 Earle Ovington Blvd.
Uniondale, NY 11553

CHRISTINE MALAFI
Suffolk County Attorney
By: Gail M. Lolis
Deputy County Atty.
Atty. For County
PO Box 6100
Hauppauge, NY 11788

MATTHEWS & MATTHEWS, ESQS.
Attys. For Resp. Katz
191 New York Ave.
Huntington, NY 11743

GARRETT SWENSON, JR., ESQ.
Atty. For Geier & Rogers
76 Bay Ave.
Brookhaven, NY 11719

Upon the following papers numbered 1 to 15 read on this Election Law petition; Notice of Petition and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 4-5; 6-7; Replying Affidavits and supporting papers ____; Other 8-9 (memorandum); 10-11 (return); 12-13 (memorandum); 14-15 (affirmation); and after hearing counsel in support of and in opposition to the petition, it is,

ORDERED that this special proceeding seeking an order pursuant to § 16-102 of the Election Law, declaring invalid and null and void the Democratic Party and Working Family Party certificates of substitution of respondent candidate Jennifer J. Maertz as a candidate for the public office of State Senator, First Senate District, County of Suffolk, State of New York is denied; and it is further

ORDERED AND ADJUDGED that the special proceeding is dismissed.

Familiarity with the short form order of the Hon. John C. Bivona, JSC, in the proceeding entitled, ***In the Matter of the Application of Ely V. Chaimowitz, et al, v Regina M. Calcaterra, et al***, Index No. 25663-10, dated August 9, 2010, the Decision & Order of the Appellate Division, Second Department, dated August 18, 2010, and the Decision & Order on Motion of the Appellate Division, Second Department, dated August 26, 2010 is presumed.

The petitioners in that proceeding, by clear and convincing evidence, were successful in having the original candidate designated by the respective parties removed from the ballot for failing to meet the constitutional and statutory residency requirements. Although petitioners additionally sought to declare the underlying designating petitions void, due to the fraud of the candidate concerning her failed residency, the short form order of Justice Bivona did not contain "ordered and adjudged" paragraphs. The Decision & Order of the Appellate Division, Second Department, dated August 18, 2010, which affirmed the order of Justice Bivona, held, "the Supreme Court properly, in effect, granted the petition and invalidated the designating petitions."

With that holding, an issue arose as to whether the respective political parties could utilize the provisions of Election Law §6-148 to substitute a new candidate to fill the vacancy. To that end, the next day, August 19, 2010, each party caused to be filed a Certificate Of Substitution By Committee To Fill Vacancies After Declination, Death or Disqualification, designating a new candidate, respondent, Jennifer J. Maertz. Thereafter, by order to show cause dated August 23, 2010, respondent, Regina M. Calcaterra, moved before the Appellate Division, Second Department to amend, resettle and/or clarify the Decision & Order, dated August 18, 2010, arguing that Justice Bivona's order "did not invalidate the designating petitions; it merely found that Regina Calcaterra was not qualified to run for the office of State Senator..."

By Decision & Order on Motion, dated August 26, 2010, the Appellate Division, Second Department, recalled and vacated its August 18, 2010 Decision & Order and substituted a new Decision & Order, which eliminated any reference to the lower court's order invalidating the designating petitions and substituted language that the respondent candidate "was not eligible for the nominations of the Democratic Party and the Working Families Party, respectively, for the public office of State Senator..."

In this instant proceeding, petitioners seek to declare invalid the Democratic Party and Working Family Party certificates of substitution of respondent candidate Jennifer J. Maertz as a candidate for the public office in question. Justice Bivona has recused himself from this proceeding. The parties have framed the issue as one arising out of a conflict between two decisions of the Court of Appeals, issued ten days apart, that each offer differing results.

Petitioners rely upon ***Matter of Bourges v Le Blanc***, 98 NY2d 418, 748 NYS2d 347 (2002) to support their position that the designating petitions should be declared invalid. In that case, a candidate failed to satisfy the identical residency requirements. He stipulated that he lived in California for a period of time in the five years immediately preceding the election.

Respondents call attention to ***Matter of Espada v Diaz***, 98 NY2d 715, 778 NYS2d 546 (2002), decided ten days thereafter, which refused to invalidate a new candidate's certificate of substitution, where the original candidate was disqualified on the identical residency grounds. In that case, the lower court explicitly determined that neither the petition nor the petition gathering process was tainted by fraud. Since the Appellate Division failed to make any substitute findings, the Court of Appeals refused to invalidate the designating petition, citing its holding in ***Matter of Owens v Sharpton***, 45 NY2d 794, 796, 409 NYS2d 2 (1978):

> Where as here, a candidate is disqualified but there is no finding that either the petition or petition gathering process is tainted by fraud, the committee [to fill vacancies] is empowered to make this substitution.

