

Bragman v Larsen

2017 NY Slip Op 32833(U)

August 14, 2017

Supreme Court, Suffolk County

Docket Number: 03795/2017

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
IAS PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

Motion Date: 08-03-2017
Adj. Date: 08-14-2017
Mot. Seq. # 001 MD; 002 MG

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JEFFREY BRAGMAN, KATHEE BURKE-GONZALEZ	:	Twomey, Latham, Shea
and CHRISTOPHER KELLEY,	:	Kelley, Dubin & Quartarari, LLP
	:	Attorneys for Petitioner-Objector
Petitioners-Objectors,	:	33 West Second Street
	:	Riverhead, N.Y. 11901
-against-	:	
	:	Garrett W. Swerlson, Jr., Esq.
GERARD LARSEN and JULIE A. EVANS,	:	Attorney for Respondents
	:	Gerard Larsen and Julie A. Evans
Respondents-Candidates,	:	76 Bay Road
	:	Brookhaven, N.Y. 11719
-and-	:	
	:	Dennis M. Brown
ANITA S. KATZ and NICK LALOTA, Commissioners	:	Suffolk County Attorney
constituting the Suffolk County Board of Elections,	:	Attorney for Respondents
	:	Commissioners and the
Respondents,	:	Suffolk County Board of Elections
	:	P.O. Box 6100
For an Order Pursuant to Sections 16-10, 16-102 and	:	H. Lee Dennison Bldg.
16-116 of the Election Law, Declaring Invalid the	:	100 Veterans Memorial Hwy.
Designating Petition(s) Purporting to Designate the	:	Hauppauge, N.Y. 11788-0099
Respondents-Candidates as candidates of the Independence	:	
Party for the Public Offices of "Town Board" and "Trustee":	:	
respectively, Town of East Hampton, in the Independence	:	
Party Primary Election to be held on the 12 th day of	:	
September 2017, and to Restrain the Said Board of	:	
Elections From Acting to Reconsider and/or Reverse Its	:	
Decision Finding Respondents' Nominating Petition(s)	:	
Invalid and Printing and Placing the Names of Said	:	
Respondents-Candidates Upon the Official Ballots of	:	
Such Primary Election,	:	

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Upon the following papers read on this motion; Notice of Motion/ Order to Show Cause and supporting papers; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers; Replying Affidavits and the

[* 2]
Affidavit in Opposition to motion to dismiss and Reply affirmation and supporting papers; Other.

ORDERED that Petitioner's Order to Show Cause is dismissed in its entirety, it is further

ORDERED that the specific objections set forth in the petitioners moving papers are without merit and are likewise dismissed and; it is further,

ORDERED that the Temporary Restraining Order is hereby vacated and as such the Board of Elections is directed to review and process the single corrected petition filed by the respondents/candidates on July 17, 2017 and to determine its validity forthwith.

Petitioners-Objectors' Order to Show Cause for an order of the court declaring null and void the Designating Petitions of the Independence party filed on behalf of the Respondents Gerard Larsen and Julie A. Evans with the Suffolk County Board of Elections purporting to designate Gerard Larsen as a candidate for the public office of "Town Board" Town of East Hampton and Julie A. Evans as a candidate for the public office of "Town Trustee," Town of East Hampton; (2) enjoining and restraining the Suffolk County Board of Elections pursuant to CPLR §§6311 and 6313 from taking any action to reconsider and/or reserve its determination made the 14th day of July, 2017 declaring the aforesaid petitions invalid; (3) declaring said Designating Petition(s) of the Independence party for the public offices of "Town Board" and "Town Trustee," Town of East Hampton, as invalid, null and void due to insufficient valid signatures; (4) declaring said Designating Petition(s) of the Independence Party for the public office of "Town Board" and "Town Trustee", Town of East Hampton as invalid, null and void for failing to comply with the Election Law; (5) declaring that the respondents/candidates are not qualified to be candidates for said office and striking said candidates' names from the official ballots and voting machines to be used in the upcoming Primary Election, to be held on September 12, 2017; (6) enjoining and restraining the Respondent Commissioners of the Suffolk County Board of Elections from printing and placing the name of Respondents Gerard Larsen and Julie A. Evans upon the official ballots and voting machines to be used in the upcoming Primary Election, to be held on September 12, 2017; and (7) granting such other, further and additional relief as this Court may deem just and proper; is determined as follows:

The controlling law and regulations are 9 NYCRR §6215 and N.Y.S. Election Law.

