

Paton v Tylec

2021 NY Slip Op 31553(U)

April 30, 2021

Supreme Court, Onondaga County

Docket Number: 003880/2021

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 Onondaga on April 30, 2021.

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

**SUPREME COURT OF THE STATE OF NEW YORK
ONONDAGA COUNTY**

**WILLIAM PATON; JOHN DINICOLANTONIO;
CHRISTOPHER GOOD; MICHAEL TORRIE;
STEPHANIE REGAN; GEORGE BALDON;
TAYLOR GRADY; JOSEPH GIAQUINTO; DALE
ANN HARVEY and SHAWN WILLIAMS,**

Petitioners,

v.

**AUSTIN TYLEC; JON WILEY; ANITA
MULLANE; SARA BEILEIN-CAPEN; JAMIE
SYMMONDS; MARK GROZIO; JEFF ELDER;
CHRIS ROBINS; WILLIAM KENNEDY II; ADAM
DICKEY; DARYL BODEWES; MARK
HOUGHTON; JOSEPH KISSEL; COLIN
LIGAMMARI; DONTA MYLES; JAMES
ABBONDANZA; ROBERT BRENNAN; RYAN
HOWZE; JAMES BERRY; JANNETTE EVANS;
JOHN JACOBY; CHARLES TEIXEIRA; MARC
CARPENTER; JEN SANDONATO, Commissioner of
the Niagara County Board of Elections; LORA ALLEN,
Commissioner of the Niagara County Board of Elections;
THE WORKING FAMILIES PARTY OF N.Y.S.;
THE EXECUTIVE BOARD OF THE WORKING
FAMILIES PARTY (WFP) OF N.Y.S.; JONATHAN
WESTIN and DANIEL LANGENBUCHER,**

Respondents.

Index No. 003880/2021

(Previously under Index No.
E174668/2021 in Niagara County)

**DECISION, ORDER AND
JUDGMENT**

This is a special proceeding pursuant to Election Law § 16-102(1) challenging the Working Families Party's designated candidates for elected offices in Niagara County. Petitioners allege that the designations are invalid because the county-wide certificates of authorization (commonly known as a *Wilson-Pakula* authorization) filed with the Board of Elections are a legal nullity since they were signed electronically (and not by hand) and acknowledged remotely by video conference. In response, the Working Families Party ("WFP") and the Respondent candidates contend that the *Wilson-Pakula* authorizations are effective because they were properly signed in accordance with the Electronic Signatures and Records Act and lawfully acknowledged pursuant to the Governor's emergency pandemic directives under Executive Order 202.7. For the reasons set forth below, the relief requested in the Verified Petition is **DENIED**, and the Petition is **DISMISSED**, with prejudice.

I.

Under New York's fusion voting system, candidates can, if properly authorized, run for elected office on multiple party lines. Political parties have the power to control their ballot lines, and a nonmember cannot be designated as a party candidate without first receiving, and timely filing, a proper *Wilson-Pakula* authorization issued by the party (Election Law § 6-120[3]). Here, since the Respondent candidates are not registered members of the Working Families Party, they were required to timely file a *Wilson-Pakula* authorization along with their WFP designating petitions to gain access to the WFP's ballot line. For the authorization to be effective, it had to "be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given," and then filed with the Board of Elections "not later than four days after the last date to file the designating petition" (Elections Law §§ 6-106; 6-120[3]).

As the record establishes, on March 25, 2021, the Executive Board of the Working Families Party of New York State met remotely via Zoom video conference in accordance with Executive Order 202.93 to authorize candidates in the 2021 local elections across the state. Later that day, Jonathan Westin (the Presiding Officer of the authorizing meeting and Working Families Party Co-Chair) and Daniel Langenbucher (Working Families Party Assistant Secretary) met again remotely with William Sacks (a notary public) by Zoom video conference to complete the cross-endorsement process and issue the *Wilson-Pakula* authorization designating 26 candidates for public office in Niagara County.

At the beginning of this meeting, Westin and Langenbucher (who were physically in their Kings County homes) held up and showed Sacks (who was physically in his New York County office) their driver's licenses. Sacks watched remotely, through Zoom, as the party officers separately signed their names by hand on blank pieces of paper. Westin and Langenbucher then photographed their signatures using their cell phones, and uploaded the digital images to their individual computers. Next, Westin and Langenbucher personally affixed the digital images of their hand-written signatures to the digital version of the *Wilson-Pakula* authorizations (which Langenbucher had earlier prepared and shared at the virtual meeting on Google Drive) by electronically "cutting-and-pasting" the downloaded image into the appropriate signature blocks on the certificates. Westin and Langenbucher viewed, and signed, the authorizations county by county in alphabetical order. With the use of available technology, all of this was observed, over many hours, by Sacks in real time.

For his part, Sacks – having verified Westin and Langenbucher's identity and watched them personally place their digital signatures on the digital certificates – printed the *Wilson-Pakula* authorizations on paper, notarized them by hand, scanned the completed documents, and then

electronically transmitted them to Langenbucher. Finally, Langenbucher printed the completed digital version of the certificates of authorization, and sent the appropriate one to the Niagara County Board of Elections by regular and overnight mail. This same procedure was followed with the substitute *Wilson-Pakula* authorizations that were subsequently executed by Westin and Langenbucher (before different notary publics) on March 29, 2021 and March 31, 2021, including the *Wilson-Pakula* authorization dated March 31, 2021, designating one substitute candidates for public office in Niagara County.

On April 5, 2021, Petitioners – purporting to be both objectors and aggrieved candidates – commenced this special proceeding in Niagara County Supreme Court challenging the Respondent candidates’ designating petitions on the grounds that the *Wilson-Pakula* authorizations were invalid or, worse, fraudulent, because the paper documents filed with the Board of Elections did not contain original signatures. The Court granted the Order to Show Cause on April 7, 2021 (NYSCEF Doc. 5). On April 22, 2021, Chief Administrative Judge Lawrence Marks issued Administrative Order 124/2021 (amended by AO/124a/2021), transferring the action to Onondaga County Supreme Court, and assigning it to the Hon. Scott J. DelConte, J.S.C. (NYSCEF Doc. 27). Altogether, 14 related actions challenging Working Families Party certificates of authorization filed with County Boards of Elections across the state were assigned to this Court.

On April 23, 2021, a consolidated briefing, hearing and argument schedule was issued for all 14 actions (NYSCEF Doc. 22). On April 27, 2021, Respondents Westin and Langenbucher, along with non-party witness Sacks, testified at a consolidated virtual hearing with respect to the signing and acknowledgement of the challenged certificates of authorization. On April 28, 2021, argument was held on the Petitions, virtually, in all related actions.

II.

A Court presiding over a special proceeding under Article 16 of the Election Law must resolve all potentially dispositive procedural objections before addressing the underlying merits of the action (*Castracan v Colavita*, 173 AD2d 924, 925 [3d Dept 1991]). Here, Respondents argue that: (1) this is a special proceeding under the Election Law and, therefore, Petitioners have no basis to seek declaratory or affirmative relief under CPLR 3001 or Article 78; and (2) that any claims of fraud were not pled with the specificity required by CPLR 3016 and must be dismissed (NYSCEF Doc. 14).

Beginning with the nature of the relief requested in this action, although Petitioners are attacking the validity of the Working Families Party's *Wilson-Pakula* authorizations, the ultimate relief that they seek is to void the Respondent candidates' designating petitions pursuant to Election Law § 16-102 (*see e.g. NY State Comm. of the Independence Party v NY State Bd. of Elections*, 87 AD3d 806, 809 [3d Dept 2011]; NYSCEF Doc. 1). Accordingly, the jurisdiction of this Court is strictly limited by the express provisions of the Election Law (*Scaringe v Ackerman*, 119 AD2d 327, 328 [3d Dept 1986] *affd* 68 NY2d 885 [1986]), and this Court cannot grant relief pursuant to CPLR 3001 or Article 78 except as otherwise available in an Election Law proceeding (*NY State Comm. of the Independence Party*, 87 AD3d at 810). To the extent that Petitioners seek any relief beyond the express provisions of the Election Law, such claims are dismissed.

Next, with respect to any claims of fraud, although the Petition in this action contains generalized allegations of fraud, it fails to plead any fraudulent conduct on behalf of any party with the specificity required under CPLR 3016. Furthermore, counsel for Petitioners has acknowledged (following the testimony of the signatories to the certificates of authorization) that there are no remaining allegations of fraud with respect to the conduct at issue here. Accordingly, to the extent that any claims of fraud were raised in this proceeding, such claims are dismissed, with prejudice

(*Eurycleia Partners, LP v Seward & Kissell, LLP*, 12 NY3d 553, 559 [2009]). The remaining procedural issues raised by the Respondents in their papers have either been waived or are unavailing and, consequently, the Court may properly consider the merits of Petitioners' claims.

III.

Turning to the merits, Petitioners claim that the *Wilson-Pakula* authorizations filed by the Working Families Party are invalid because the signatures of the Presiding Officer and Secretary are not hand-affixed and "wet" ink original signatures. However, there is no statutory mandate that a *Wilson-Pakula* authorization must contain hand-affixed and "wet" original signatures in order to be filed. To the contrary, the Legislature has specifically authorized electronic signatures on election-related and other documents through the Electronic Signatures and Records Act ("ESRA"; State Tech. Law §§ 301 – 309). In particular, State Technology Law § 304(2) provides that:

Unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.

Critically important here is that the Election Law sets forth only four specific documents that must be signed by hand in ink: (1) designating petitions (Election Law § 6-132); (2) independent nominations (Election Law § 6-140); (3) party designations for elective village offices (Election Law § 15-108[3]); and (4) independent nominations for elective village offices (Election Law § 15-108[4]). For sound and obvious reasons, these documents are only valid if presented to the Board of Elections for filing with hand-affixed "wet" ink original signatures. However, under the ESRA, all other election-related documents, including *Wilson-Pakula* authorizations (Election Law § 6-120), may be signed electronically (State Tech. Law § 307).

Moreover, the statutory definition of what constitutes an “electronic signature” is extremely broad under the ESRA, and includes any “electronic sound, symbol or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record” (State Tech. Law § 302[a]). Under the plain meaning of this definition, the “cutting-and-pasting” of a digital photograph of a signature onto a digital version of a document is – without question – a valid electronic signature under the ESRA. Indeed, the rules governing the New York State Court Electronic Filing system (which all attorneys appearing in this action are utilizing) explicitly recognizes such an act as one of the acceptable means of electronically signing a Court document under the ESRA (22 NYCRR § 202.5-b[e][1][ii]).

Here, there is no dispute that the WFP’s Presiding Officer and Secretary personally signed the *Wilson-Pakula* authorizations electronically before a notary public, who acknowledged the certificates, and thereafter scanned and returned digital versions to the party’s officers for filing. The completed digital versions of the certificates were printed, and timely filed with the Board of Elections. Accordingly, Petitioners’ allegation that the WFP’s officers copied and pasted digital photographs of their signatures onto the *Wilson-Pakula* authorizations fails to state a cause of action.

Petitioner’s reliance on *Gentner v Albany County Board of Elections*, 309 AD2d 962 (3d Dept 2003) and New York Attorney General Opinion 2016-1 for a contrary result is misplaced. *Gentner* concerns the *filing* of election-related documents under Election Law § 1-106, not the *signing* of those documents. There is no claim here that the *Wilson-Pakula* authorizations were filed by any improper method. In addition, the certificate of acceptance challenged in *Gentner* was not electronically signed as allowed under the ESRA; rather, the candidate’s signature was affixed by hand and then the certificate was improperly faxed to the board of elections.

The ESRA, therefore, simply did not apply. Similarly inapplicable is Attorney General Opinion 2016-1, which merely concluded that there was no need to resort to the ESRA because the Election Law already permitted the use of electronic signatures for voter registration. Neither of these citations support Petitioners' claim that the Election Law excepts certificates of authorization from the electronic signature provisions of the ESRA.

IV.