Upon review of the controlling caselaw, this Court agrees that there is a need for appellate clarification on the issue of what is the requisite degree of facts and actions engaged in by a candidate, who is removed from the ballot for failing to meet the constitutional and statutory residency requirements, to additionally constitute sufficient fraud to invalidate the designating petitions.

The caselaw before and after these two determinations remains inconsistent. Recently, the Second Department, in ***Matter of Willis v Suffolk County Bd. of Elections***, 54 AD3d 436, 862 NYS2d 608 (2d Dept 2008), invalidated a designating petition of a candidate, who was an attorney, who had lived in Illinois for a period of time.[1] Designating petitions were also invalidated in ***Matter of Fernandez v Monegro***, 10 AD3d 429, 780 NYS2d 741 (2d Dept 2004) (for not residing at the address listed on the designating petition), in ***Matter of Camardi v Sinawski***, 297 AD2d 357, 746 NYS2d 489 (2d Dept 2002) (same), in ***Matter of Eisenberg v Strasser***, 100 NYY2d 590, 769 NYS2d 150 (2003) (candidate used an address that was not a true residence), in ***Matter of Carey v Foster***, 164 AD2d 930, 559 NYS2d 589 (2d Dept 1990) (with evidence of residency in Florida "we need not address the petitioners' contention that the designating petition was permeated with fraud"), in ***Matter of Markowitz v Gumbs***, 122 AD2d 906, 505 NYS2d 948 (2d Dept 1986) (evidence of lack of residency in the Senatorial District for the requisite time period), and in ***Matter of Thompson v Hayduk***, 45 AD2d 955, 259 NYS2d 72 (2d Dept 1974) *affd* 34 NY2d 980, 360 NYS2d 413 (1974) (evidence of residency in Bronx County instead of Westchester County).

Caselaw which declines to invalidate a new candidate's certificate of substitution, where the original candidate was disqualified on residency grounds, makes note that the designating petition is otherwise valid. These cases predate ***Matter of Owens v Sharpton***, 45 NY2d 794, *supra*, and include ***Matter of Marley v Hamilton***, 55 AD2d 864 (2d Dept 1976), ***Matter of Grieco v Bader***, 43 Misc2d 245, 250 NYS2d 841 (Kings County 1964), *affd* 21 AD2d 751, 252 NYS2d 51 (2d Dept 1964),and ***Matter of Blinn***, NYLJ, Oct 23, 1940, p 1220, col 1, *affd* 260 App Div 884, 23 NYS2d 477 (2d Dept 1940).

The best explanation is set forth in ***Matter of Grieco v Bader***, 43 Misc2d 245, *supra*, which details the relevant statute, then Election Law §140, now Election Law §6-148, which authorizes the committee to fill vacancies to act when a vacancy occurs due to a declination, death, disqualification of the candidate, or by a tie vote at a primary. As stated in ***Matter of Grieco,*** *supra*, "[t]hose that signed the petition were cognizant of such committee, which had the right to substitute in case of a declination, in case of death or in case of disqualification. Each voter had the right to name the designee and the right to name the committee on vacancies to act for him."

Here, petitioners appear to be relying upon the following statement found in ***Matter of Owens v Sharpton***, 45 NY2d 794, *supra*: "[w]here, on the other hand, the designating petition itself is 'invalid,' the result will be different." Petitioners argue that in this case, a showing of fraud had been made before Justice Bivona and the certificates of substitution should be declared invalid. Examples of what constitutes an invalid designating petition include where the candidate is not an enrolled member of the party for the required period (*see* ***Matter of Fotopoulos v Board of Elections of the City of New York***, 45 NY2d 807, 409 NYS2d 130 [1978]), where a candidate circulates designating petitions for incompatible offices, absent acceptable excuse or justification (*see* ***Matter of Lufty v Gangemi***, 35 NY2d 179, 359 NYS2d 273 [1974]; *cf* ***Matter of Phillips v Suffolk County Bd. of Elections***, 21 AD3d 509, 800 NYS2d 225 [2d Dept 2005]),

---

[1] Upon an examination of one of the appellate briefs, this Court is unsure of the status of the committee to fill vacancies.

and where there has been an over-designation of the number of candidates on a petition (*see* ***Matter of Elgin v Smith***, 10 AD3d 483, 781 NYS2d 182 [3d Dept 2004]).

