

Tenney v Oswego County Bd. of Elections
2020 NY Slip Op 34388(U)
November 10, 2020
Supreme Court, Oswego County
Docket Number: EFC-2020-1376
Judge: Scott J. DelConte
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At a Special Term of the Supreme Court
of the State of New York held in and for
the County of Oswego on November 10,
2020.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

CLAUDIA TENNEY,

Petitioner,

v.

**OSWEGO COUNTY BOARD OF ELECTIONS;
ONEIDA COUNTY BOARD OF ELECTIONS;
CORTLAND COUNTY BOARD OF ELECTIONS;
MADISON COUNTY BOARD OF ELECTIONS;
BROOME COUNTY BOARD OF ELECTIONS;
TIOGA COUNTY BOARD OF ELECTIONS;
HERKIMER COUNTY BOARD OF ELECTIONS;
CHENANGO COUNTY BOARD OF ELECTIONS;
NEW YORK STATE BOARD OF ELECTIONS;
KEITH D. PRICE, JR.; and ANTHONY BRINDISI,**

Index No. EFC-2020-1376

Respondents.

DECISION AND ORDER ON PETITIONER’S MOTION FOR INJUNCTIVE RELIEF

APPEARANCES:

- Joseph T. Burns, Esq., *for Petitioner Claudia Tenney*
- Richard C. Mitchell, Esq., *for Respondent Oswego County BOE*
- Robert E. Pronteau, Esq., *for Respondent Oneida County BOE*
- Karen L. Howe, Esq., *for Respondent Cortland County BOE*
- Tina Marie Wayland-Smith, Esq., *for Respondent Madison County BOE*
- Robert G. Behnke, Esq., *for Respondent Broome County BOE*
- Peter J. De Wind, Esq., *for Respondent Tioga County BOE*
- Lorraine Lewandrowski, Esq., *for Respondent Herkimer County BOE*
- Alan E. Gordon, Esq., *for Respondent Chenango County BOE*
- Nicholas Cartagena, Esq., *for Respondent NYSBOE (Commissioners Kellner and Spano)*
- Kimberly Galvin, Esq., *for Respondent NYSBOE (Commissioners Kosinski and Casale)*
- Martin E. Connor, Esq., *for Respondent Anthony Brindisi*

In this special proceeding pursuant to Election Law § 16-112, Claudia Tenney, a candidate for Member of Congress in New York's 22nd Congressional District, seeks to preserve absentee and affidavit ballots for prospective judicial review and, subsequently, validate the vote tallies (NYSCEF Doc. 1). Respondent Anthony Brindisi, also a candidate in New York's 22nd Congressional District, counterclaims for similar relief (NYSCEF Doc. 23). By Letter Order issued November 6, 2020 (NYSCEF Doc. 21), the canvass of the absentee, affidavit and other paper ballots was temporarily stayed to permit all parties an opportunity to argue whether, at this time, judicial intervention is permissible, necessary and proper to preserve the candidates' anticipated objections and their ability to ultimately seek judicial review of the ballots. Upon reviewing the papers and hearing arguments, the temporary stay is hereby vacated, and the requested relief is **GRANTED**, in part, as set forth below.

I.

In June of 2020, in response to the public health emergency presented by the global pandemic, the New York State Legislature amended Election Law § 8-400(1)(b) to temporarily permit the use of absentee ballots by voters "unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." As a result, tens of thousands of absentee ballots were requested and cast during the November 3, 2020 general election in New York's 22nd Congressional District. None of these ballots have been canvassed by the County Boards of Elections. Tenney and Brindisi separately ask the Court to intervene – before the envelopes are opened and the votes counted – and issue a series of procedural mandates to the Boards of Elections to control the canvassing process.

II.

This Court's authority to intervene in the congressional, or any, election is very limited, and no relief can be granted to a candidate except as specifically authorized by the Legislature (*Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007]). As it relates to this proceeding, this Court has no authority to modify the statutory procedures enacted by the Legislature for canvassing absentee and affidavit ballots (*People v Board of Elections*, 286 AD2d 783, 783-84 [2d Dept 2001]); nor can the Court extend the deadline for the Boards of Elections to certify the general election results beyond November 28, 2020 (Election Law § 9-124). This Court's consideration, and response, to the pre-canvass requests presented by Tenney and Brindisi are guided by these constraints.

III.

First, with respect to the preservation of absentee and affidavit envelopes and ballots, Election Law § 16-112 expressly authorizes injunctive relief as may be necessary and proper to ensure that ballots and timely objections are meaningfully preserved for subsequent judicial review (*O'Keefe v Gentile*, 1 Misc3d 151, 155 [Sup Ct Kings Cty 2003]). Here, Tenney and Brindisi have established that irreparable harm will result if protective measures are not implemented before envelopes under continuing objection are opened and vote counting begins. The Court agrees that the minimally burdensome protective measures narrowly tailored in *O'Keefe*, and requested by Tenney and Brindisi in this proceeding, are necessary and proper. As fully set forth below, when an objection to an envelope is overruled, a meaningful opportunity for judicial review of that objection must be preserved – and the canvass may continue with minimal delay – by the Respondent Boards of Elections making, and securely

maintaining, a photocopy of the ballot within the disputed envelope without revealing how the votes on that ballot were cast. Further, the inspectors shall endorse the original mailing envelope with a notation sufficiently memorializing that an objection was not sustained, the ballot was canvassed, a photocopy of the ballot was inserted in the envelope, and the envelope was resealed pursuant to Court Order. (*King v Smith*, 308 AD2d 556 [2d Dept 2003]).

