

Kepert v Tullo

2011 NY Slip Op 32681(U)

October 5, 2011

Sup Ct, Suffolk County

Docket Number: 11-26187

Judge: Hector D. LaSalle

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART XXX SUFFOLK COUNTY**

**PRESENT:
HON. HECTOR D. LASALLE**

INDEX NO.: 11-26187

CONSTANCE M. KEPERT,

DECISION AND ORDER

Petitioner,

-against-

**PETITIONER'S ATTY:
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HUNTINGTON, NY 11743
(631) 385-1175**

**JAMES M. TULLO,
-and-**

**RESPONDENT'S ATTY (TULLO):
SINNREICH KOSAKOFF & MESSINA, LLP
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(631) 650-1200**

**ANITZ KATZ and WAYNE ROGERS,
BEING THE COMMISSIONERS OF
THE BOARD OF ELECTIONS IN
SUFFOLK COUNTY, and the SUFFOLK
COUNTY BOARD OF ELECTIONS,**

Respondents,

**FOR AN ORDER VALIDATING
CERTAIN DESIGNATION PETITIONS
OF THE WORKING FAMILIES
PARTY FILED WITH THE BOARD OF
ELECTIONS DESIGNATING THE
WITHIN NAMED CANDIDATE FOR
THE PUBLIC OFFICE OF COUNCIL
MEMBER, DISTRICT #4 TOWN OF
BROOKHAVEN REFERRED TO AS TO
BE VOTED UPON IN THE PRIMARY
ELECTION TO BE HELD ON
SEPTEMBER 13, 2011 AND
DIRECTING THE SUFFOLK COUNTY
BOARD OF ELECTIONS TO PLACE
THE PETITIONER CANDIDATE'S
NAME ON THE OFFICIAL BALLOT
AND VOTING MACHINES FOR SAID
PRIMARY ELECTION.**

**RESPONDENT'S ATTY
(BOARD OF ELECTIONS):
SUFFOLK COUNTY ATTORNEY
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X

This is an action commenced by Petitioner, Constance Kepert, seeking judicial review of a Suffolk County Board of Elections determination invalidating sixteen (16) signatures in her Working Families Party designating petition for Councilmember, Fourth Town District in the Town of Brookhaven. The Board of Elections review was based upon the objection of Mr. James Tullo. On September 9, 2011, the Court conducted a hearing to review the determination of the Board of Elections. The Petitioner was represented by Mr. John J. Leo, Esq. and Mr. Stuart Besen, Esq. of 191 New York Avenue, Huntington, New York 11746. The Respondent, Mr. James M. Tullo, was represented by Mr. Vincent J. Messina, Esq. of Sinnreich, Kossoff & Messina, LLP, Courthouse Plaza, 267 Carleton Avenue, Suite 301, Central Islip, New York 11722. The Respondent, Suffolk County Board of Elections was represented by Leonard G. Kapsalis, Esq., Suffolk County Department of Law, 100 Veterans Memorial Highway, Hauppauge, New York 11788. Post hearing submissions were received by the Court on September 28, 2011 from Mr. Leo and Mr. Messina. These submissions have been considered by the Court. The Court has had a full opportunity to consider the evidence presented with respect to the issues in the proceeding, including the testimony offered and the exhibits received in evidence. The Court has further had a full opportunity to observe the demeanor of the various witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court makes the following finding of facts and conclusions of law:

I. FINDINGS OF FACT

The parties have made the following stipulations:

- a) The subject designating petition required fourteen (14) valid signatures,
- b) The subject designating petition contained twenty four (24) signatures and
- c) The respondent Suffolk County Board of Elections determined sixteen (16) signatures on the subject designating petition were invalid.

The first individual to testify was Jaime Negron, Jr. of 130 Beaver Dum Road, Brookhaven, New York. Mr. Negron testified that he is a member of the Working Families Party. He identified his name and mark on Court Exhibit A on page four, line five. Mr. Negron stated that he printed his name on Ms. Kepert's petition in either the springtime or early summer. Additionally, Mr. Negron identified the mark of his father on Court Exhibit A at page four, line four.

The next person called to testify was Ms. Aida Alvarez of 928 Scherger Avenue, East Patchogue, New York. Ms. Alvarez testified that she is a member of the Working Families Party. She identified her signature on page four, line two of Exhibit A.

Ms. Tammy White of 746 Americus Avenue, East Patchogue, New York testified next. Ms.

White stated she was a member of the Working Families Party and identified her mark. She testified that it was her intention to designate Ms. Kepert as the Working Families representative for Brookhaven Town Council, District Four, when she signed page four, line one of Exhibit A.

The last witness to testify at the hearing was Ms. Elizabeth Alexander of 164 Main Street, Northport, New York. Ms. Alexander testified that she is a member of the Working Families Party and has been since 2005. She stated that she gathered the signatures on page one of Exhibit A. Ms. Alexander testified that she went to the home of each person listed on page one of Exhibit A. Ms. Alexander testified that she witnessed each designating signature placed on Exhibit A.

Further, Ms. Alexander explained why she failed to fill in the number of signatures that were left blank. Ms. Alexander stated that when she went to the home located at 701 Taylor in East Patchogue she presented Ms. Kepert's Working Families designating petition to a woman appearing at the door. This woman identified herself as the mother of the person living at 701 Taylor and signed the petition stating "I am signing for my daughter." Ms. Alexander testified that she knew the signature located on page one, line four on Exhibit A was invalid. Ms. Alexander testified that she knew the signature was invalid and had the signature "red flagged." Ms. Alexander further stated each person who signed page one of Exhibit A identified themselves except for the person at 701 Taylor. It was clear from Ms. Alexander's testimony that she was unsure how to detail the amount of signatures on page one of Exhibit A because of the invalid signature at line four. Ms. Alexander stated that she spoke with Jess Carano of the Working Families Party to obtain direction on how to handle the petition now that an invalid signature had been placed on it. Ms. Carano directed Ms. Alexander to submit the petition to an unidentified Working Families party member. Ms. Alexander pointed out to this unidentified person exactly which signature was invalid and submitted to this person. She further testified she made no alterations to Exhibit A after her conversation with Ms. Carano.

II. CONCLUSIONS OF LAW

- A. That Aida Alvarez is a duly registered member of the Working Families Party. That Ms. Alvarez lives in the Fourth Council District of the Town of Brookhaven. That the signature affixed to page four of Working Families petition W11-5 is the valid signature of Ms. Alvarez.
- B. That Tammy White is a duly registered member of the Working Families Party. That Ms. White lives in the Fourth Council District of the Town of Brookhaven. That the signature affixed to page four of Working Families petition W11-5 is the valid signature of Ms. White.
- C. That Jaime Negron is a duly registered member of the Working Families Party. That Mr. Negron lives in the Fourth Council District of the Town of Brookhaven. That the signature affixed to page four of Working Families petition W11-5 is the valid signature of Mr. Negron.

- D. Accordingly the petition signatures of Ms. Alvarez, Ms. White and Mr. Negron on behalf of Ms. Kepert in the Town of Brookhaven Council Member number four election are hereby deemed valid.
- E. Four of the five signatures in page one of Working Families petition W11-5 are hereby deemed valid. Signature four purportedly signed by Geriann Woods is deemed invalid as it was purportedly signed by Ms. Wood's mother. Accordingly signature four is deemed invalid.
- F. In upholding the validity of signatures 1,2,3 and 5 on page one of W11-5, the Court finds the failure of Ms. Alexander to set forth the number of signatures on petition W11-5, page one, was neither fraudulent nor abusive.
- G. Election Law §6-132 governs the form of designating petitions. The statute requires a subscribing witness to detail the total number of signatures on each petition, among other items. This requirement has been deemed essential to the integrity of the petition process (*Matter of Jonas v. Velez*, 65 N.Y.2d 954, 955, 483 N.E.2d 1151, 493 N.Y.S.2d 1019 [1985]; *Cronk v. Ferencsick*, 181 A.D.2d 754, 581 N.Y.S.2d 234 (2d Dept. 1992)), since the "purposes of the requirements imposed by the Election Law include avoiding fraudulent practices, confusion, and threats to the integrity of the system" (*Fromson v. Lefever*, 112 A.D.2d 1064, 1066, 493 N.Y.S.2d 169 (2d Dept. 1985) affd sub nom. *Matter of Barrett v. Scaringe*, 65 N.Y.2d 946, 483 N.E.2d 1149, 493 N.Y.S.2d 1017 [1985]).
- H. Conversely, "when dealing with the technical requirements of a designating petition-the invention of the Legislature obviously being the avoidance of fraud, abuse or irregularities-an error so insignificant in proportion as to be totally inconsequential should not be the basis for the elimination of the right to vie for public office" (*Stabler v. Fidler*, 110 A.D.2d 38, 39, 493 N.Y.S.2d 161 (2d Dept. 1985) affd 65 N.Y.2d 529, 482 N.E.2d 1204, 493 N.Y.S.2d 285 [1985]).
- I. Ultimately in balancing the procedural requirements of the Election Law against the public policy interest in ensuring an individuals right to vie for public office the Courts of this State have generally held that "a candidates designating petition will only be invalidated on the ground of fraud only if there is a showing that the entire designating petition is permeated with fraud" (*Matter of Volino v. Calvi*, 87 A.D.3d 657, ___, 928 N.Y.S.2d 470, 470[2011]; *Bonner v. Negron*, 87 A.D.3d 737, 929 N.Y.S.2d 170, 2011 N.Y. Slip Op. 06377 [2011]; See *Matter of Ferraro v. McNab*, 60 N.Y.2d 601, 603, 454 N.E.2d 533, ___, 467 N.Y.S.2d 193 [1983]; *Matter of Harris v. Duran*, 76 A.D.3d 658, 659, 905 N.Y.S.2d 777, ___ (2d Dept. 2010); *Matter of Drace v. Sayegh*, 43 A.D.3d 481, 482, 844 N.Y.S.2d 314, ___ (2d Dept. 2007)).
- J. This Court found Ms. Elizabeth Alexander's testimony to be credible. This Court did not find her actions in the signature gathering process to be fraudulent. To the contrary, Ms.

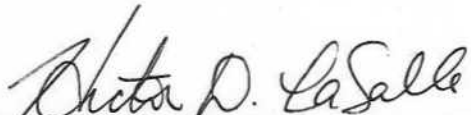
Alexander actions demonstrates her intention to properly complete Ms. Kepert's designating petition. Her efforts to get clarification as to the proper handling of Ms. Wood's signature demonstrate her attention to the dilemma she found herself in. While the "higher ups" in the Working Families Party may have "dropped the ball" in failing to complete the total signature line on Ms. Kepert's designating petition, this failure does not rise to level wherein the petition itself has become compromised by fraud.

- K. Therefore, each of the signatures at issue in this hearing are deemed valid, except for the purported signature of Geriann Woods on Working Families petition W11-5 page one, line four. Accordingly, due to the reinstatement of seven signatures to Ms. Kepert's Working Families petition, Ms. Kepert now has fifteen valid signatures, which are sufficient to secure her position as the Working Families Party candidate for Council District #4 in the Town of Brookhaven in the upcoming General Election.

The Suffolk County Board of Elections is ordered to take all steps necessary to ensure Ms. Constance M. Kepert is on the Working Families Party ballot for Town of Brookhaven Councilperson in the fourth council district on November 8, 2011.

The foregoing constitutes the Order of this Court.

Dated: October 5, 2011
Central Islip, New York


HON. HECTOR D. LASALLE, J.S.C.