Bailey v Village of Lyons Bd. of Trustees
2014 NY Slip Op 30405(U)
February 19, 2014
Supreme Court, Wayne County
Docket Number: 76640
Judge: John B. Nesbitt

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

JACK BAILEY and ANDREW DEWOLF

Petitioners,

-vs- **Index No. 76640**

VILLAGE OF LYONS BOARD OF TRUSTEES

Respondents.

APPEARANCES: Jack Bailey and Andrew DeWolf
Petitioners Pro Se

Arthur B. Williams, Esq.
Attorney for Respondent

MEMORANDUM - DECISION

John B. Nesbitt, J.

The instant petition brought under CPLR Article 78 challenges certain actions by the Village Clerk of the Village of Lyons *(herein the "Village Clerk")* and the Board of Trustees of the Village of Lyons *(herein the "Village Board" or "Village")* resulting in the scheduling of a special election on March 18, 2014, on the proposition whether the plan of dissolution for the Village of Lyons shall take effect. Petitioners allege that the statutory requirements enabling such election have not been met; accordingly, such election should be enjoined and the dissolution plan go into effect as provided by law. Petitioners invoke this Court's authority under CPLR §7804(3), enabling judicial review and remedy where a "body or officer" has made a determination that "was affected by an error of law or was arbitrary and capricious."

The operative facts are uncomplicated and undisputed. Effective March 21, 2010, a new Article 17-A was added to the N.Y. General Municipal Law *(herein "GML")*, designated the "New N.Y. Government Reorganization and Citizen Empowerment Act." This legislation replaced Article 19 of the N.Y. Village Law, which had previously governed dissolution of villages. However, like the repealed Article 19 of the Village Law, GML Article 17-A provides mechanism by which the voters can petition and require a village board to prepare and approve an "elector initiated dissolution

plan" that dissolves of the village. GML Article 17-A mandates voter referenda upon the initial petition seeking dissolution as well as one after village board approval of the dissolution plan if so petitioned by the voters. This proceeding concerns the latter.

Under GML Article 17-A, voter referenda initiates by petition. Regarding this process, GML §785 controls and provides in pertinent part.

> **§785. Effective date of elector initiated dissolution plan; permissive referendum**
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> 1. A local government entity dissolved pursuant to an elector initiated dissolution plan shall continue to be governed as before dissolution until the effective date of the dissolution specified in the elector initiated dissolution plan, which date shall be no less than forty-five days after final approval of the plan ...
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> 2. Notwithstanding subdivision one of this section, the elector initiated dissolution plan shall not take effect if, no later than forty-five days after final approval of such plan ..., electors of the local government entity to be dissolved shall:
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> (a) file an original petition, containing not less than the number of signatures provided for in subdivision three of this section, seeking a referendum on the question whether the elector initiated dissolution plan shall take effect ...; and
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> (b) thereafter less than a majority of the electors vote in the affirmative on such question at a referendum.
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> 3. The petition shall be circulated, signed and authenticated in substantial compliance with the provisions of §779, shall contain the signatures of at least twenty-five percent of the number of electors, or15,000, whichever is less, in the local government entity to be dissolved, and shall be accompanied by a cover sheet containing the name, address, and telephone number of an individual who signed the petition and who will serve as a contact person.
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> 4. Within ten days of the filing of the petition seeking a referendum on whether the elector initiated dissolution plan shall take effect, the clerk with whom the petition was filed shall make a final determination regarding the sufficiency of the number of signatures on the petition and provide timely written notice of such determination to the contact person named in the cover sheet accompanying the petition. The contact person or any individual who signed the petition may seek judicial review of such determination in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Upon the clerk's determination that the petition contains less than the required number of signatures, the governing body of the local government entity to be dissolved shall within thirty days enact a resolution calling for a referendum by the electors on the question whether the elector initiated dissolution plan shall take effect and set a date for such referendum in accordance with subdivision five of this section.
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> 5. The referendum on the question whether the elector initiated dissolution plan shall take effect shall be submitted at a special election to be held not less than sixty or more than ninety days after enactment of a resolution pursuant to subdivision four of this section...