The petitioners are duly registered voters with the State of New York, and of the Town of East Hampton, enrolled in the Democratic Party and entitled to vote in the primary election scheduled to be held on the 12th Day of September, 2017 and in the general election to be held November 7, 2017 and are designated candidates by the Democratic Party, the Independence Party and Working Families Party in East Hampton to run for the Offices of Town Board/Town Councilman.

The respondents Gerard Larsen and Julie A. Evans are duly enrolled members of the Independence Party seeking its nomination to run for the offices of Town Board and Town Trustee. They, too, are eligible voters and entitled to vote and seek to run a primary on the Independence Party line against the petitioners in the upcoming primary election to be held on September 12, 2017.

Pursuant to the requirements to run for Elective Office in the State of New York, on July 11,

2017, respondent Larsen personally filed Designating Petitions with the Suffolk County Board of Elections, Yaphank, N.Y. He presented seven (7) unbound pages containing ninety-five (95) signatures of Independence Party members designating the moving respondents (Larsen and Evans) for the respective offices of Town Board and Town Trustee.

The Suffolk County Board of Elections treated each page as a single, separate and distinct Designating Petition, processing and numbering them accordingly; labeled 117-1 through 117-7. As the necessary minimum signature requirement for a primary on the Independence Party line is fifty-five (55), the Board, in its *prima facie* review of each page separately determined that the minimum signature requirement was not met on each submitted page and accordingly on July 14, 2017, notified the Respondents/Candidates via letter that the petition has been ruled invalid, even though the board did not state the reason as required by 9 NYCRR §6215.7(b).

Respondents Larsen and Evans thereafter on July 17, 2017 pursuant to the "cure" provisions of §6-134(2) of the New York State Election law and 9 CRR-NY 6215.7(d) refiled the copies of the seven (7) page Designating Petition as a single volume, this time stapling the pages together and numbering them. As submitted the volume would constitute a total of ninety-five (95) signatures, well in excess of the required fifty-five (55) minimum signature requirement. Petitioners Bragman, et.al, and no one else has ever challenged the validity of the 95 signatures filed by respondents.

On July 24, 2017, the petitioners initiated this proceeding by an ex-parte Order to Show Cause granted by Hon. Martha L. Luft, A.J.S.C., who in her order granted a Temporary Restraining Order prohibiting the Board of Elections from proceeding with any further action to determine the validity/invalidity of the seven (7) page petition which was resubmitted pursuant to the "cure" provision of §6-134(2) of the New York Election Law. Petitioner Kelley, prior to the filing of the Order to Show Cause, did file pursuant to §6-154 of the N.Y.S. Election Law specifications of the grounds of objections in support of the general objections to the foregoing Designating Petitions of the respondents. The petitioner alleges that the designating petitions of the respondent/candidates are invalid for several reasons. Petitioner Kelley in his affidavit in opposition to dismiss fails to indicate the TRO prevented the Board of Elections from acting. However, the inaction of the Board of Elections is explained by the TRO.

The petitioners contend that the Board of Elections can not reconsider, reverse, rescind or annul the determination of invalidity upon which the petitioners have relied. The undersigned disagrees with petitioner's position. Pursuant to §6-134(2) of the N.Y.S. Election Law and 6215.7(d).

"A candidate may, within three (3) business days of the date of determination that a petition does not comply with these regulations, cure the violation of these regulations ... such cure or correction must be received by the Board of Elections no later than the third business day following such determination."

The respondent/candidates were notified on July 14, 2017 that the petition was invalid. Within three business days on July 17, 2017, the respondents/candidates refiled a "cured" petition which would have been reviewed by the Board of Elections to determine its validity but for the TRO referred to above.

Petitioners advance the argument that the petitions, reviewed individually, are invalid as each page does not consist of the minimum number of required signatures, namely fifty-five (55). The court deems that argument has no merit since the respondents have refiled a "cured" petition pursuant to §6-134(2) and 6215.7(d) which was properly bound by staple and each page numbered sequentially at the foot of each sheet. This was done by the respondents/candidates pursuant to the rules and regulations of the NY State Board of Elections 9 NYCRR § 6215.1(a),(c), (d). Furthermore, the Board of Elections is required upon the submission of the "cured" petition, to review the petition to see if it complies with the cover sheet and bounding requirements. See, 9 NYCRR § 6215.7(a).

Petitioners' argument that the respondents/candidates petition is invalid as it does not have a cover sheet fails. Pursuant to 9 NYCRR § 6215.1(b), only petitions containing ten or more sheets shall be accompanied by a cover sheet. As respondents/candidates' petition comprises a total of seven (7) sheets, this argument of the petitioners is unavailing (*see*, 9 NYCRR §6215(a)(b) and (e)(2)).

Another argument set forth by the petitioners is that the office designated by the respondents/candidates Gerard Larsen as "Town Board, Town of East Hampton" does not exist and is inaccurate and insufficiently specific to avoid confusion amongst likely voters, signatories of the petition, and the Board of Election. Petitioners, cite Town Law § 60 which in pertinent part reads,

"In every town the Supervisor and the Town Councilmen shall constitute the Town Board..."

Petitioner further argues that the Supervisor has a term of two years and a town Councilman has a term of four years. Accordingly, petitioner argues the confusion lies in which office respondent Larsen is seeking; Supervisor for two years or Councilman for four years as both are considered to be part of the Town Board.

The undersigned finds that the petition submitted is sufficiently informative under § 6-132 of the Election Law so as to preclude any reasonable probability of confusing or deceiving the signers, voters or Board of Elections. (*see Matter of Denn v Mahoney*, 64 AD2d 1007; *Matter of Cook v Zelazny*, 49 AD2d 1036; *Matter of Murray v Coveney*, 39 AD2d 932; *Matter of Margolis v Larkin*, 39 AD2d 952, *affd* 30 NY2d 876; *Matter of Caffery v Lawley*, 21 AD2d 749, *affd* [**2] 14 NY2d 768; *Matter of Pearson v Board of Elections of City of Syracuse*, 284 App Div 649; *Matter of Carusone v Varney*, 277 App Div 326, *affd sub nom*, *Matter of Barber v Varney*, 301 NY 669; *Matter of Praete v Van Wart*, 47 Misc 2d 898; *Matter of Duffy v Board of Elections of County of Westchester*, 40 Misc 2d 175). If a candidate were seeking the office of Supervisor, it would indicate so on the petition. It is common knowledge that a Councilperson is a member of the Town Board. See, *Zulauf v. Martin*, 131 A.D.3d 656; 2015.

The Court also notes that the petition submitted has two candidate positions; "Town Board" and "Town Trustee". Had respondent/candidate Larsen sought to run for the position of "Town Supervisor", said position would have been placed upon the designating petition, ergo there is no confusion to the voting public. *Zulauf v. Martin*, 131 A.D.3d 656; 2015; *Donnelly v McNab* 83 A.D.2d 896 (1981); *May v Daly*, 254 A.D.2d 688; *Praete v Van Wart*, 47 Misc.2d 898, 263 NYS2d 396 (Westchester, 1965); *Plunkett v Mahoney*, 176 A.D.2d 1191, 576 NYS 2d 472 (4th Dept. 1991)

Petitioner's analogy regarding Congress actually makes the point for respondents - Any petition in referencing a candidate running for Congress could not possibly believe such candidate was running for the U.S. Senate. It is common knowledge the members of the House of Representatives call themselves Congressmen and the public accepts that identification. So, too with a Town Board member, there is no such entity as a Town Council, all Town governments are known as Town Boards even though Town Board members are known as Councilmen and Councilwomen. The public is properly notified and there is no confusion.

The respondents were required to show cause why an order should not be made regarding (1), (2), (3), (4), (5), and (6) set forth in the ex-parte Order to Show Cause signed by Hon. M. Luft, A.J.S.C. The respondents have shown such cause for the reasons set forth above.

In addition it should be noted that the Board of Elections was ordered to comply with the Order to Show Cause by providing the court with all documents. The Board of Elections has complied. The Board of Elections was restrained from making any decisions regarding the cure of the petitions by respondents. It should be noted that counsel for the Board of Elections took no position whatever on the merits of petitioners' legal position or respondents' legal position on these issues before the court. The court opines that the corrected petition by respondents complies with all requirements of the Election Law and all requirements 9 CRR-NY 6215. The Board of Elections should declare the Larsen and Evans petitions valid.

Respondents' reliance on 9 NYCRR §6215 is appropriate. The regulation even calls for a liberal interpretation of the requirement of the Rules and Regulations of 9 NYCRR §6215. There can be no question whatever that the rules permit a cure of a defect in 3 days. Respondents did timely correct the petition. The 95 signatures have never been questioned. Public policy also dictates that the voters should not be denied their ability to choose candidates without probable just cause. That cause does not exist in the case at bar. Candidates Larsen and Evans should be placed on the Primary Ballot for September 12, 2017.

Accordingly, the Order to Show Cause is dismissed and the Board of Elections is ordered to make a determination of the validity of the respondents' petitions.

Petitioners' counsel is directed to serve a copy of this order with notice of entry upon counsel for the respondents.

Dated: August 14, 2017

W. Gerard Asher

Hon. W. Gerard Asher, J.S.C.

FINAL DISPOSITION