

Battle v Nassau County Bd. of Elections

2010 NY Slip Op 32740(U)

September 24, 2010

Supreme Court, Nassau County

Docket Number: 014126-10

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**Eileen Battle, Catherine M. Cucchiara and
Pietro Cucchiara, as Objectors,**

Petitioner,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 014126-10
Motion Seq. No: 3
Submission Date: 8/9/10**

- against -

**NASSAU COUNTY BOARD OF ELECTIONS
and Patricia A. Friedman,**

Respondents.

-----x

The following papers have been read on this Order to Show Cause:

- Order to Show Cause and Verified Affidavit.....x**
- Notarized Letter of R. Pendleton.....x**
- Affirmation in Opposition.....x**
- Affidavit in Reply and Exhibits.....x**
- Correspondence dated August 18, 2010.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Respondent Patricia A. Friedman ("Respondent") on August 2, 2010 and submitted on August 9, 2010. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Respondent moves for an Order 1) sanctioning Petitioners Eileen Battle ("Battle"), Catherine M. Cucchiara ("Catherine") and Pietro Cucchiara ("Pietro") (collectively

“Petitioners”) for knowingly filing false General Objections on July 16, 2010 with the Board of Elections, County of Nassau, State of New York (“BOE”); 2) sanctioning the Petitioners for knowingly filing false Specific Objections on July 22, 2010 with the BOE; 3) sanctioning Petitioners for knowingly filing a false, unsupported Order to Show Cause and Petition in this action and requesting that the Court issue an erroneous Order; and 4) sanctioning Petitioners for violating Uniform Rules 130-1.1(a), 130-1.1-a(b), 130-1.1(c)(2) and (3) and CPLR § 8303-a.

Petitioners oppose Respondent’s Order to Show Cause.

B. The Parties’ History

Respondent affirms as follows in her Affidavit in Support:

Respondent is a registered voter of the State of New York (“New York”) and an enrolled member of the Conservative Party, 21st Assembly District (“District”). Respondent is a candidate for Member of the Assembly in the District.

Pursuant to the New York State Election Law (“Election Law”), June 8, 2010 was the first day for signing Designating Petitions (“Petitions”) and July 12 - July 15, 2010 were dates for filing Petitions. Respondent’s Petitions were filed at the BOE on July 13, 2010 at 4:08 p.m. Petitioners filed General and Specific Objections within the authorized time period.

In their Specific Objections, Petitioners alleged that certain of the signatures (“Signatures”) on Respondents’ Petitions were forgeries. Respondent alleges that Petitioners “presented no credible evidence” (Resp. Aff. at ¶ 5) to support the allegations of forgery. To address Petitioners’ allegations, however, Respondent obtained Affidavits authenticating the Signatures.

In light of the Petitioners’ allegedly improper conduct in challenging certain Signatures as forgeries, Respondent requests that sanctions be imposed on Petitioners to cover expenses incurred by Respondent in responding to Petitioners’ allegations.

The submissions include a notarized letter to the Court, dated August 6, 2010, from an individual named Robert Pendleton (“Pendleton”) who resides in Merrick, New York.¹ Pendleton affirms as follows:

On June 23, 25 and 27, Pendleton circulated Conservative Party Petitions for Respondent

¹ The Court has chosen to use Mr. Pendleton’s full name in this decision in light of language in his letter asking the Court to “[p]lease honor my request in permitting Patricia A. Friedman to read my letter into the record.”

for the primary scheduled on September 14, 2010. Pendleton obtained numerous Signatures, some of which Petitioners subsequently challenged. Pendleton subsequently obtained eight (8) affidavits attesting to the authenticity of the Signatures, to address Petitioners' challenge. Pendleton was prepared to obtain additional affidavits but was advised it was not necessary.

Pendleton avers that he has been a member of the Conservative Party since 1965 and has served in various capacities as a member of that party. He submits that the instant lawsuit was frivolous. He asks that "the Petitioners admit that their accusations were made in bad faith and for political reasons" (Pendleton letter at p. 2).

In his Affirmation in Opposition, counsel for Petitioners submits that 1) the Court need not address this motion in light of the Notice of Discontinuance that was filed;² and 2) the Court lacks jurisdiction over this motion, which relates to a filing with the BOE.