Moving on to the acknowledgements on the *Wilson-Paula* authorizations, in March of 2020, as the Covid-19 pandemic began spreading through New York, the Legislature amended Executive Law §§ 20 and 29-a to allow the Governor to, by executive order, suspend any law or issue any directive he determined to be necessary to respond to the emergency, provided such suspension of directive was in the interest of the health or welfare or the public and reasonably necessary to aid in the disaster effort. Pursuant to this authority, on March 19, 2020, Executive Order 202.7 was issued (subsequently extended by Executive Order 202.97), which permits the remote notarization of documents during the pandemic as follows:

Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided the following conditions are met:

- The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;
- The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);
- The person must affirmatively represent that he or she is physically situated in the State of New York;

- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

Under its plain and unambiguous language, Executive Order 202.7 applies to all notarial acts required by State law, which by definition includes acknowledgements under the Election Law. Importantly, the New York State Board of Elections alerted all County Boards of Elections of the applicability of Executive Order 202.7 to election-related documents. In a March 23, 2020 bipartisan email, the State Board of Elections advised that “[a]ny acceptance or declination (EL 6-146(1)), authorization (EL 6-120), consent of a substitution (EL 6-148(5)) may utilize the video notary process as set out in Executive Order 202.7” (NYSCEF Doc. 19). This guidance was reaffirmed in the New York State Board of Elections’ 2020 Election Law Update which instructs that “[c]ertificates of designation or nomination, minutes, authorizations and/or acceptances may be executed in separate acts by the signatories thereto and where acknowledgements or oaths are required, they may be performed or administered remotely and pursuant to executive order 202.7 allowing notarizations to be performed using communication technology.”¹ Accordingly, a printout of the digital version of the certificate that has been scanned and electronically transmitted back to the signer by the notary public after acknowledgment may then be filed with the Board of Elections (NYSCEF Doc. 19).

¹ <https://www.elections.ny.gov/NYSBOE/download/law/2020ElectionLawUpdate.pdf> (at page 56).

There is simply no support for Petitioners' argument that Executive Order 202.7 does not apply to election-related documents. Indeed, such an argument is logically incompatible given Executive Order 202.93, which explicitly permits a party committee to meet to issue a *Wilson-Pakula* authorization remotely during the pandemic "by telephone or video conferencing means." Clearly, if a party's executive committee may meet and authorize a certificate remotely, then that certificate may also be acknowledged using remote technology. Likewise, Petitioners' argument that Executive Order 202.7 does not apply to electronically signed documents is unavailing. State Technology Law § 304(2) clearly states that "[t]he use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." Accordingly, the Department of State advised in its March 31, 2020 Guidance to Notaries Concerning Executive Order 202.7, "[t]he signatory may use an electronic signature, provided the document can be signed electronically under the Electronic Signatures and Records Act (Article 3 of the State Technology Law). If the signer uses an electronic signature, the notary must witness the electronic signature being applied to the document, as required under Executive Order 202.7" (NYSCEF Doc. 18). As such, Petitioners' allegation that the notary public acknowledged the WFP's officers' signatures remotely with virtual technology fails to state a cause of action.

V.

Simply put, Petitioners fail to allege any fatal errors or defects in the WFP's *Wilson-Pakula* authorization. Even if they had alleged such errors, however, that certificate would still be presumptively valid because of the acknowledgments contained on it. All documents acknowledged by a notary public are presumed to have been properly signed and notarized in accordance with the law (*Dwyer v Pellegrino*, 164 AD3d 1088, 1089 [3d Dept 2018];

O’Dea v Bell, 242 AD2d 349, 350 [2d Dept 1997]). Indeed, this presumption of regularity is one of the primary purposes that documents are required to be notarized in the first place. And Petitioners have submitted no evidence rebutting the presumption that the acknowledged *Wilson-Pakula* authorization is valid.

Accordingly, although a factual hearing was held in this action on April 28, 2021 in order to establish the record for the parties, there are no issues of fact for the Court, and its ruling is based solely upon the pleadings and paper submissions only. Had the Petitioners submitted evidence rebutting the presumption of regularity of the acknowledged certificate of authorization, though, this Court would have found – based upon the thorough and credible testimony of the party and non-party witnesses – that the *Wilson-Pakula* authorization was properly signed and acknowledged in accordance with the ESRA and Executive Order 202.7.

VI.

