

<b>Erick v Wading River Fire Dist.</b>
2014 NY Slip Op 30881(U)
April 2, 2014
Sup Ct, Suffolk County
Docket Number: 32847/2013
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 6 - Suffolk County

Motion Seq.: 002MG

**PRESENT:**

Hon. RALPH T. GAZZILLO  
A.J.S.C.

-----X  
GLENN ERICK ,

Plaintiff(s),

-against-

WADING RIVER FIRE DISTRICT, TOWN CLERK  
TOWN OF BROOKHAVEN, TOWN CLERK TOWN  
OF RIVERHEAD, and TIMOTHY DEVENY,

Defendant(s),

-----X

Upon the following papers numbered 1-36 , read on this motion; plaintiff's Order to Show Cause and supporting papers numbered 1-5; Plaintiff's Order to Show Cause and supporting papers numbered 6-15; Affidavit in Opposition and Cross-Motion and supporting papers numbered 16-20; Affidavit in Opposition and supporting papers numbered 21-27; Affirmation in Opposition and supporting papers numbered 28-30; Affidavit in Opposition and supporting papers numbered 31-36; it is,

**ORDERED** that the plaintiff Glenn Erick's motion for summary judgment (mot seq 002) is granted in its entirety and the any filings made by the defendants which determined that the defendant Timothy Deveny was elected to the public office of Commissioner of the Wading River Fire District are null, void, and of no legal effect; and it is further,

**ORDERED** that said plaintiff, Glenn Erick, was duly elected to the public office of the Commissioner of the Wading River Fire District on December 10, 2013 having received a total of 238 votes as opposed to 231 votes received by defendant Timothy Deveny, and defendant Wading River Fire District is directed to make whatever municipal filings are required and to

issue any and all documentation required to effectuate said election within thirty (30) days of the date of entry of this Short Form Order; and it is further,

**ORDERED** that the cross motion of the defendants for summary judgment (mot seq 003) is denied in its entirety; and it is further,

**ORDERED** that the plaintiff's motion (mot seq 001) seeking a temporary restraining order is denied as moot; and it is further,

**ORDERED** that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

This is a declaratory judgment action brought pursuant to CPLR §3001 and commenced for the purpose of determining the results of an election held in and for the Wading River Fire District on December 10, 2013 for the public office of Commissioner of the Wading River Fire District.

The facts are undisputed. Plaintiff Glenn Erick was a write-in candidate for the public office of Commissioner of the Wading River Fire District (hereinafter "District") at an election held on December 10, 2013. Defendant Timothy Deveny was also a candidate for the same position of Commissioner at that election. Timothy Deveny's name was, however, included on the ballot for the election as he had obtained and submitted a nominating petition in proper form to the Steven Donnelly (hereinafter "Donnelly"), Secretary to the Wading River Fire District within twenty (20) days of the election as required by Town Law §176 (7). In accordance with the directives of the Board of Fire Commissioners and pursuant to Town Law §176 (29), Donnelly obtained the optical scanning voting equipment from the Suffolk County Board of Elections. Due to the use of the optical scanning voting equipment, the District was required to purchase pre-printed ballots from the Board of Elections at a cost of \$0.57 for each ballot.

The pre-printed ballots are 8.5 inches high by 14 inches wide and are in landscape format so that the text runs along the wide or horizontal side of the paper. On the extreme left side of the ballot are two (2) side-by-side and parallel columns (each hereinafter described as either "left" and "right"). Each of the two (2) columns consists of eight (8) boxes so that there are eight (8) rows with two (2) boxes within each (hereinafter, top-to-bottom, the "first" through the "eighth" row). The pre-printed heading of the top or first box of the left column contains the word "OFFICE". To its immediate right is the top or first box of the right column which contains the pre-printed words "Fire Commissioner"; within that box and beneath those words are the pre-printed parenthetical "(Vote for One)". Continuing down the ballot, the box of the second row, left column contains a pre-printed blackened silhouette of a hand pointing to the

right and the box next to it in the same row. Also within the former box is a pre-printed “A”. The box to which the hand points—the second of the right column—contains the pre-printed name “Tim Deveny” as well as a smaller, pre-printed “1A” and a small oval<sup>1</sup>. The next five rows of both columns - ten (10) in all - are blank. The bottom of the eighth and final row of the left column also contains a pre-printed blackened silhouette of a hand. The hand has the pre-printed words “Write-in” across it and it points to its right (the box of the eighth row, right column). Pre-printed within the latter box are the words “Write-in”. Notably, those words and the “1A” noted above are undoubtedly the smallest print of the entire ballot<sup>2</sup>.

Below the boxes and along the bottom of the ballot are voting instructions. In pertinent part, those instructions include the following language: “3. To vote for a person whose name is not printed on this ballot write or stamp his or her name on a blank “Write-In” area under the names of the candidates for that office” and, “4. Any other mark or writing, or any erasure made on this ballot outside the voting squares or blank spaces provided for voting will void this entire ballot.”

The election followed the required Notice of Election which had been published in *Newsday* on November 7, 2013, and was conducted at the District’s fire house (Town Law § 175 (1)). Upon the conclusion of the voting, Donnelly reviewed the votes cast in the presence of the candidate/defendant Deveny and write-in candidate/plaintiff Glenn Erick. Following a review of the machine tally and the write-in ballots, it was determined that a total of 474 votes had been cast as follows:

- a) 231 for Tim Deveny;
- b) 243 (the balance) for write-in candidates:
  - I) one (1) for Craig Erick (plaintiff Glenn Erick’s brother);
  - ii) one (1) for Jim Meier;
  - iii) one (1) for Danielle Sequino;
  - iv) 240 for the plaintiff, Glenn Erick.

Of the plaintiff’s 240 write-in votes, however, the district electors who conducted the election pursuant to Town Law §175(1) had invalidated ten (10). Of those ten (10), eight (8) were deemed invalid as not within the box provided for a write-in vote, but placed within another blank box (right column, third from the top/immediately below the one which lists Tim Deveny).

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<sup>1</sup> The instructions at the bottom of the ballot (number “2”) indicate the oval is to be filled in “to vote for a candidate whose name is printed on this ballot . . . .”

<sup>2</sup> Parenthetically, it could be argued that the size of that print might render the words indiscernible to many an adult’s naked and unassisted eye.

Two (2) of those eight (8) also spelled the plaintiff's name incorrectly ("Eric Glenn" and "Glen Erik"). The remaining two (2) of the ten (10) rejected votes were written in the "write-in" box (bottom, right column) but omitted the plaintiff's first name and solely bears his surname (one of which misspelled the surname). In the absence of these ten (10) votes, Glenn Erick's final tally, therefore, was 230 votes to Deveny's 231, and the latter declared to be the winner.

This action was thereafter commenced by the plaintiff to challenge the determination made by the District to invalidate the ten (10) write-in votes, maintaining that those were, in law and in fact, valid votes for him. Based upon an inclusion of those votes, he seeks to be declared the winner of the election.

In opposition, defendants argue that none of the ten (10) write-in ballots should be counted because the voters who completed the ballots did not follow the instructions and wrote the candidate's name in an incorrect space on the ballot and/or misspelled the candidate's name, or wrote only the candidate's surname. Specifically, and as was indicated above, two (2) of the ten (10) allegedly defective ballots merely indicate the plaintiff's surname—"Erick" or "Eric"—written into the space on the ballot that says "Write-In" (eighth row, right column). Similarly alleged to be fatally flawed are the six (6) ballots which have the plaintiff's name correctly spelled but written into the blank box just below the box containing Tim Deveny's name (third row, right column). Another one (1) ballot alleged deficient is that which has the candidate's name entered in the box just below the box containing Tim Deveny's name (third row, right column) *and* spells the candidate's name "Erik Glenn". The last of the ten (10) allegedly defective ballots is that which has the name "Glen Erik" written into the box directly below the box containing Tim Deveny's name (third row, right column).

In addition, by way of his counterclaim, defendant Deveny now also challenges an additional six (6) write-in ballots that were counted by the fire district as part of the plaintiff's 230 votes when it originally certified the election results. He contends that those ballots should not have been counted since the voters wrote the name directly under the printed candidate's name (third row, right column) *and* in the "Write-in" box located in the eighth row, right column.

The analysis begins with the governing legal authority. Fire district elections are regulated by the Town Law § 176 (7). That section authorizes a fire district's board of commissioners to mandate that "candidates for district offices file their names with the secretary of the fire district at least twenty days prior to the date of such fire district elections." In addition that section states that "ballots prepared for the election of fire district officers shall specify the names of the candidates duly filed and in addition provide proper blank spaces for each office to be filled at such election." Town Law § 176 (29) authorizes a fire district's board of commissioners to "use . . . voting machines at any annual or special election held within the fire district and such voting machine shall be used in accordance with the provisions contained

[within] . . . the election law.” *Miller v Lakeland Fire Dist., infra*.

Superimposed upon statutory rules and regulations is, of course, the relevant case law but any analysis begins with the premise that, beyond peradventure, one of our society’s loftiest and most fundamental rights and privileges is voting. The lawful and unfettered exercise of one’s franchise has been jealously guarded by our system of government, including enlisting the aid, assistance, and protection of our laws and judiciary. Indeed, it has been held that a voter’s rights to have his or her intent implemented and franchise safeguarded trumps technical errors. *Matter of Weinberger v Jackson*, 28 AD2d 559 (2d Dept 1967), *affd* 19 NY2d 995 (1967). Towards that goal, it has been held that “[t]he Election Law vests the courts with the power to determine, on a reasonable basis, the intent of the voter in casting his [or her] ballot for a ‘write-in’ candidate.” *Matter of Guilianelle v Conway*, 265 AD2d 594, at 594-95 (3d Dept 1999) (citations omitted). This power stems from “[t]he right of the voter to be safeguarded against disenfranchisement and to have his [or her] intent implemented wherever reasonably possible.” *Id.* at 595 (citing *Matter of Weinberger v Jackson, supra*). Indeed, even “the use of surnames alone on write-in ballots has been held to be sufficient as long as the intent of the voters can be reasonably ascertained from the surrounding circumstances.” *Matter of Guilianelle v Conway, supra*, at 595.

With regard to the issue of write-in ballots in a fire district election, in a remarkably similar and instructive case<sup>3</sup>, *Matter of Miller v Lakeland Fire District*, 31 AD3d 556 (2d Dept 2006), a unanimous panel upheld the decision of this Court (Whelan, J.). In so affirming, it agreed that it was correct to count as valid those votes for a write-in candidate named Matthew G. Miller despite the fact that some voters had used several variations of his name and wrote outside the specified area on the ballot. As noted within that case, the variations of the candidate’s name included: “Matthew G. Miller,” “Matthew Miller,” “Matt Miller,” and “Miller, Matt.” As to the votes outside the columns, the panel noted that, “the voters who cast write-in votes for Miller, *whatever column they used*, clearly intended to cast a vote for Miller for the position of Fire Commissioner.” *Id.* at 558 (emphasis added). As to variations, it also upheld the lower court’s determination to count those write-in votes cast for the names of “Matt G. Miller,” “M. Miller,” “G. Miller Matthew,” and “Miller.” The only caveat it offered was that the use of just a candidate’s surname was limited and would only be “acceptable where no other candidate with the same surname has campaigned for the position.” *Id.* at 558 (citations omitted).

Therefore, and under the light and logic of the relevant case law, the defendant’s contentions are correct and the two (2) ballots containing the plaintiff’s surname only, whether or not spelled correctly, must be considered invalid. Clearly, since the plaintiff’s brother has the same surname also received one vote, it cannot be satisfactorily determined whether the voters

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<sup>3</sup>The defendant’s various arguments and suggestions that this case is inapplicable are unpersuasive.

completing those ballots intended to vote for the plaintiff Glenn Erick, or his brother Craig Erick.

This is not the case, however, with the remaining eight (8) write-in ballots which contain the name Glenn Erick, Erik Glenn or Glen Erik. Each and all should be counted as valid votes for the plaintiff. This is despite the fact that the plaintiff's name may be misspelled<sup>4</sup> and/or has been written in a box other than the box in the eight row, right column (argued by the defendants as the only correct box for write-in candidates). In reviewing the ballots the undersigned finds that there can be no mistaking that the intent of those voters was to vote for the plaintiff.<sup>5</sup>

Similarly, the undersigned rejects the defendant's counter claim's contentions that the six (6) write-in ballots that were initially counted by the fire district should not be counted within the plaintiff's tally of votes. Indeed, those voters' intent to cast their ballots for the plaintiff is abundantly and redundantly clear: *twice* they wrote his name—once below the defendant Deveny's box and once again in the so-called "write-in" box.

Accordingly, plaintiff received 238 votes rather than the 230 initially reported, and has

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<sup>4</sup> Purely as an aside, the caption on the face page of one of the defendant's moving papers, specifically his February 24, 2014, "Affidavit in Opposition" misspells the plaintiff's name, *viz*, "Glen Erick."

<sup>5</sup> Additionally, the defendants allege that the voters that completed the contested write-in ballots failed to follow the ballot instructions when filling them out, thereby rendering them void. A reading of the instructions on the ballot arguably undermines that contention as the ballot instructions read as follows:

"3. To vote for a person whose name is not printed on this ballot write or stamp his or her name on a blank "Write-In" area under the names of the candidates for that office" and

"4. Any other mark or writing, or any erasure made on this ballot *outside the voting squares or blank spaces* provided for voting will void this entire ballot" (*emphasis added*).

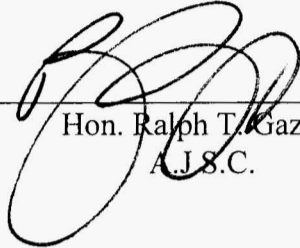
Thus, according to these instructions, placing the write-in candidate's name in the "*area under*" the pre-printed name of the candidate for that office, as was done on eight (8) of the ten (10) disputed ballots, might be deemed compliance with the instructions. Clearly, a voter reading the ballot might read those instructions to require that the "write-in" candidate's name needed to be written "under" the pre-printed candidate's name and that they could write a name in any of the *voting squares or blank spaces*. Moreover, none of those ballots contained "any other mark or writing or any erasure *outside the voting squares or blank spaces*" provided.

seven (7) more votes than the 231 the defendant Timothy Deveny received. Therefore, the initial elections results are invalid and the plaintiff must be declared the winner of the election.

Accordingly, the plaintiff's motion for summary judgment is granted and the defendants' cross-motion denied and counter claims are dismissed.

Submit judgment on notice.

Dated: 4/2/14  
Riverhead, N.Y.

  
Hon. Ralph T. Gazzillo  
A.J.S.C.

Non-Final Disposition

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