

Poretsky v Browne
2011 NY Slip Op 32260(U)
August 8, 2011
Sup Ct, Nassau County
Docket Number: 010986-11
Judge: Timothy S. Driscoll
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**SUPREME COURT - STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MIRIAM PORETSKY,

Petitioner-Objector,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

-and-

JOSEPH K. SCANNELL,

Candidate-Aggrieved,

-against-

Index No: 010986-11

Motion Seq. No: 1

Submission Date: 8/8/11

CHRISTIAN BROWNE,

Respondent-Candidate,

-and-

**WILLIAM T. BIAMONTE and LOUIS G.
SAVINETTI Commissioners constituting
Nassau County Board of Elections,**

Respondents,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid Designating Petition Purporting to Designated the Respondent(s)-Candidate(s) as a candidate of the Independence Party for Public Office of County Legislator, 5th Legislative District, in the Independence Party Primary Election to be held on the 13th day of September 2011, and to Restrain the said Board of Elections from Printing and Placing the Names of said Candidate(s) upon the Official Ballots of such Primary Election.

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[*2]
Presently before the Court is the Order to Show Cause filed by Petitioner-Objector Miriam Poretsky and Candidate-Aggrieved Joseph K. Scannell. The Petition seeks an order declaring insufficient, defective, invalid, null and void the purported designating petition filed by Respondent Christian Browne as candidate for the public office of County Legislator, 5th Legislative District, in the County of Nassau, in the Independence Party Primary Election on September 13, 2011 and in the General Election on November 8, 2011. The Court has before it the Order to Show Cause and the accompanying exhibits, which were filed on July 26, 2011 and signed by the Court on July 27, 2011, and the Verified Answer and Cross-Petition filed on August 1, 2011, and has heard the arguments of counsel.

On the consent of the parties, the Court issued an order referring any "line-by-line" determination to a Special Referee for the designated referee to hear and determine, although the parties have jointly agreed that the reference now be a "hear and report" by the Special Referee. Proceedings were held before Special Referees Marston Gibson and Thomas Dana, and this Court retained its authority to determine all legal issues in the petition.

On the consent of the parties, the Court held a hearing before this Court on August 4, 2011 on the question whether the process by which the signatures was obtained violated Election Law § 6-132. More specifically, the central issue at the hearing was whether the subscribing witnesses to the petition obtained the signatures in a manner that ensured that the signatories affirmed the truth of the matter to which they subscribed their names.

The Court heard testimony from five witnesses who signed the petition at issue, and from Jeffrey Farrell, who notarized some 30 signatures. The Court credits Farrell's testimony in its entirety. Of particular relevance to the instant dispute, Farrell testified that (a) he obtained some 30 signatures, (b) he informed all signatories that he was obtaining signatures in his capacity as a notary, (c) he asked each signatory to (1) confirm the signatory's identity, (2) confirm the signatory's address, (3) confirm that the signatory was a member of the Independence Party, and (4) confirm that everything that the signatory signed was truthful. He further testified that he typically raises his own right hand as he asked these questions of the signatories.

None of the five signatories who testified remembered the process about which Farrell testified, although one signatory did recall that Farrell identified himself as a notary. This apparent inconsistency notwithstanding, the Court credits Farrell's testimony based on his appearance, demeanor, and the manner in which he answered the questions posed to him by both petitioner's counsel and the Court.

Election Law § 6-132(3) governs the process by which signatories are to affirm, to a notary public, the truth of their statements in election petitions. That statute has been the subject of interpretation in recent court decisions, including *Imre v. Johnson*, 872 N.Y.S.2d 691 (Sup. Ct. 2008, *aff'd*, 863 N.Y.S.2d 473 (2d Dept. 2008)), and *Liebler v. Friedman*, 863 N.Y.S.2d 719 (2d Dept. 2008). In *Liebler*, the signatories were not asked to "swear," but the signatories affirmed the truth of the matter to which they subscribed their names. The Second Department held that this process substantially complied with Election Law § 6-132(3). In *Imre*, the notary did not

remember identifying himself as such, and did not obtain a statement from any of the signatories as to the truth of the matter to which they subscribed their names. The trial court held that process did not comply with Election Law § 6-132(3), and the decision was upheld by the Second Department.

Here, the testimony of Mr. Farrell demonstrated that the process of obtaining signatures was relatively informal, but it did comply with Election Law § 6-132(3). There are two critical facts that are central to the Court's analysis. First, Mr. Farrell testified credibly that he identified himself as a notary to all signatories. Second, he testified that, after confirming the identity, address, and party affiliation of each signatory, he asked whether the signatory confirmed that everything the signatory signed was truthful. This process appears similar to the process approved in *Liebler*. It further appears to comport to CPLR § 2309(b), in that the process was "calculated to awaken the conscience and impress the mind of the person in accordance with his religious or ethical beliefs."

Nor has the petitioner demonstrated that the signatories did not understand that the oath referred to the matter to which each signatory subscribed his or her name, in violation of the principles espoused in *Kutner v. Nassau*, 65 A.D.3d 643 (2d Dept. 2009). Rather, Mr. Farrell's asking the signatories whether everything the signatory signed was truthful appears to comport with *Kutner*. It is true that the process Mr. Farrell employed could have been more fulsome, and indeed it appears that the process in *Kutner* was at least a bit more complete than that employed here. Nevertheless, the process employed here appears to satisfy Election Law § 6-132, in that each signatory was specifically asked whether he or she swore to the truth of the document upon which the signatory had signed his or her name, and this question was asked immediately after the signatory signed his or her name.

Accordingly, that basis for the relief cited in the petition is denied.

The Special Referee made two sets of determinations that have been challenged by the Respondent. First, the Respondent asserts that the Referee erroneously determined that four (4) signatures were not sufficiently similar to the buff cards on file at the Board of Elections. Those signatures appear at the following places in the nominating petitions at issue:

Volume 1, page 3, line 3

Volume 1, page 7, line 7

Volume 2, page 3, line 4

Volume 2, page 4, line 6

The record demonstrates, and the parties agree, that the Special Referee compared the buff cards on file to the signatures in the petitions. On the request of the parties, this Court conducted the same inquiry, and arrives at the same conclusion. The four (4) signatures at issue are not sufficiently similar, and the Referee's observations regarding the dissimilarities, which were placed on the record before him on August 5, 2011, are shared by the Court.

Second, the Respondent asks this Court to validate the signatures that were otherwise held invalid by the Special Referee on Volume 1, page 6, on the grounds that the Notary Public failed to date his own signature. Ruling on a prior iteration of the Election Law, the Court of Appeals held in *Sortino v. Chiavaroli*, 42 N.Y.2d 982 (1977) that the lower courts properly determined that the notary's failure to date his authentication was fatal to the validity of the undated petitions, and that the defect was not curable by affidavits of the notary filed in the court proceeding. Rather, the affidavits should have been filed with the Board of Elections on or before the last day for filing a designating petition. The Second Department relied on *Sortino* in *Burgess v. D'Apice*, to invalidate petitions filed under the current iteration of the Election Law, in which the notary failed to affix his notary stamp to the petition at issue. *Burgess v. D'Apice*, 112 A.D.2d 1058 (2d Dept. 1985). In light of this controlling authority, and there being no controlling authority to the contrary, the Court concurs with the Special Referee, and determines that the signatures on Volume 1, page 6 are not to be considered in the determination of whether there are sufficient signatures in the nominating petitions at issue.

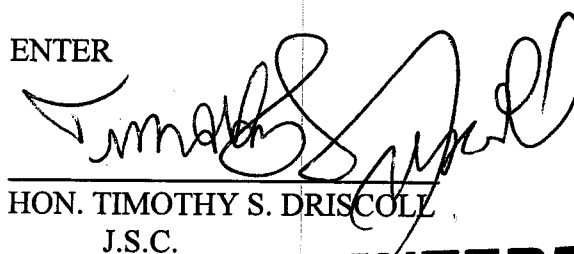
Coupled with the rulings of the Special Referee that have not been challenged before this Court, and the rulings of the Board of Elections, the Court's ruling results in 69 signatures being valid, with 76 needed to qualify for the party nomination for the office at issue. Accordingly, the petition is granted.

All matters not decided herein are hereby denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, NY
August 8, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 10 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE