

**Matter of Toles v Quintana**

2020 NY Slip Op 34547(U)

April 26, 2020

Supreme Court, Erie County

Docket Number: 804315/2020

Judge: Emilio Colaiacovo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

---

In the Matter of the Application of

JORDAN D. TOLES

Petitioner – Objector

JONATHAN D. RIVERA

Petitioner – Candidate,

Decision & Order

vs.

Index #: 804315/2020

ROBERT QUINTANA,

Respondent – Candidate,

ERIE COUNTY BOARD OF ELECTIONS,  
JEREMY ZELLNER, as Commissioner of the  
Erie County Board of Elections, and  
RALPH MOHR, as Commissioner of the Erie  
County Board of Elections,

Respondents.

---

BRITTANYLEE PENBERTHY, ESQ.  
Attorney for Petitioners

JAMES OSTROWSKI, ESQ.  
JOSEPH A. MATTELIANO, ESQ.  
Attorneys for Respondent – Quintana

MICHAEL A. SIRAGUSA, ESQ.

JEREMY C. TOTH, ESQ.  
Attorney for Respondents – Erie  
County Board of Elections, Jeremy  
Zellner and Ralph M. Mohr

Colaiacono, J.

*Procedural History*

The Petition before this Court was commenced pursuant to Election Law Articles 6 and 16, more specifically §§ 6-130, 6-132, 6-134, 6-136, 6-154, 16-100, and 16-102, seeking to invalidate the designating petitions filed on behalf of Respondent Robert Quintana (hereinafter “Quintana”) for the Democratic Party primary to be held on June 20, 2020 for the office of New York State Assembly, 149<sup>th</sup> District. Petitioners allege that the designating petitions filed on behalf of Quintana were invalid because they, *inter alia*, are permeated with fraud, contain errors in the subscribing witness statement, and have legally insufficient signatures.

Petitioners filed general and specific objections with the Erie County Board of Elections prior to the commencement of the verified petition. Of the 928 signatures submitted, the Respondent Board of Elections ultimately invalidated 681 signatures leaving Quintana with 247 purportedly valid signatures. In light of the public health emergency arising from COVID-19, Governor Andrew Cuomo issued Executive

Order 202.2 on March 7, 2020 wherein he modified Article 6 of the Election Law by reducing the number of signatures necessary to qualify for the ballot. Thus, as a result of the Executive Order, for the 147<sup>th</sup> Assembly District, only 150 valid signatures were needed. Further, all signature gathering was to stop on Tuesday, March 17, 2020 at 5 p.m. After finding 247 sufficient signatures, the Respondent Board of Elections validated Quintana's designating petitions. It took no position on the allegations of fraud, hand-printed signatures or other remaining line-by-line objections.

At an initial hearing before this Court on April 13, 2020, which was conducted via Skype pursuant to the Court's Administrative Orders establishing Virtual Chambers, Petitioners withdrew their verified petition against Adam Bojak (hereinafter "Bojak"), another candidate who filed Democratic Party designating petitions for the same office. (See Toles v. Bojak et. al. Index Number 804316/2020). The allegations against Bojak were similar to those against Quintana. The Court scheduled a virtual hearing for April 24, 2020 on the Quintana petitions. Each party was permitted to supply the Court with pre-trial submissions.

### *Hearing*

An evidentiary hearing on the Petition was held via Skype on April 24, 2020.

The parties stipulated that the following documents, as well as the Court's decision and transcript, would constitute the record:

1. Order to Show Cause with Verified Petition and Exhibits, granted April 2, 2020; and
2. Affirmation of Brittany Lee Penberthy, dated April 2, 2020; and
3. Proofs of Service; and
4. Freedom of Information Letter of Brittany Lee Penberthy, dated April 6, 2020; and
5. Quintana Verified Answer and Exhibits; dated April 10, 2020; and
6. Reply Affirmation of Brittany Lee Penberthy, dated April 10, 2020; and
7. Erie County Board of Elections, Zellner & Mohr Verified Answer with Exhibits; dated April 12, 2020; and
8. Reply Affirmation of Brittany Lee Penberthy with Exhibits, dated April 16, 2020; and
9. Freedom of Information Letter of Brittany Lee Penberthy with Response, dated April 16, 2020; and

10. Reply Affirmation of Jeremy Toth with Exhibits, dated April 20, 2020; and
11. Freedom of Information Letter of James Ostrowski with Response; dated April 21, 2020; and
12. Reply Affirmation of James Ostrowski & Joseph Matteliano with Exhibits, dated April 22, 2020; and
13. Letter of James Ostrowski, dated April 24, 2020; and
14. Affidavit of Justin Rooney, dated April 24, 2020; and
15. Letter of Brittany Lee Penberthy, dated April 24, 2020.

The first witness to testify was Aubrey Powell (hereinafter "Powell"). Powell, who appeared by phone, lives at 801 Columbus Parkway, Lower, in the City of Buffalo, New York. Powell testified that the signature that appears on Sheet 16, Line 10 of the Verified Petition was not his signature. He testified that he did not know, nor had he ever met Keila Sabala, the person who purportedly circulated the petition on behalf of Quintana. He admitted during cross-examination that he was contacted by Jonathan Rivera (hereinafter "Rivera"), a candidate for the same office and endorsed Democratic candidate, who alerted him to the signature. He also acknowledged that he lived across the street from Rivera. He admitted that it was possible his wife signed the petition on his behalf.

Jocelyn Gonzalez (hereinafter "Gonzalez"), who resides at 937 Amherst Street in the City of Buffalo, New York, also testified. She and her mother, Miriam Gonzalez, previously submitted an affidavit which was attached as an exhibit to the verified petition. Gonzalez testified that she previously resided with her mother at 182 15<sup>th</sup> Street in the City of Buffalo. Interestingly, she sold the 182 15<sup>th</sup> Street property to Keila Sabala, an individual who circulated designating petitions for Quintana, in October 2019. She testified that the signatures appearing on lines 1 and 2 on Sheet 10 for Quintana, which was circulated by Sabala, were neither her nor her mother's signature. She testified that it would have been impossible for her mother to have signed the petition as she now resides in Florida. Gonzalez knew Sabala from the real estate transaction, and she testified that she never signed any petition circulated by Sabala for any candidate. During cross-examination, it was suggested by counsel for Quintana that a niece of Gonzalez, Jessynia Thorton, signed the petition on her behalf. Gonzalez doubted that conclusion.

The Petitioners served a subpoena on Keila Sabala to testify at the evidentiary hearing. Sabala, who is the daughter of Quintana, did not appear. Counsel for Quintana acknowledged that he represented Sabala as well. He questioned the

accuracy of the service of the subpoena, however did not make a motion to quash the subpoena. Notwithstanding, Sabala did not appear to testify.

Respondent Quintana testified from the conference room of his attorney, Joseph Matteliano. He acknowledged that he was a candidate for the 149<sup>th</sup> Assembly district, but disavowed any knowledge of efforts undertaken on his behalf to qualify on the ballot. He testified that he was unaware that his daughter, Sabala, circulated petitions on his behalf. Instead, he testified that a candidate for Congress, Eddie Egriu (hereinafter "Egriu") offered to circulate Quintana's designating petitions along with his. Quintana also testified that he never reviewed his designating petitions before they were filed. However, he did acknowledge that he reviewed them after they were filed. Respondent Board of Elections advised the court that though Sabala circulated petitions for her father, there was no record of any petitions that she circulated on behalf of Egriu.

No further witness testimony was heard.

### *Argument*

Respondent Quintana contends that the petition is defective and must be dismissed. First, Quintana alleges that service of the petition was defective. More particularly, Quintana suggests that service by express mail does not comply with

the Election Law in order to acquire personal jurisdiction. Also, Quintana maintains that the hand-printed signatures are valid and argues that Petitioners failed to satisfy their burden to invalidate the remaining contested signatures.

Regarding allegations of fraud, Quintana maintains that he was never given adequate notice of the specific allegations of fraud. Instead, Respondent maintains that Petitioner only offered conclusory arguments. Lastly, Respondent argues that the Governor's Executive Order reducing signatures and shortening the time to circulate petitions was unconstitutional in that it failed to provide adequate notice to aggrieved candidates.

Petitioners, at the conclusion of proof, moved for summary judgment maintaining they adequately met their burden. In addressing Quintana's arguments, Petitioners countered that service was properly affected one day before service was to be complete. Regarding hand-printed signatures, Petitioners maintained that no testimony was needed to challenge the sufficiency of the signatures. Petitioners argued that Respondent was certainly on notice of the fraud allegations, as he appeared by counsel at the administrative hearings and learned of the signatures that were alleged to be fraudulent.

While Respondent Board of Elections took no position on the argument of fraud, it did note that Quintana's argument as to the constitutionality of the Governors Executive Order was misplaced. The Board of Elections argued that to challenge the constitutionality of the Executive Order, Quintana should have filed a separate action, or at the very least, a cross-petition. Instead, Quintana raised its objections to the Order in its Verified Answer. In doing so, Quintana deprived the Governor and the Attorney General of the State of New York of actual notice of his intention to challenge the constitutionality of the Executive Order.

### *Decision*

The Board of Elections validated Quintana's designating petitions, leaving 247 valid signatures. The Court acknowledges that the Respondent Board of Elections is without jurisdiction to make a determination of fraud. Further, it is also noted that the Respondent Board of Elections made no determination as to the remaining contested signatures.

In understanding Petitioners' challenge, there are three groups of contested signatures. Group I contains 29 signatures gathered by Keila Sabala that are the subject of the allegations of fraud. Although Petitioners made specific allegations to the three sheets circulated by Sabala, they also claim that the remaining signatures in

Group I, as well as all of the sheets submitted, should be invalidated as they were permeated by fraud. Group II contains 45 hand-printed signatures, which Petitioners argue are invalid because the signature card on file with the Board of Elections reflects an actual signature rather than a hand-printed signature. Group III includes 52 signatures that are subject to a variety of other challenges made by Petitioner. As such, the Court will review each group of affected signatures.

#### Group I – Fraud

“A court will invalidate a designating petition where the challenger establishes, by clear and convincing evidence, ‘that the entire petition is permeated with fraud or that the candidate participated in, or can be charged with knowledge of, fraudulent activity.’” Mattice v. Hammond, 131 A.D.3d 790 (3<sup>rd</sup> Dept. 2015); citing Matter of VanSavage v. Jones, 120 A.D.3d 887 (3<sup>rd</sup> Dept. 2014); Matter of Haygood v. Hardwick, 110 A.D.3d 931 (2<sup>nd</sup> Dept. 2013). Where a candidate is involved in the fraud, the challenger need not show that the fraud permeated the entire petition and “the petition may be invalidated even if it contains a sufficient number of valid signatures independent of those fraudulently procured.” Matter of Valenti v. Bugbee, 88 A.D.3d 1056 (3<sup>rd</sup> Dept. 2011); Matter of Cirillo v. Gardiner, 65 A.D.3d 638 (2<sup>nd</sup> Dept. 2009).

It has been alleged that Quintana's daughter, Keila Sabala, committed fraud by circulating petitions that contained signatures not made by the registered voter. More specifically, Petitioner contends that sheets 10, 13 and 16, all circulated by Sabala, should be invalidated because of the fraudulent signatures. Petitioner also contends that because of these fraudulent sheets, the remaining sheets of petitions are permeated with fraud and they should all be invalidated. While Sabala failed to appear notwithstanding a subpoena, Quintana testified that he was not aware that his daughter circulated petitions on his behalf and that he never reviewed his petitions before they were submitted. There was no evidence submitted demonstrating that Quintana had knowledge that his daughter circulated petitions on his behalf prior to his review of the filed petitions.

Clearly, Petitioners have met their burden by demonstrating that Aubrey Powell, Jocelyn Gonzalez and Miriam Gonzalez did not sign the petition for Quintana and that the signatures appearing on the sheet were not their own. While Quintana offers alternate explanations as to how they appeared, they are nonetheless invalid signatures and are hereby struck.

