

Matter of Mitrano v New York State Bd. of Elections

2020 NY Slip Op 34485(U)

July 15, 2020

Supreme Court, Yates County

Docket Number: 2020-5030

Judge: Jason L. Cook

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At a Term of The Supreme Court of
The State of New York held in and for the
Seventh Judicial District at the Yates County
Courthouse in Penn Yan, New York heard
on the 7th day of July 2020.

PRESENT: HON. JASON L. COOK
ACTING SUPREME COURT JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF YATES

In the Matter of the Application of
Tracy Mitrano,

Candidate-Petitioner,

vs.

New York State Board of Elections, Peter S.
Kosinski, Douglas A. Kellner, (one vacancy),
and Andrew J. Spano, Commissioners of and
Constituting the New York State Board of
Elections, et al.

Respondents,

and

Michael Palmesano,

Objectant-Respondent.

APPEARANCES: Jessica A. Kulpit, Esq.,
Attorney for Petitioner

Joseph T. Burns, Esq.
Attorney for Respondent Palmesano

Brian L. Quail, Esq.
Attorney for Respondent New York State Board of Elections

DECISION & ORDER

INDEX # 2020-5030

JASON L. COOK, AJSC**FINDINGS OF FACT**

Petitioner Tracy Mitrano, commenced this petition pursuant to Election Law § 16-102 by way of Order to Show Cause on April 28, 2020, seeking judicial review and reversal of the determination issued by Respondent New York State Board of Elections (hereinafter “Board of Elections”) on April 27, 2020, which invalidated her designating petition of the Working Families Party for the office of Representative in Congress from New York’s 23rd Congressional District.

By way of background, on March 20, 2020, Petitioner filed with the Board of Elections a designating petition seeking the Working Families Party nomination for the office of Representative in Congress from New York’s 23rd Congressional District. In order to obtain a position on the ballot for this office, Petitioner was required to file petitions with the Board of Elections containing at least twenty-nine (29) valid signatures¹. Petitioner filed designating petitions that contained a total of thirty-one (31) signatures. General and specific objections were filed with the Board of Elections by Respondent Michael Palmesano. After review, the Board of Elections issued a determination invalidating three of the submitted signatures, resulting in Petitioner being one signature shy of the number of signatures required to be placed on ballot, resulting in the petition declared invalid by the Board of Elections.

The petition takes issue with the determination rendered by the Board of Elections, specifically, on the following objections that were sustained which invalidated voter’s signatures:

- (a) That two (2) dates were amended/modified without being properly initialed (sheet 1, line 3, and sheet 5, line 1); and
- (b) One (1) date was missing entirely (sheet 8, line 1).

A hearing was held on July 7, 2020 to allow testimony and evidence to be presented by Petitioner; Petitioner called a total of three witnesses and introduced the Board of Elections file into evidence, upon stipulation and without objection. Respondent Palmesano did not call any witnesses but actively participated in the hearing. An attorney from Respondent Board of Elections was present at the hearing, but demurred to the Court and took no position.

¹ New York Election Law § 6-136 provides for the minimum number of valid signatures required on a designating petition for a person to be placed on a ballot for public office. Pursuant to Executive Order No. 202-2 signed by New York Governor Andrew Cuomo on March 14, 2020, the signature requirements were reduced to 30% of the statutory threshold for the 2020 general election.²²²²

At the hearing, Petitioner's first witness to testify was Dorothy K. Stevens. Ms. Stevens testified that she often collected signatures for various parties' election petitions and while not a member of the Working Families Party, she was a licensed New York attorney and notary. She stated that she had been involved in collecting signatures for about ten years. Relative to the instant matter, Ms. Stevens attested that she was the individual who collected and witnessed the signatures on sheet 1 of Petitioner's Working Families Party designating petition. Ms. Stevens stated that she wrote in the date on sheet 1, line 3, and that the date was not altered at all, but rather what looks like a possible alteration was simply a stray mark from trying to get her pen to write. This testimony was undisputed. The Court finds Ms. Stevens' testimony to be credible and her explanation plausible.

Petitioner's next two witnesses were Thomas Waterman and Robert Dondo, Jr. Both witnesses testified about the circumstances of the alleged alteration on sheet 5, line 1. The Court need not address the specifics of the testimony or issues of witness credibility as the Court's ultimate decision in this matter renders the testimony moot and further discussion of said testimony unnecessary. No testimony was offered as to sheet 8, line 1.

CONCLUSIONS OF LAW

It is well settled that "the burden of proof in a proceeding brought to reinstate an invalidated petition is on the petitioner, who must prove the petition's validity by clear and convincing evidence" (Matter of Mielnicki v. New York State Bd. of Elections, 224 A.D.2d 819, 820 [3rd Dept. 1996], citing Matter of Goldstein v. Carlsen, 59 A.D.2d 642, 643 [4th Dept. 1977]).

In the case at bar, Respondent Palmesano objected to the Working Families Party designation petition, arguing that, *inter alia*, the date next to the signature on sheet 1, line 3 was modified and such modification was not initialed. The Board of Elections in its April 27, 2020 Determination agreed and invalidated that signature. It has been held that when modifications are not initialed or explained, the court will sustain such a determination by the Board (Matter of Abraham v. Ward, 43 A.D.3d 1271 [4th Dept. 2007]); Matter of Shoemaker v. Longo, 186 A.D.2d 979 [4th Dept. 1992]). However, during a hearing, the witness may explain the alleged modification, and such testimony may allow the Court to reverse a Board of Elections' determination and validate a sheet or signature (see Matter of Gabler v. Cattaraugus County Board of Elections, 63 Misc.3d 1236(A) [Cattaraugus Cty. Supm. Ct. 2019]). Such testimony must be "credible and worthy of belief by the court." (Id. citing Matter of Merrill v. Fritz, 120 A.D.3d 992 [2nd Dept. 2014]).

Here, the Court found Ms. Stevens testimony credible that the date in question was not modified, but rather what appears to be a modification is in fact an extraneous pen mark caused in

her attempt to make her pen write. As such, the Court holds that the signature of Cathy Rone, found on line 3 of sheet 1 of Petitioner's designating petition is valid and shall be restored as an eligible signature. As such, Petitioner has met the required minimum number of valid signatures to be placed as a candidate of the Working Families Party for the office of Representative in Congress from New York's 23rd Congressional District in the 2020 general election.

The Court need not address the validity of the remaining two challenged signatures as only one additional signature was required to allow Petitioner to appear on the Working Families Party line on the November 3, 2020 ballot, rendering the validity of said signatures moot.

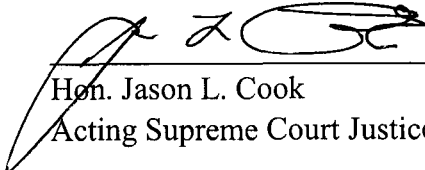
Therefore, based on the foregoing, it is hereby

ORDERED, that the petition is **granted**, to the extent that the signature of Cathy Rone on Sheet 1, Line 3 is deemed to be valid, and the New York State Board of Elections is hereby directed to place Petitioner's name on the November 3, 2020 ballot as a Working Families Party candidate for the office of Representative in Congress from New York's 23rd Congressional District.

IT IS SO ORDERED.

ENTER

Dated: July 15, 2020



Hon. Jason L. Cook
Acting Supreme Court Justice