

Matter of Torgersen v Oldknow

2021 NY Slip Op 34071(U)

April 26, 2021

Supreme Court, Greene County

Docket Number: Index No. EF2021-263

Judge: Lisa M. Fisher

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STATE OF NEW YORK
SUPREME COURT

GREENE COUNTY

In the matter of the application of

LORI TORGERSEN,

Petitioner-Candidate Aggrieved

DECISION & ORDER

RENA LIGGIO,

Petitioner-Candidate Aggrieved

Index No.: EF2021-263

KATHERINE L. STONE,

Petitioner-Candidate Aggrieved

HINDE MORELLI,

Petitioner-Candidate Aggrieved

- against -

JOAN S. OLDKNOW,

Respondent-Objector

- and -

GREENE COUNTY BOARD OF ELECTIONS,

Respondent,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring valid the Petitioners filed by Lori Torgersen, Lena Liggio, Katherine L. Stone, and Hinde Morelli as Candidates of the Democratic Party for the Public Office/Party Position of Members of the Windham Committee at the June 22, 2021 Primary Election.

PRESENT: HON. LISA M. FISHER:

APPEARANCES:

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FISHER, J.:

This is an elections law case wherein the Petitioners are candidates seeking party nomination at the primary election to be held on June 22, 2021 in the Town of Windham. Petitioners filed with the Respondent Greene County Board of Elections (hereinafter "GBOE")

their respective designating petitions. On or about March 25, 2021, Respondent Joan Oldknow (hereinafter “Objector”) mailed specification objections with the Respondent GBOE for each of the Petitioners which were received by the Respondent GBOE on March 29, 2021. As a result, both the Democratic and the Republican Greene County Commissioners unanimously agreed that the subject designating petitions for each of the Petitioner-Candidate Aggrieved were insufficient and fatally invalid.

Petitioners commenced this special proceeding via order to show cause with petition, arguing that there was no proof of service of Respondent Objector’s specifications on any of the Petitioners as required by 9 NYCRR § 6204.1. Alternatively, Petitioners argue that if the Respondent GBOE found the designating petitions deficient on their own volition, without the filing of written and specific objections by a qualified objector, Respondent GBOE “should have” notified the Petitioners of their ability to cure such deficiencies pursuant to Election Law § 6-134 (2). The Court signed the order to show cause and set a return date for oral argument.

Respondent GBOE served a verified answer and opposition, arguing that 9 NYCRR § 6204.1 only applies to the State Board of Elections and not to the GBOE, as the GBOE has not adopted this regulation (*see Matter of Grancio v Coveney*, 60 NY2d 608, 610 [1983] [finding 9 NYCRR § 6204.1 only applies to the State Board of Elections and “local boards are not subject to State rules unless they elect to follow them.”]). Thus, Respondent GBOE contends it did not review the designating petitions on their own volition but, nonetheless, had it done so, all of the defects raised were incurable and fatal defects that were unanimously rejected by the Democratic and Republican Greene County Commissioners. Respondent GBOE’s position was that, inasmuch as 6204.1 did not apply and that Respondent GBOE did not review the designating petitions on their own volition, that the petition failed to state any cognizable claim for relief.

After service of Respondent GBOE’s answer and opposition, Petitioners’ counsel e-mailed chambers requesting permission to amend the petition. This was immediately objected to by Respondent GBOE on the grounds that it already joined issue, and further on the grounds that Petitioners’ request was untimely under Election Law § 16-102. Respondent Objector filed and served her opposition, and then joined in the objection. Courts do not issue orders via e-mail request. An application for an order is called a motion (CPLR § 2211), which Petitioners did not avail themselves to their remedies under CPLR R. 3025.

Oral Argument

Oral argument was held via Microsoft Teams on April 16, 2021, wherein Petitioners argued for the first time that the designating petitions were substantively valid because they were rejected largely on the grounds of 1) lack of the number of signatures listed on the designating petition, and 2) a failure to put page numbers in. Petitioners argued that these were curable defects under Election Law § 6-134 and, further, because the designating petitions were a single page, they could not be manipulated or subject to fraud. Further, Petitioners contend that even if Respondent GBOE has not adopted 9 NYCRR § 6204.1, by virtue of Respondent Objector using the State Board of Elections form “she has availed herself of that requirement.” Furthermore, Petitioners contend that the lack of adoption of 9 NYCRR § 6204.1 and the fact they “never” received notice of the Respondent GBOE commission hearing really amounts to a lack of due process. Inasmuch as Petitioners were never given an opportunity to cure, they request that the designing petitions be found valid—as they presumably are under Elections Law § 6-154.

Respondent GBOE was first to respond after Petitioners at oral argument and noted that the objection was signed March 25, 2021 and received on Monday, March 29, 2021. Respondent GBOE’s determination to invalidate the designating petitions was on March 31, 2021. This is the same day one of the Petitioners first contacted Respondent GBOE and was told of the decision. Petitioners were e-mailed notice of the decision on the same day that it was made, March 31, 2021, which was also the day when they had first called. Petitioner’s counsel did not have any alternative timeline or information on when notice was received to rebut this claim when asked by the Court.

Further, Respondent GBOE noted at oral argument that the Petition did not challenge the basis of the grounds that the Respondent GBOE invalidated the designating petitions and the new argument was a surprise. Rather, in the petition the “sole argument [] within the four corners of the pleadings was merely that the [GBOE] lacked jurisdiction to review the validity . . . pursuant to 9 NYCRR 6204.1[.]” Respondent GBOE contended that even if section 6204 was adopted by the County, it was still complied with and the defects in the designating petitions were not curable.

Respondent Objector added to oral argument that Petitioners raised new arguments not in the petition, including the use of a form by the Objector which somehow implicates 9 NYCRR § 6204.1. Respondent Objector refutes this and contends Petitioners cite to no case law in support of how the Objector’s actions could function as a waiver for Respondent GBOE or “create some sort of jurisdictional issue simply by the filing of a form[.]”

Petitioners were allowed to rebut Respondents' oral argument and contended first that they believed they adequately preserved the "new" arguments, which they do not believe to be new at all but an extension of the petition. Second, Petitioners note that the grounds within the Election Law cited by Respondents were to prevent fraud. Petitioners reiterated that the one page designating petitions could not be manipulated to add more signatures or pages, particularly because the candidates each had more signatures than required. No actual numbers of the required signatures were provided in the papers. Specifically, for Petitioner Torgersen, counsel argued she had more than enough signatures and there were no areas to add signatures on her page without adding more pages which was unnecessary. Therefore, Petitioners conclude there was no potential for fraud which should not be an issue in invalidating the designating petitions.

Legal Analysis

The gravamen of the Petition is that Respondents failed to comply with 9 NYCRR § 6204.1 regarding notice or that Respondent GBOE improperly reviewed the designating petitions on its own volition. It was uncontroverted that section 6204.1 does not apply to this case as Respondent GBOE has never adopted this provision. The Court of Appeals in *Matter of Grancio* (*supra*, 60 NY2d, at 610) has made it clear that section 6204.1 only applies to the State Board of Elections, and cannot be charged against a county board of elections unless the county elects to follow this regulation. Here, Respondent GBOE did not. This is echoed by Respondent Objector. It is clear this notice provision does not apply. Further, it is uncontroverted that Respondent GBOE did not initiate a review of the designating petitions on its own volition. Therefore, both arguments in the petition are without merit.

The petition also argues that there was delayed notice of the objection until after it was too late for Petitioners to cure the defect. The record reflects the objections were mailed on March 25, 2021, which was a Thursday, and received by the Respondent GBOE in the midday of March 29, 2021, a Monday. