

Wagner v Elasser

2021 NY Slip Op 31800(U)

April 23, 2021

Supreme Court, Queens County

Docket Number: 708902/2021

Judge: Timothy J. Dufficy

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

SPECIAL ELECTION
PART 35

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MARGARET A. WAGNER, PHILIP A. MCMANUS,
JR., KATHY WU PARRINO, STEPHEN A.
SIRGIOVANNI, DANIEL MAIO, YANLING Z.
WAGNER, ANGELO KING, DAVID ABRAHAM,
ALEX AMOROSO, BETTY ANN HOGAN,
CATHERINE ANN WASHHELL, DANIEL NOBLE,
SUSAN B. ERLEBACHER, STEPHEN H. WEINER,
JOSEPH CONCANNON, CRAIG TYSON, PHIL
ORENSTEIN, AND ANITA UPPAL,

ORDER/JUDGMENT

Index No. 708902/21
Mot. Date: 4/21/21
Mot. Seq.: 1

Candidate-Petitioners,
-against-

BARBARA A. ELASSER, ANTHONY NUNZIATO,
MATTHEW D. HUNTER, LAUREN N. RIVERA,
HAWTISE CABIRI, KAREN M. KENDER, WINNIE H.
ENG, WILLIAM HOROWITZ,

FILED & RECORDED
4/26/2021
11:45 AM
COUNTY CLERK
QUEENS COUNTY

Respondent(s)-Objector(s),

FREDERIC UMANE, MIGELINA CAMILO, JOSE
MIGUEL ARAUJO, GINO A. MARMORATO,
MICHAEL MICHEL, RODNEY L. PEPE-SOUVENIR,
SIMON SHAMOUN, PATRICIA ANNE TAYLOR,
TIFFANY TOWNSEND, JOHN WM. ZACCONE,
Commissioners constituting THE CITY OF NEW YORK
BOARD OF ELECTIONS, and THE QUEENS COUNTY
REPUBLICAN COMMITTEE,

Respondents,

For an Order pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, overturning The Board of Elections decision, declaring valid the Designating Petition which designated the Candidate(s)-Petitioner(s) as candidate(s) of the Republican Party positions for various public party positions in the Primary Election to be held on the 22nd day of June 2021, and to Order the said Board of Elections to print and place the names of said Candidate(s)-Petitioner(s) upon the official ballots of such Primary Election. Republican Party Election to be held on June 22, 2021, and to Order said BOARD OF ELECTIONS to print and place the names of said Candidates upon the official Ballots of such Election.

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The following papers were read on the Verified Petition by Petitioners Margaret A. Wagner, Philip A. McManus, Jr., Kathy Wu Parrino, Stephen A. Sirgiovanni, Daniel Maio, Yanling Z. Wagner, Angelo King, David Abraham, Alex Amoroso, Betty Ann Hogan, Catherine Ann Washell, Daniel Noble, Susan B. Erlebacher, Stephen H. Weiner, Joseph Concannon, Craig Tyson, Phil Orenstein, and Anita Uppal for an Order: declaring valid, proper, sufficient, and legally effective the Designating Petition heretofore filed with the Respondent Board of Elections, designating the Candidate-Petitioners as candidates for various public party positions in the Republican Party Primary Election scheduled to be held on June 22, 2021, and in the General Election to held on November 2, 2021; directing, requiring and commanding the Respondent Board of Elections to print and/or place the name of the Candidate-Petitioners aforesaid as candidate of the Republican Party on the official ballots to be used at the Republican Party Primary Election scheduled to be held on June, 22, 2021, and in the General Election to held on November, 2, 2021; and enjoining and restraining Respondent The City of New York Board of Elections (Board of Elections) from printing, issuing, or distributing for use during the Primary Election to be held on the June 22, 2021, and in the General Election to be held on November 2, 2021, any and all official ballots upon which the name of the Candidate-Petitioner does not appear as candidate for the various public office positions.

PAPERS
NUMBERED

Orders To Show Cause.....	EF 8 - 9
Verified Petition-Affidavits-Exhibits.....	EF 1 - 5
Affidavits of Service.....	EF 11-52;55
Memorandum of Law in Support.....	EF 56
Answering Papers-Exhibits.....	EF 59 - 60
Answering Affidavits.....	EF 61

Upon the foregoing papers, it is ordered that the Verified Petition by Candidate-Petitioners Margaret A. Wagner, Philip A. McManus, Jr., Kathy Wu Parrino, Stephen A. Sirgiovanni, Daniel Maio, Yanling Z. Wagner, Angelo King, David Abraham, Alex Amoroso, Betty Ann Hogan, Catherine Ann Washell, Daniel Noble, Susan B. Erlebacher, Stephen H. Weiner, Joseph Concannon, Craig Tyson, Phil Orenstein, and Anita Uppal, is denied, and the proceeding is dismissed.

Petitioners bring the instant Verified Petition seeking an order: declaring valid, proper, sufficient, and legally effective the designating petition(s) heretofore filed with the Respondent Board of Elections, designating the Candidate-Petitioners as candidates for various public party positions in the Republican Party Primary Election scheduled to be held on June, 22, 2021, and in the General Election to held on November 2, 2021; directing, requiring and commanding the Respondent Board of Elections to print and/or

place the name of the Candidate-Petitioners aforesaid as candidate of the Republican Party on the official ballots to be used at the Republican Party Primary Election scheduled to be held on June, 22, 2021, and in the General Election to be held on November, 2, 2021; and enjoining and restraining the Respondent Board of Elections from printing, issuing, or distributing for use during the Primary Election to be held on June, 22, 2021, and in the General Election to be held on November, 2, 2021, and any and all official ballots upon which the name of the Candidate-Petitioner does not appear as candidate for the various public office positions.

At the outset, the Court finds that the instant Amended Order to Show Cause (NYSCEF Doc. No. 9) is jurisdictionally properly brought before the Court. The Court finds unavailing the arguments of the Respondents that service was not properly made pursuant to the dictates of said Order. Petitioners presented *prima facie* proof that the Respondents and Respondent-Objectors were properly served via submission of the affidavits of service of process servers, Tobias B. Stallworth, Luis Perez, Calvin Chen, Ericka Kirkland, and Dondre Dennis, all sworn to on April 20, 2021. A properly executed affidavit of service creates a presumption of mailing by Petitioners and of receipt by Respondents. In opposition, Respondents have not raised an issue of fact which would require a hearing or rebut the presumption (*see Kihl v Pfeffer*, 94 NY2d 118 [NY 1999]).

Additionally, the Court finds unavailing the argument of the Respondents that since several of the verifications of the Petitions were notarized by Joseph Concannon and Stephen Weiner, who are petitioners in this proceeding, said petitions must be deemed a nullity. It is well-established law, pursuant to the Election Law that a candidate may notarize signatures on his own designating petition pursuant to the Election Law (*see Election Law* 6-132[3]); *Matter of Harte v Kaplan*, 87 AD3d 813 [3d Dept 2011]; *Brodsky v Board of Mgrs of Dag Hammar skjold Tower Condominium*, 1 Misc. 3d 591 [Sup Ct., NY Cty 2003]).

As such, the Court finds that the Amended Order to Show Cause was properly served.

On April 12, 2021, the Board of Elections issued a decision finding that the petition form was “defective and void *prima facie*.” (*See* “Exhibit B” of the Amended Order To Show Cause - Board of Elections decision).

As an initial matter, the Court finds that Petitioners have failed to specify the particular rulings of the Board of Elections which they are now contesting. The pleadings fail to indicate which of the determinations by the Board of Elections are being contested. Such is a fatal defect (*Matter of Lacorte v Cytryn*, 109 AD3d 544 [2d Dept 2013], *affirmed* 21 NY3d 1022 [2013]; *Jennings v Board of Elections*, 32 AD3d 486 [2d Dept 2006]; *Krueger v Richards*, 59 NY2d 680 [1983]). It is well-established law that a validating petition must specify the specific determinations of the Board of Elections that are claimed to be erroneous or the signatures that are allegedly improperly invalidated (*Matter of Lacorte, supra*). On this ground alone, the Petition(s) can be invalidated.

However, if this Court were to overlook same, and to review the decision of the Board of Elections, the Petition is still invalidated. In its decision, dated April 12, 2021, the Board of Elections held, *inter alia*: “The face of all of the petition sheets contains additional information that is not contained in statute Election Law 6-132. The additional information consists of numbers that are not germane to the petition and are misleading and confusing to the signers. The form is defective and void *prima facie*.”

The Board of Elections decision specifically states that “in the middle of each page of the petition volumes ... there is a series of unexplained numbers where the names candidates are listed.” and determined that such numbers could confuse or mislead signers. The Board analogized the addition of the random series of numbers to the inclusion of “unexplained material alterations” in a witness statement which would invalidate the entire page, citing the New York Court of Appeals cases of *Matter of Jonas v Velez*, 65 NY2d 954 [1985] and *McGuiree v. Gamache* 5 NY3d 444 [2005]. Petitioners have clarified to this Court that said numbers represent election districts.

After careful review and consideration, this Court is in accord with the determination of the Board of Elections. Election Law 6-132 specifically sets forth the required form of the Designating Petition. Such provision does not provide for the inclusion of the additional information of the election districts. Such extraneous information can be confusing and misleading to signers. Thus, invalidating the Designating Petition(s).

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Verified Petition is denied, and this proceeding is dismissed.

ORDERED, ADJUDGED and DECREED that the branch of the Verified Petition for an order declaring valid, proper, sufficient, and legally effective the Designating Petition(s) heretofore filed with the Respondent Board of Elections, designating the Candidate-Petitioners as candidates for various public party positions in the Republican Party Primary Election scheduled to be held on June 22, 2021, and in the General Election to held on November, 2, 2021, is denied; and it is further

ORDERED, ADJUDGED and DECREED that the branch of the Verified Petition for an order directing, requiring and commanding Respondent Board of Elections to print and/or place the name of the Candidate-Petitioners aforesaid as candidate of the Republican Party on the official ballots to be used at the Republican Party Primary Election scheduled to be held on June, 22, 2021, and in the General Election to held on the November, 2, 2021, is denied; and it is further

ORDERED, ADJUDGED and DECREED that the branch of the Verified Petition for an order enjoining and restraining Respondent Board of Elections from printing, issuing, or distributing for use during the Primary Election to be held on June 22, 2021, and in the General Election to be held on November, 2, 2021, any and all official ballots upon which the name of the Candidate-Petitioner does not appear as candidate for the various public office positions, is denied.


The foregoing constitutes the decision, order, and judgment of the Court.

Dated: April 23, 2021



TIMOTHY J. DUFFICY, J.S.C.

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4/26/2021
11:45 AM
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QUEENS COUNTY**


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