Second, the candidates mutually request that the Respondent Boards of Elections produce voter and other election data, including registration records for all absentee voters, in advance of the canvass. However, this Court has no authority to compel the production of any material by the Board of Elections prior to the canvass except “a complete list of all applicants to whom absentee voters’ ballots have been delivered or mailed,” which is required by Election Law § 8-402(7) (*Jacobs*, 38 AD3d at 778-79). This jurisdictional limitation does not, however, diminish the statutory right of both Tenney and Brindisi to inspect, pursuant to Election Law § 3-220, all public records maintained by the Respondent Boards of Elections relating to voter registration, as well as the affidavit, absentee and other ballots in the 22nd Congressional District. Accordingly, the Respondent Boards of Election must make all public election records immediately and reasonably available for inspection throughout the canvassing process. Any good faith claim by either Tenney or Brindisi that these records are not reasonably available to their designees for inspection may, given the exigencies, be promptly presented to the Court by counsel via a telephone call or email to Chambers.

The Court has considered the other arguments and relief requested by Tenney and Brindisi, and declines to grant further relief at this time.

IV.

Accordingly, upon due deliberation, with respect to all ballots cast in New York's 22nd Congressional District, it is hereby

ORDERED that the temporary restraining order (NYSCEF Doc. 21) enjoining the canvassing of absentee, affidavit and other paper ballots is vacated; and it is further

ORDERED that, pursuant to Election Law § 6-112, if a Board of Elections does not sustain an objection to an envelope containing a ballot, then that Board of Elections shall: (1) open each such envelope and make a photocopy of the ballot inside before canvassing that ballot, without revealing how the votes on the ballot were cast; (2) place the photocopy of that ballot into the envelope, and reseal the envelope; (3) endorse the original mailing envelope with a minimal notation sufficient to memorialize that an objection was not sustained, the ballot was canvassed, a photocopy of the ballot was inserted in the envelope, and the envelope was resealed pursuant to Court Order; (4) canvass the original ballot; and (5) secure and preserve the envelope and enclosed photocopy until further order of this Court; and it is further

ORDERED that, pursuant to Election Law § 8-402(7), Respondent Boards of Elections shall, upon request and only to the extent not previously completed, provide Petitioner Claudia Tenney and Respondent Anthony Brindisi with a complete list of all applicants to whom absentee ballots covering New York's 22nd Congressional District were mailed or delivered; and it is further

ORDERED that, pursuant to Election Law § 3-220, all public records, including but not limited to records relating to voter registration as well as affidavit, absentee and other paper ballots in New York's 22nd Congressional District, shall, immediately, be made reasonably available for inspection until the canvassing is complete, and any good faith claim by Tenney or

Brindisi that public records are not available to their designees for inspection shall be presented promptly to the Court by an attorney of record in this proceeding or an affiliated attorney via telephone call or email to the Court's Chambers; and it is further

ORDERED that this Court shall retain jurisdiction over the canvassing of ballots and the parties until such time as Petitioner Tenney and Respondent Brindisi both withdraw their requests for relief, or this Court issues a final order following the hearing on the application to validate the tallies of the ballots from the Respondent Boards of Elections; and it is further

ORDERED that, pursuant to 22 NYCRR § 202.12(j), a compliance conference is hereby set for **Thursday, November 19, 2020, at 3:00 p.m.** via Microsoft Teams, and Counsel for all parties are directed to participate.

Dated: November 10, 2020



HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

PAPERS CONSIDERED

1. Order to Show Cause, entered November 5, 2020 (NYSCEF Doc. 9);
2. Verified Petition, sworn to November 4, 2020 (NYSCEF Doc. 1);
3. Affirmation of Joseph T. Burns, Esq., affirmed November 4, 2020 (NYSCEF Doc. 3);
4. Affirmation of Brian L. Quail, Esq., affirmed November 4, 2020 (NYSCEF Doc. 6);
5. Affirmation of Joseph T. Burns, Esq., affirmed November 5, 2020 (NYSCEF Doc. 12);
6. Verified Answer with Counterclaim and Cross-Claim by Respondent Anthony Brindisi, sworn to November 8, 2020 (NYSCEF Doc. 23);
7. Verified Answer by Respondent Oswego County Board of Elections, sworn to November 9, 2020 (NYSCEF Doc. 25);

8. Verified Answer by Respondent Oneida County Board of Elections, sworn to November 9, 2020 (NYSCEF Doc. 26);
9. Affirmation of Robert E. Pronteau, Esq., affirmed November 9, 2020 (NYSCEF Doc. 27);
10. Affirmation of Brian L. Quail, Esq., affirmed November 9, 2020, with Exhibit B, attached (NYSCEF Doc. 32);
11. Verified Answer by Respondent Broome County Board of Elections, sworn to November 9, 2020 (NYSCEF Doc. 33); and
12. Affidavit of Robert G. Behnke, Esq., sworn to November 9, 2020 (NYSCEF Doc. 34).