In this proceeding, the Village Board resolved at a special meeting convened on January 9, 2014, to conduct a special election to be held on March 18, 2014. The proposition to be voted upon at the special election is whether the dissolution plan adopted by the Village Board shall take effect. The enabling authority for the Village Board's resolution scheduling the voter referendum derives from GML §785. That section requires a proper petition before such a referendum can be held. There is no authority for a Village Board by resolution without a proper petition to conduct such a referendum. There is nothing in GML §785 comparable to Town Law §94, for example, that allows a municipal entity to proceed upon its own motion to cause a referendum election without a petition.[1] Petitioners claim that the petition submitted to the Village Clerk was inadequate both in form and the number of valid signatories to enable a referendum election. The Village argues otherwise. Before discussing the merits of this issue, the Court must first address the threshold issue of petitioner's standing.

Of course, as the Village correctly points out, standing is "a threshold requirement for a plaintiff to challenge governmental action" (*New York State Assn. Of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 [2004]). Standing requires "the existence of an injury in fact - an actual legal stake in the matter being adjudicated - ensur[ing] that the party seeking review has some concrete interest in prosecuting the action which cases the dispute 'in a form traditionally capable of judicial resolution.'" (*The Society of Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761, 773 [1991][citation omitted]). The type of injury conferring standing is one gleaned by a "zone of interests" test, which ties "the in-fact injury asserted to the governmental act challenged," and "circumscribes the universe of persons who may challenge the administrative action" (id). "Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency acted" (*id.*)(citations omitted).

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[1] This section of the N.Y. Town Law reads:

§94. Referendum on acts or resolutions of the town board without petition

The town board, upon its own motion, may cause to be submitted for the approval of the electors any act or resolution of such board against which a petition could be filed as provided in this chapter and the proceeding thereon shall be the same as if such petition had been filed in accord with the provisions of this chapter.

The Village alleges that petitioners suffer no injury, if there be any, different than any other member of the public at large. More importantly, argues the Village, the State Legislature specifically defined, to quote the Court of Appeals, the "universe of persons who may challenge the administrative action" in these circumstances" (*Society of Plastics Industry, Inc. v County of Suffolk, supra*, at 773). That is, after the Village determines the sufficiency of the petition seeking referendum upon the dissolution plan, GML §785 (4) provides that "*[t]he contact person or any person who signed the petition* may seek judicial review of such determination in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules." (emphasis added). By negative implication, therefore, argues the Village, one who is not the contact person or a petition signatory does not have standing to pursue an Article 78 proceeding. Petitioners argue that they nevertheless have standing, because they signed the initial petition seeking dissolution of the Village.

This Court determines that the petitioners have standing, albeit for different reasons. In *Matter of Ecker v. Town of West Seneca*, 87 Misc.2d 322 (Sup. Ct., Erie Co. 1976), petitioners challenged the results of a special election authorizing the construction of a swimming pool complex. Petitioners claimed, among other things, that the statutory procedures noticing the election were not timely followed, thus the election was a nullity. The town claimed that the petitioners were without standing. Justice Callahan disagreed:

> "Addressing the question of petitioners' standing to initiate this suit and as well, the alleged failure of petitioners to establish a specific violation of their rights, the court finds that the petitions do have standing. While there is no specific showing of damages to the petitioners themselves or a specific violation of their rights, it is inconceivable that there can be no court review of a special election where there are allegations affecting the integrity of legal procedures in the expenditures of public funds and in the conduct of special election for that purpose. Public policy considerations dictate that the instant case be subject to court review" (id. at 325)(citations omitted).

Later the same year *Matter of Ecker* was decided, the Fourth Department spoke in a similar vein in *Albert Elia Building Company v New York State Urban Development Corp.*, 54 AD2d 337 (4th Dep't 1976). The challenge there was to a change order granted to a general contractor for a public works project. Petitioner alleged that the change order violated the competitive bidding law. A unanimous Appellate Division, speaking through Justice Cardamone, addressed the standing issue:

> "[S]tanding is held to exist where a failure to accord it would in effect erect an impenetrable barrier to any judicial scrutiny of legislative action. ... As a general rule, where a citizen, in common with all other citizens, is interested in having some act of a general public nature done, devolving as a duty upon a public body or officer refusing to perform it, the performance of such act may be compelled by a proceeding brought by such citizen against a body or officer. ..Any citizen may maintain a mandamus proceeding to compel a public officer to do his duty" (id. at 341)(citations omitted).

In this Court's view, it should make no difference that the remedy sought in the present case is one of prohibition rather than mandamus.

More recently, in *Oyster Bay Associates Ltd Partnership v. Town of Oyster Bay*, 2013 WL 7176872 (Sup. Ct., Suffolk Co. 2013), a trial level decision, a proposed sale of town property was challenged upon several grounds, among them being that the Town did not use a method that would ensure that the best sale price was obtained and that the property was not surplus property so to allow its sale.

On these two grounds, the court held:

> "[T]he interests of justice requires recognition of [petitioner's] standing. [Petitioner] is a tax-paying resident of the Town. It is clear that the public interest would be subverted if no one were found to have standing to challenge the planned sale of municipal real property. Under the circumstances, even if the petitioners may not have established direct harm different from that of the public at large, they have properly pled standing herein" (id. at 3)(citations omitted).

Ecker, Albert Elia Building, and *Oyster Bay Associates* are predicated upon the idea that failure to recognize standing would leave possible illegal municipal action insulated from any judicial review. Here, however, GML 785(4) does expressly confer standing upon the petition's contact person or anyone who signed it. Thus, the cases are distinguishable. However, *Boryszewski v. Brydges*, 37 N.Y.2d 361 (1975) suggests a closer look. In *Boryzewski,* a taxpayer challenged the constitutionality of state budget statutes providing lump sum "lulus" in lieu of expenses for members of the State Legislature. Writing for the Court, Judge Jones, found a strong public policy at play in deciding the question of standing:

> Where the prospect of challenge to the constitutionality of State Legislation is effectively remote, it would be particularly repellant today, when every encouragement to the individual citizen taxpayer is to take an active, aggressive role interest in his State as well as his local government, to continue to exclude him from

> access to the judicial process - since *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60, the classical means for effective scrutiny of legislative and executive action. The role of the judiciary is integral to the doctrine of separation of powers. It is unacceptable now by any process of continued quarantine to exclude the very persons most likely to invoke its powers" (37 N.Y.2d at 364).
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> Holding that the citizen taxpayer did have standing, the Court stated:
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> "We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. In the present instance it must be considered unlikely that the officials of State government who would otherwise be the only ones having standing to seek review would vigorously attack legislation under which each is or may be a personal beneficiary" (*id.*)

By analogy to the present case, it would be "effectively remote" and "unlikely" that the petition's designated contact person and its signatories would attack municipal action that vindicates the petition's validity. It makes little sense to confine standing in this context to those with the least interest in testing the petition's legitimacy. So too, there is no intimation here that the present petitioners have any agenda other than that advanced in their petition suggesting collusive or other than adversarial litigation (*see* 1A C.J.S. Actions §71). Accordingly, this Court recognizes petitioners' standing to maintain the instant proceeding under CPLR Article 78.

Turning to the substantive merits of the Article 78 petition, there are three arguments made against the Village's action to submit the dissolution plan to voter referendum. First, the referendum petition itself is fatally defective in the form it was presented. Second, the referendum petition fails for want of a sufficient number of signatures to allow the dissolution plan to go to voter referendum. Third, the process of securing petition signatures and the manner it was validated by the Village Clerk was tainted with serious irregularities. The Court addresses these issues *ad seriatim*.

The first claim attacking the form of the referendum petition is based upon its lack of allegedly required content. If this is correct, then it matters not how many signatures the petition has; it was dead on arrival when submitted to the Village Clerk. GML §785(3) quoted above requires that the petition be "in substantial compliance" with the provisions of GML §779. GML §779(3) sets out

a form of petition and provides that a petition "substantially comply with" that form.[2] The statutory form recites the following language before the lines provided for signatures, printed names, and home addresses.

> We, the undersigned, electors and legal voters of (insert type of local government entity - town, village, or district) of (insert name of local government entity), New York, qualified to vote at the next general or special election, respectfully petition that there be submitted to the electors of (insert type and name of local government entity proposed to be dissolved), for their approval or rejection at a referendum held for that purpose, a proposal to dissolve and terminate (insert type and name of local government entity).
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> In witness whereof, we have signed our names on the dates indicated next to our signatures.

The petition in this case omits the last sentence entirely and reads before the signature lines.

> We, the undersigned, electors and legal voters of the Village of Lyons, County of Wayne, State of New York, qualified to vote at the next general election, respectfully petition that there be submitted to the electors of the Village of Lyons, for their approval or rejection at a referendum, held for that purpose, the question as to whether the elector initiated dissolution plan shall take effect.

Petitioners contend that the omission of the "in witness whereof" language wherein the signatories affirm that they signed their names on the indicated dates nullifies the petition. On this issue, *Matter of Hunter v. Campagni,* 74 AD2d 1000 (4th Dep't 1980) is both instructive and dispositive. There the Appellate Division dealt with an objection to candidates' designating petition based upon the fact that some of the petition sheets were altered after their authentication. Said the Court:

> "The alteration consisted of inserting the following hand-stamped phrase directly above the signatures, "In witness whereof, I have hereunto set my hand, the day and year opposite my signature.' Although this phrase is used on the form provided by statute for petition sheet (Election Law §6-132(1)), its omission has been held not to result in invalidation of the designating petition (*Matter of Cairo v Harwood*, 42 NY2d 1098). We agree with Special Term that since the omission of the phrase would not affect the designating petition's validity; similarly, its subsequent inclusion will not invalidate it" (id. at 1000-1001).

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[2] GML §779(5) enjoins that "[i]n the matter of form, this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud."

Matter of Cairo v Harwood, 42 NY2d 1093 (1977) cited by the Appellate Division noted that "this case does not involve either an omission of required information or an omission of the declaration of support and nomination" (citations omitted).

This Court finds no reason to interpret GML §779 differently than comparable provisions of the State Election Law. According, the language omission challenge is denied. Further, in line with *Matter of Cairo, supra*, the referendum petition does not omit required information or omit a declaration of support for the voter referendum on the issue whether the dissolution plan should be approved or rejected.

Petitioners also object to the petition on the grounds that the petition sheets do "not include proper pagination to allow reasonable and appropriate review against possible fraudulent activity" (Petition ¶31). Petitioners do not cite any provision of law that requires pagination of referendum petition sheets under GML §779, nor has the Court found any. In any event, mispagination has not been held to be a reason to invalidate a petition absent a showing of fraud (*Matter of Farrell v Morgan*, 112 AD2d 882 [1st Dep't 1985])("Absent some indication that the gaps [in pagination] are the result of some fraudulent act, it is manifestly unfair to penalize the signatories who, after all, have the greatest stake in the proper operation of the democratic process, for these occasional aberations."). Petitioners present no proof that any lack of pagination in this case was intentional, much less fraudulent. Petitioners thoroughly reviewed the referendum petition sheets and filed detailed objections. Accordingly, the pagination objection is denied.

The second ground attacking the referendum petition is not based upon its form but its verity. That is, are the signatories thereto qualified to be counted towards the number required to mandate a referendum election on the dissolution plan. In this case, GML §785(3) requires twenty-five percent of the number of electors in the Village of Lyons, or 491, a number not in dispute. The referendum petition on its face contains well more than enough signatures to meet the statutory threshold. The term "elector" is defined in GML §750(7) to "mean a registered voter of this state registered to vote in the local government entity subject to ... dissolution proceedings conducted pursuant to [GML Article 17-A]. The Court has reviewed the Article 78 petition with its exhibits as well as the Answer and Return of the Village. The Village Clerk has sworn under oath that the

referendum petition contains at least 570 signatures of electors of the Village of Lyons, that is, signatures of individuals who at the time they signed the petition were registered voters of the Village of Lyons according to the Wayne County Board of Elections Summary Voter Master List dated November 20, 2013. The petition sheets in this case were almost all signed in the second half of November and the first half of December, 2013; thus, the Village Clerk used the appropriate data base to make her determination. The Court finds therefore that a sufficient number of signatures were contained on the referendum petition so to warrant the Village Clerk's certification thereof pursuant to GML §785(3).

The third ground for attacking the referendum petition is the manner in which the process was conducted. Petitioners claim that persons with political and/or pecuniary interests in the preservation of village government may have garnered signatures by means that could be interpreted as intimidating. The Court can make no finding on this issue, because no petition signatory has stepped forward to say that was the case, nor is there any sworn allegation of sufficient specificity on this issue that would support further inquiry by way of an evidentiary hearing. Apart from the manner in which the signatures were collected, petitioners contest the manner in which the Village Clerk certified the sufficiency of the referendum petition. Petitioners contrast the Clerk's assiduousness in reviewing their referendum petition initiating the referendum process with what they perceive as the "rubber stamp" approach she took regarding the present petition. The Court's role here is merely to determine whether the Clerk correctly certified the sufficiency of the referendum petition. Her attitude towards, approach to, and process employed is relevant for present purposes only to the extent it bears whether a correct result was reached. Accordingly, the Court cannot invalidate the Village Clerk's certification based upon fraud, bias, or other irregularity.

The Court concludes that the petition in this matter must be denied.

Dated: February 19, 2014
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice