

O'Connor v Green

2021 NY Slip Op 31556(U)

April 30, 2021

Supreme Court, Onondaga County

Docket Number: 003884/2021

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

JAMES P. O'CONNOR ET AL.,

Petitioners;

Index No. 003884/2021

v.

(Previously under Index No. 606284/2021 in Suffolk County)

DARIN GREEN; CATHY A. ROGERS; JOHN P. WHELAN; KATHEE BURKE-GONZALEZ; HUNTER J. GROSS; JENNIFER A. HEBERT; JOSEPH G. SCHRAMM JR.; EVELYN J. HOBSON-WOMACK; JUAN E. MICIELI-MARTINEZ; BRETT G. SUERUS; ROBIN L. LONG; THOMAS SCHIAVONI; BRIAN O. MEALY; GREGORY P. DOROSKI; CARLA SIMPSON; JASON A. RICHBERG. SUSAN A. BERLAND; BRIDGET M. FLEMING; DONOVAN G. CURREY; KEVIN S. ORELLI; THOMAS F. NEELY; DANIEL J. GOODWIN; PETER K. VAN SCOYOC; REBECCA L. SANIN; CATHERINE KENT; DAVID J. CATALETTO; RICHARD P. DREW, II; SUSAN F. MCGRAW-KEBER; TIMOTHY A. GARNEAU; WILLIAM F. TAYLOR; ANDREW J. BROSNAN; ANN E. WELKER; MARTHA F. REICHERT; WILL S. PECKHAM; ELIZABETH A. GILLOOLY; ELIZABETH W. PEEPLES; ERIC SEPENOSKI; MARK A. CUTHBERTSON; KARINA HAHN; SARAH S. ANKER; ROBERT T. CALARCO; SAMUEL J. GONZALEZ; JAY H. SCHNEIDERMAN; SUFFOLK 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; AND JONATHAN WESTIN and DANIEL LANGENBUCHER,

**DECISION, ORDER AND
JUDGMENT**

Respondents.

This is a special proceeding pursuant to Election Law § 16-102(1) challenging the Working Families Party's designated candidates for elected offices in Suffolk County. Petitioners allege that the designations are invalid because the county-wide certificates of authorization (commonly known as *Wilson-Pakula* authorizations) filed with the Board of Elections are legal nullities 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 action was not timely commenced, and 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 43 candidates for public office in Suffolk 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 Suffolk 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 Suffolk County.

On April 5, 2021, Petitioners – purporting to be both objectors and aggrieved candidates – commenced this special proceeding in Suffolk County Supreme Court challenging the Respondent candidates’ designating petitions on the grounds that the *Wilson-Pakula* authorization was invalid or, worse, fraudulent, because the paper document filed with the Board of Elections did not contain original signatures. The Court granted the Order to Show Cause on April 8, 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. 17). 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. 28). 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; (2) that the matter was not timely commenced because Petitioners failed to properly serve Respondents Elizabeth Nara Peeples, Kathee Burke-Gonzalez, Eric Sepenoski, Rebecca Sanin, Robin L. Long and Brett Surerus; and (3) that any claims of fraud were not pled with the specificity required by CPLR 3016 and must be dismissed (NYSCEF Docs. 7, 21).

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* authorization, 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] *aff'd* 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 the statute of limitations, the Courts do not have subject matter jurisdiction over an Election Law proceeding unless all necessary parties have been joined and properly served in accordance with the provisions of the order to show cause prior to the expiration of the applicable statute of limitations (*Nunziato v Messano*, 87 AD3d 647, 647-48 [2d Dept 2011];

Caci v State, 107 AD3d 1121, 1123 [3d Dept. 2013]). The statute of limitations for an Election Law proceeding challenging the validity of a certificate of authorization is 14 days after the last date to file designating petitions (Election Law § 16-102[2]; *see e.g. Keane v Clark*, 43 AD3d 639, 640 [4th Dept 2007]). Here, that was April 8, 2021. Accordingly, the Order to Show Cause and Petition had to be personally delivered to each Respondent, or affixed to her door with a properly-addressed copy also delivered to an overnight carrier, before the end of the day on April 8, 2021 (*Marcoccia v Garfinkle*, 307 AD2d 1010, 1010 [2d Dept 2003]).

Respondent candidates Elizabeth Nara Peeples, Kathee Burke-Gonzalez, Eric Sepenoski, Rebecca Sanin, Robin L. Long, Andrew Brosnan and Brett Surerus each submitted affidavits swearing that service had not been properly effectuated on them (NYSCEF Doc. 22), thereby rebutting the presumption of timely and proper service afforded to Petitioners' affidavits of service for those Respondents (*Nunziato*, 87 AD3d at 647). Upon stipulation of counsel for the parties in open court, the Court then held a traverse hearing on paper submissions. Based on the parties' submissions, the Court hereby finds that the Petitioners have failed to sustain their burden of proving by a preponderance of the evidence that service was properly effectuated upon Respondent candidates Elizabeth Nara Peeples, Kathee Burke-Gonzalez, Rebecca Sanin, Robin L. Long and Brett Surerus (*see e.g. Steuhl v CRD Metalworks, LLC*, 159 AD3d 1182, 1183 [3d Dept 2018]). This is a fatal procedural defect, which cannot be cured, and requires the Court to dismiss the entire Petition (*Marin v Board of Elections*, 67 NY2d 634, 636 [1986]).

III.

The Court does not reach any of the other issues in this action. However, were the Court to reach the merits of the Petitioners' application, the Petition would be dismissed for the reasons set forth in the April 30, 2021 Decision, Order and Judgment in *Knapp v Hess* under Onondaga County Index Number 003260/2021 (NYSCEF Doc. 53). 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 relief requested in the Petition is **DENIED**, and the Petition is **DISMISSED**, with prejudice, as barred by the statute of limitations and for lack of subject matter jurisdiction; and it is further

ORDERED that counsel for the Respondent Suffolk 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:

Messina Perillo & Hill, LLP by *John Ciampoli, Esq.* on behalf of the Petitioners

Lawrence H. Silverman, Esq. on behalf of the Respondent candidates

John R. Dicioccio, Esq. PC by *John R. Dicioccio, Esq.* on behalf of Anita S. Katz, Suffolk County Democratic Election Commissioner

Brody O'Connor & O'Connor by *John R. Petrowski, Esq.* on behalf of Nick Lalota, Suffolk County Republican Election Commissioner

Office of the Suffolk County Attorney by *Alyssa Lynn Garone, Esq.* on behalf of the Suffolk County Board of Elections

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 8, 2021 (NYSCEF Doc. 1);
2. Order to Show Cause of the Hon. Joseph A. Santorelli, J.S.C., entered April 8, 2021 (NYSCEF Doc. 5);
3. Verified Answer of Respondent Katz, sworn to April 20, 2021 (NYSCEF Doc. 6);
4. Verified Answer of Working Families Party Respondents, sworn to April 21, 2021 (NYSCEF Doc. 7);
5. Affirmation of Alexander Rabb, Esq., in Support of Respondents' Verified Answer in Opposition to Petitioners' Verified Petition, Affirmed April 21, 2021, with Exhibits 1 through 4, attached (NYSCEF Docs. 8 to 12);
6. Administrative Order 124-2021 (NYSCEF Doc. 17);
7. Affidavits of Service (NYSCEF Docs. 18 and 35);
8. Verified Answer of Respondent Candidates, sworn to April 26, 2021, with Exhibits A through F, attached (NYSCEF Docs. 21 to 27);
9. Cross-Petition of Respondent Nick LaLota, sworn to April 26, 2021 (NYSCEF Doc. 30);
10. Affidavit of Rebecca Sanin, sworn to April 29, 2021, with attachment (NYSCEF Doc. 37);
11. Affidavit of Kathee Burke-Gonzalez, sworn to April 29, 2021, with attachment (NYSCEF Doc. 38);
12. Affidavit of Elizabeth Nara Peeples, sworn to April 29, 2021, with attachment (NYSCEF Doc. 39);
13. Unacknowledged Affidavit of Eric Sepenoski, dated April 29, 2021, with attachment (NYSCEF Doc. 40);

14. Affidavit of Robin L. Long, sworn to April 29, 2021, with attachment (NYSCEF Doc. 41);
15. Affidavit of Brett Surerus, sworn to April 30, 2021 (NYSCEF Doc. 42);
16. Affirmation of Lawrence H. Silverman, Esq., affirmed April 30, 2021 (NYSCEF Doc. 43);
and
17. Original Certificate of Authorization (NYSCEF Doc. 44).