Finally, as a matter of law, the *Wilson-Pakula* authorization that was mailed to and filed with the Niagara County Board of Elections is the original version of that document, properly signed and acknowledged in accordance with the provisions of the ESRA and Executive Order 202.7; and it is therefore valid. However, even if there had been a defect in the execution or filing of the WFP’s *Wilson-Pakula* authorization, this Court would be without authority to invalidate the certificate if it substantially complies with the requirements of the Election Law. As the Second Department admonished in *Farrell v Reid* (131 AD3d 628 [2015]), the “primary purpose of Election Law § 6-120(3) is to ‘safeguard the integrity of the electoral process and not to defeat elections’” and, as such, it is of “‘paramount importance ... that the will of the party committee of the political subdivision involved is expressed’” (*Id.* at 629).

With the exception of the statutory timing deadlines (*see Seawright v Board of Elections*, 35 NY3d 227 [2020]), Courts have “recognized that a procedural defect need not be fatal where, as here, the defect alleged did not constitute a ‘substantive deficiency’ implicating the integrity of the electoral process (*Marzullo v DelConte*, 165 AD3d 1466, 1468 [3d Dept 2018]). The will of the Working Families Party to cross-endorse the candidates that are named on its *Wilson-Pakula* authorization is perfectly clear, and an improperly affixed signature or an incorrectly applied acknowledgment does not change that fact. Minor subscribing errors do not rise to the level of a substantive deficiency warranting invalidation (*Hazell v Board of Elections of the State of New York*, 224 AD2d 806, 807 [3d Dept 1996]).

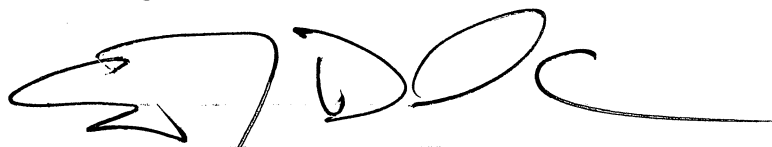
VII.

Accordingly, after consideration of all of the papers filed in this action and the argument of counsel for the parties, and upon due deliberation, it is hereby

ORDERED that that relief requested in the Petition is **DENIED**, and the Petition is **DISMISSED**, with prejudice and on the merits; and it is further

ORDERED that counsel for the Respondent Niagara County Board of Elections shall contact the Court’s Chambers to make arrangements for the return of the original documents submitted pursuant to the Court’s April 23, 2021 Scheduling Order.

Dated: April 30, 2021



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

ENTER.

APPEARANCES:

Joseph T. Burns, Esq. on behalf of the Petitioners

Messina Perillo & Hill, LLP by *Lisa A. Perillo, Esq. and Vincent J. Messina, Esq.* on behalf of Jen Sandonato, Niagara County Republican Election Commissioner

John J. DelMonte, Esq. on behalf of Lora Allen, Niagara County Democratic Election Commissioner

Levy Ratner PC by *Alexander C. Rabb, Esq.*, on behalf of Respondents the Working Families Party, The Executive Board of the Working Families Party, Jonathan Westin and Daniel Langenbucher

PAPERS CONSIDERED:

1. Verified Petition, sworn to April 5, 2021 (NYSCEF Doc. 1);
2. Order to Show Cause of the Hon. Richard C. Kloch, Sr., J.S.C., entered April 7, 2021 (NYSCEF Doc. 5);
3. Verified Answer of Respondent Allen, sworn to April 16, 2021, with Exhibits A and B, attached (NYSCEF Docs. 7 to 9);
4. Verified Answer of Respondent Sandonato, sworn to April 22, 2021 (NYSCEF Doc. 11);
5. Verified Answer of Working Families Party Respondents and Respondent Candidates, sworn to April 22, 2021 (NYSCEF Doc. 14);
6. Affirmation of Alexander Rabb, Esq., in Support of Respondents' Verified Answer in Opposition to Petitioners' Verified Petition, Affirmed April 22, 2021, with Exhibits 1 through 4, attached (NYSCEF Docs. 15 to 19);
7. Appendix to Memorandum of Law Containing Specific Objections (NYSCEF Doc. 24);
8. Administrative Order 124-2021 (NYSCEF Doc. 27); and
9. Original Certificate of Authorization (NYSCEF Doc. 31).