Other than the three witnesses who did testify, Petitioners offered no evidence as to any of the other signatures they claim are fraudulent. Thus, Petitioners did not

satisfy their burden that the remaining signatures on sheets 10, 13 and 16 were the product of fraud nor did they meet their burden to invalidate the remaining designating petitions. While it is hard to believe that a candidate would not know that this daughter circulated designating petitions on his behalf, Quintana testified that he had no knowledge of his daughter's actions and Petitioners submitted no proof that he did. In the absence of such proof, the Court cannot find that the candidate participated in, or can be charged with knowledge of, the fraudulent activity. See Mattice v. Hammond, at 790. As such, the Court invalidates the three aforementioned signatures, but finds that the remaining 26 signatures to be presumptively valid.

### Group II – Hand-Printed Signatures

It is generally understood that a printed signature should be ruled invalid unless the voter's signature is similarly printed on the voter registration card. See Matter of Hall v. Heffernan, 185 Misc. 742, 744 (Sup. Ct. Richmond County 1945), aff'd 269 A.D. 953 (2d Dept 1945), aff'd 295 N.Y. 599 (1945); Matter of Henry v. Trotto, 54 A.D.3d 424 (2d Dept 2008); Edelstein v. Matuszowski, 2009 N.Y. Misc. LEXIS 4196 (Whelan J., Suffolk County, 2009). Here, Petitioners have argued that the signatures on the petition do not match the signature on the voter identification card on file with

the Board of Elections. However, the analysis does not end there. The Court is mindful that the Legislature intended Article 16 of the Election Law to be construed liberally so as to maintain the fairness and integrity of the electoral process. See Election Law § 16-100 [1]; Matter of Jones v. Gallo, 37 A.D.2d 793 (4<sup>th</sup> Dept. 1971); Cullinan v. Ahern, 212 A.D.2d 103 (4<sup>th</sup> Dept. 1995). In Cotroneo v. Monroe County Board of Elections, it was noted that "[t]he term signature includes any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument in writing." 166 Misc. 2d 63 (Ark J., Monroe Co, 1999, Ark) citing General Construction Law § 46. The Court held that since the General Construction Law should be read into every statute, a hand-printed signature should be given the appropriate legal significance unless the legislature enacted a statute to the contrary. Id.

Here, the Board of Elections took no action in its hearing to invalidate the hand-printed signatures. Further, in the hearing before this Court, the Petitioners called no witnesses to invalidate the hand-printed signatures. Contrary to Petitioners argument, this burden is not shifted to the Respondent Candidate to prove otherwise. Certainly, the Court cannot speculate as to the validity of

someone's signature and invalidate it with no other offer of proof. It is a drastic remedy to disenfranchise voters, let alone a candidate, because someone chooses to print, rather than sign, their signature.

As such, the Court declines to invalidate the 45 hand-printed signatures.

### Group III – Line by Line Objections

The remaining 52 signatures that Petitioners challenge are garden variety objections that range from "incorrect address", "not a registered Democrat", "to signature not identifiable". Only conclusory allegations were made regarding these 52 signatures; no testimony or direct evidence was offered during the hearing regarding these disputed signatures. The Court cannot ignore burdens that are to be met and sift through the various documents to guess what is valid and what is invalid. It is the responsibility, and indeed burden, of the petitioner to present the evidence necessary to sustain its claims.

The Court did review the 52 signatures and found that the majority were facially valid while certain others were questionable. For example, a document prepared by counsel for the Board of Elections states that twenty of the disputed signatures were objected to on the grounds that "no voter information [was] on file." However, the Board of Elections ultimately validated the signature. Petitioners

submitted no testimony or evidence as to why the Board of Elections erred in this determination. With no testimony, argument or evidence regarding signatures that might be considered questionable to the trier of fact, the Court cannot simply invalidate them.

As such, the Court finds that the 52 signatures are presumptively valid.

The Court chooses not to address Respondents remaining contention that the Governors Executive Order was unconstitutional as it is not properly before the Court.

*Conclusion*

The Court finds that, other than the 3 signatures invalidated from Group I, the Petitioners have not met their burden to invalidate the remaining signatures on the designating petitions filed on behalf of Quintana. As such, the petition is hereby DENIED. This shall constitute the Decision and Order of the Court.



---

Hon. Emilio Colaiacovo, J.S.C.

DATED: **GRANTED**  
Buffalo, New York  
April 26, 2020