Here, the same argument advanced by petitioners, that is, the petition is tainted by fraud due to the actions surrounding the residency of the original candidate, appears to have been expressly rejected by the Court of Appeals in reversing the Third Department's holding in ***Matter of Espada v Diaz***, 297 AD2d 497, 747 NYS2d 8 (3d Dept 2002). Similar to that matter, here, Justice Bivona made no explicit finding of fraud and did not explicitly invalidate the designating petition (*compare* ***Matter of Cotten v Greene County Bd. of Elections***, 65 AD3d 810, 884 NYS2d 290 [3d Dept 2009]).

This Court is troubled by the fact that in order to be successful in invalidating a candidacy due to lack of residency, the burden of proof is a clear and convincing standard (*see* ***Matter of Stavisky v Koo***, 54 AD3d 432, 863 NYS2d 87 [2d Dept 2008]), the same as that required to prove a claim of fraud. Here, one could read Justice Bivona's decision and argue that the facts confirmed therein spell out fraud. The original candidate was described as an attorney who worked on high profile federal litigation. Her conduct was summarized, by Justice Bivona, as follows:

> Based upon her conduct of surrendering her New York driver's license, voting in Pennsylvania, maintaining her bank account in Pennsylvania, obtaining her divorce in Pennsylvania, filing income taxes in Pennsylvania (listing herself as a non-resident of New York) it is this Court's reluctant opinion that for the period from November of 2005 until May of 2006 the candidate was not a New York resident ...

Yet, as noted, Justice Bivona did not explicitly invalidate the designating petition and the Second Department, has recalled its initial Decision & Order to eliminate any reference to invalidating the designating petitions.

This Court agrees with petitioners' claim that the dicta set forth in the last paragraph of Justice Bivona's decision is not an express statement rejecting the claim of fraud. As noted above, the court was "reluctant" in arriving at its opinion and rejected the claim of fraud only on the Pennsylvania Court with regard to the original candidate's divorce in that state. The Court additionally agrees with petitioners' contention that the issue of whether or not a candidacy constitutes a "sham," tracks language consistently set forth in appellate authority. In the often cited opinion of ***People v O'Hara***, 96 NY2d 378, 385, 729 NYS2d 396 (2001), *quoting* ***Matter of Gallagher v Dinkins***, 41 AD2d 946, 947, 343 NYS2d 960 (2d Dept 1973), *affd* 32 NY2d 839, 346 NYS2d 268 (1973), the Court of Appeals held:

> The crucial [factor in the] determination [of] whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent [to reside there], coupled with physical presence 'without any aura of sham.'

Here, while Justice Bivona rejects the claim that the candidacy was a "sham," he agreed with the clear and convincing evidence that the candidate was not a New York resident. However, this Court, being a court of coordinate jurisdiction, cannot add to or subtract from Justice Bivona's decision. Only the Second Department can do so. As stated in ***Matter of Lehrer v Cavallo***, 43 AD3d 1059, 1061, 844 NYS2d 334 (2d Dept 2007) *quoting* ***Northern Westchester Professional Park Assoc. v Town of Bedford***, 60 NY2d 492, 499, 470 NYS2d 350 (1983):

> Where, as here, a case is tried without a jury, the Appellate Division's 'authority is as broad as that of the trial court ... and as to a bench trial it may render the judgment it finds warranted by the facts.'

Based upon this Court's reading of Justice Bivona's decision, and the holdings in ***Matter of Espada v Diaz***, 98 NY2d 715, *supra* and ***Matter of Grieco v Bader***, 43 Misc2d 245, *supra*, this Court is without authority to declare the certificates of substitution invalid.

The Court does reject the attempt by petitioners to review the circumstances surrounding the signing and notarization of the certificates of substitution. Such a challenge relates to the internal functioning of a political party and there is no showing that these petitioners possess the requisite standing to offer such a challenge (*see* ***Matter of Scaturro v Becker***, __ AD3d__, 2010 WL 3340525 [2d Dept 2010]; ***Matter of MacKay v Johnson***, 54 AD3d 428, 863 NYS2d 85 [2d Dept 2008]; ***Matter of Nicolai v McKay***, 45 AD3d 965, 845 NYS2d 515 [3d Dept 2007]).

Accordingly, this special proceeding is denied and dismissed. This constitutes the decision and short form judgment of this Court.

DATED: 9/27/10

THOMAS P. WHELAN, J.S.C.