Counsel for Petitioners also submits, *inter alia*, that 1) given the restrictive deadlines in the Election Law, courts have approved the filing of "anticipatory proceedings" (Counsel's Aff. in Opp. at ¶ 3) by petitioners, to preserve their claims prior to a ruling by the BOE; 2) Petitioners followed the methodology prescribed in the Election Law; 3) the Petition underlying Petitioners' prior Order to Show Cause properly set forth Petitioners' objections to the Signatures; 4) Respondent is improperly seeking sanctions against Petitioners based on a certification signed by counsel; and 5) CPLR § 8303-a, cited by Respondent, is inapplicable to this proceeding because it applies only to actions to recover damages for personal injury, injury to property or wrongful death.

In addition, counsel for Petitioners affirms that after he reviewed the affidavits provided to him by Respondent on August 2, 2010, he advised Respondent that he would urge his clients to discontinue the action. Counsel for Petitioners left repeated telephone messages for Respondent on August 4th and 5th to advise her of his intention to discontinue this action. Counsel for Petitioners then advised Respondent in person, at the court proceeding on August 6th, that the matter would be discontinued.

Respondent submitted a Reply Affidavit. Although the CPLR does not authorize a Reply Affidavit under these circumstances, and counsel for Petitioners objected to the Court's

² Petitioners filed a Notice of Discontinuance in this action on or about August 13, 2010.

consideration of that submission, the Court, in its discretion, agreed to consider Respondent's Reply Affidavit.

In her Reply Affidavit, Respondent submits, *inter alia*, that 1) notwithstanding the discontinuance of this action, the Court may consider and rule upon Respondent's motion; and 2) the restrictive temporal deadlines in the Election Law do not excuse Petitioners' allegedly improper conduct.

C. The Parties' Positions

Respondent submits that the Court should sanction Petitioners for their allegedly improper conduct in connection with a campaign for the position of Member of the Assembly in the 21st District.

Petitioners oppose Respondent's motion, submitting that she has not demonstrated that Petitioners engaged in sanctionable conduct.

RULING OF THE COURT

Preliminarily, the Court determines that CPLR § 8303-a, which applies to actions to recover damages for personal injury, injury to property or wrongful death, is inapplicable to the matter at bar. As noted by counsel for Petitioners, however, that statute provides some guidance to the Court with respect to the instant motion. CPLR § 8303-a(c) provides as follows:

(c) In order to find the action, claim, counterclaim, defense or cross claim to be frivolous under subdivision (a) of this section, the court must find one or more of the following:

(i) the action, claim, counterclaim, defense or cross claim was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another;

(ii) the action, claim, counterclaim, defense or cross claim was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. **If the action, claim, counterclaim, defense or cross claim was promptly discontinued when the party or the attorney learned or should have learned that the action, claim, counterclaim, defense or cross claim lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith [emphasis added].**

Election Law § 6-154(2) addresses, *inter alia*, the procedure for making written objections to a designating petition and filing subsequent specifications of the grounds of those

objections. Election Law § 16-102 sets forth the procedure regarding, *inter alia*, judicial proceedings to invalidate designating petitions. Election Law § 1-106 sets forth strict procedural requirements regarding the filing of such proceedings. The untimely filing of a designating petition is a fatal defect and the judiciary is foreclosed from fashioning any exceptions. *Fischer v. Suffolk County Bd. of Elections*, 905 N.Y.S.2d 779 (2d Dept. 2010), citing *Matter of Amo v. Orange County Bd. Of Elections*, 286 A.D.2d 454 (2d Dept. 2001), quoting Election Law § 1-106(2).

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

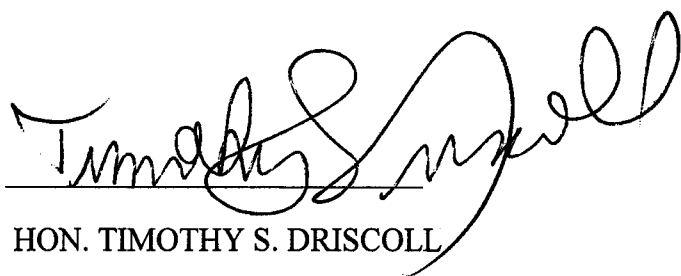
The Court concludes, in light of the 1) the strict deadlines set forth in the Election Law, and 2) the timely discontinuance of this matter by Petitioners, that sanctions are not warranted in this matter. Accordingly, the Court denies Respondent's Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
September 24, 2010


HON. TIMOTHY S. DRISCOLL

J.S.C.

X X **ENTERED**
SEP 30 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE