

Shahzad v Montesano
2012 NY Slip Op 32115(U)
August 2, 2012
Sup Ct, Nassau County
Docket Number: 9368/12
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

NAUSHAD SHAHZAD,

Petitioner-Objector,

Index No. 9368/12

-and-

Motion Submitted: 7/31/12

Motion Sequence: 001

MARIO FERONE,

Candidate-Aggrieved,

-against-

MICHAEL A. MONTESANO,

Respondent-Candidate,

-and-

**WILLIAM T. BIAMONTE and LOUIS G.
SAVINETTI, Commissioners constituting the 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
the Designating Petition Purporting to Designate the
Respondent(s)-Candidates(s) as a candidate of the
Conservative Party for Public Office of Member of
Assembly, 15th District, Two Year Term, in the
Conservative Party Primary Election to be held on
the 13th day of September 2012, 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,**

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Petitioner-Objector Shahzad and Candidate Aggrieved Ferone move this Court by order to show cause for an Order declaring invalid the designating petition of Respondent-Candidate Montesano, purporting to designate him as the Conservative Party candidate for the public office of Member of Assembly, 15th District, Nassau County, New York, in the primary election scheduled to be held on September 13, 2012, and in the General Election to be held on November 6, 2012. Petitioner Shahzad and Candidate-Aggrieved Ferone further seek an Order directing that Respondent Nassau County Board of Elections (“BOE”) not place Mr. Montesano’s name on the official ballots as the Conservative Party candidate in the upcoming primary and general elections, declare any such official ballots designating Mr. Montesano as the Conservative Party candidate to be a legal nullity, and reversing any contrary determination of the BOE.¹

Respondent-Candidate Montesano opposes the requested relief, and requests dismissal of the instant Petition.

This matter was initially heard before this Court on July 31, 2012. At that time, Petitioner Shahzad and Candidate-Aggrieved Ferone narrowed the basis of the Petition to the ground that Respondent-Candidate Montesano’s Conservative Party Designating Petitions Cover Sheet and accompanying signature pages list an incorrect place of residence for

¹In the order to show cause issued by the Court on July 24, 2012, the instant petition was directed to be delivered to a recognized overnight delivery carrier and/or the United States Postal Service no later than 8:00 p.m. on July 25, 2012. The Affidavit of Service fails to state when the petition was delivered to Federal Express, necessitating this Court to access the website for Federal Express in order to track the package containing the instant petition. While the Court will accept as accurate the information contained on the website, which indicates delivery to Federal Express at 5:15 p.m. on July 25, 2012, the better practice would be to include such vital information as part of the sworn allegations contained in an Affidavit of Service.

Montesano, thereby necessitating invalidation of all of the required signatures appearing thereon.

Specifically, Montesano's place of residence is listed on the designating petition as being "2055 Bruce Lane, Merrick, New York."² It is undisputed that this was never a correct address for Mr. Montesano, who actually resides at 313 Frost Pond Road, Glen Head, New York, nor does it appear that Mr. Montesano designated the Merrick address in connection with his candidacy for any purpose.

Respondent-Candidate Montesano supplied evidence in the form of an affidavit from an officer of the Conservative Party of Nassau County that there was an inadvertent typographical error in the printing of Montesano's address on the designating petition, and acknowledging that the error was detected on the eve of the last day to file petitions.

Montesano argues that there is no showing made of an intent to mislead or confuse those invited to sign the designating petition or those seeking to verify Montesano's qualifications.

"The purpose of inclusion of the residence address of the candidate (citations omitted) is not only to facilitate the processing of his petition by the Board of Elections and to ease the task of one checking his qualification to run, but perhaps most important to assure that the signers of his petition are aware of the identity of their candidate. Where . . . there is no proof of any intention on the part of the candidate or of those who have solicited signatures on his behalf to mislead or confuse, and no evidence that the inaccuracy did or would lead or tend to lead to misidentification or confusion on the part of those invited to sign the petition or seeking to verify his qualification," the designating petition should not be invalidated (*Matter of Ferris v. Sadowski*, 45 NY2d 815, 817 [1978]).

Where there is no showing made of an intent to mislead or confuse signatories as to the candidate's identity, and no showing that the incorrectly listed address would or did tend to mislead or confuse anyone, the invalidating petition should be dismissed (*Matter of Pagonis v. Irizarry*, 87 AD3d 648 [2d Dept 2011]; *Matter of Maloney v. Ulster County Board of Elections*, 21 AD3d 692 [3d Dept 2005]).

Courts have considered as important factors in determining whether signatories could

²The Court takes judicial notice of the fact that the particular address in Merrick, New York is located within the 19th New York State Assembly District.

be misled and/or confused by an incorrect address 1) whether there is any other registered voter with the same name as the candidate, in the political subdivision in which he or she seeks public office; 2) whether the candidate is an incumbent known to the signatories, and 3) whether the candidate has been involved in the community and political activities in the political subdivision in which he/she is seeking public office (*Matter of Ferris, supra; Matter of Rosenbaum v. Power*, 43 Misc2d 377 [Sup Ct, Kings Co 1964], *affirmed*, 21 AD2d 700 [2d Dept 1964]; *Matter of Orlando v. Power*, 24 Misc2d 39 [Sup Ct, Bronx Co 1960]).

Aside from alleging that Montesano's residence address is incorrectly listed on the subject designating petition, which is conceded by Montesano, Petitioner and Candidate-Agrieved have not made any showing that there was an intent to mislead or confuse the signatories, or those seeking to verify his qualification.

In opposition to the instant petition, Respondent-Candidate Montesano submitted an affidavit of an officer of the Conservative Party of Nassau County establishing that there was a typographical error made in the printed portion of the subject designating petition regarding Montesano's address, which was also filed with the Board of Elections on July 12, 2012.³ Montesano contended and the Board of Elections confirmed that he is the only registered voter in Nassau County by that name. In addition, he is a sitting Assembly member seeking re-election in the 15th Assembly District. Petitioner and Candidate-Agrieved do not controvert those factual assertions.

The Court notes that the subject designating petition correctly designates the "public office" for which Montesano seeks re-election as being "Member of Assembly Fifteenth District Two Year Term."

The Court also takes judicial notice of the New York State Assembly website (assembly.state.ny.us/mem/) listing the biography of Assemblyman Michael Montesano, which states, *inter alia*, that he is currently an Assemblyman for District 15, and a resident of Glen Head since 1979. The biography section also lists a number of other community activities and other past offices held by him.

In view of the foregoing, this Court has determined that Petitioner and Candidate-Agrieved have failed to make any showing that the incorrect address listed on the subject petition was intended to mislead or confuse, or that the inaccuracy did or would lead, or tend to lead to, misidentification or confusion on the part of those invited to sign the petition or

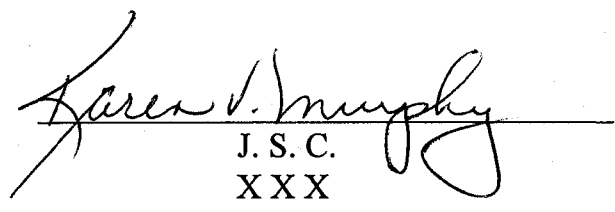
³The last day to file designating petitions with the Board of Elections was July 12, 2012.

seeking to verify his qualification. Thus, the Court has further determined that the incorrect address is in the nature of a clerical error (*i.e.*, a “cut and paste” error) that does not warrant invalidation of the designating petition (*see Matter of Hoare v. Davis*, 207 AD2d 309 [1st Dept 1994]).

Accordingly, the petition is denied and the proceeding is dismissed.

The foregoing constitutes the Order of this Court.

Dated: August 2, 2012
Mineola, N.Y.


J. S. C.
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ENTERED
AUG 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE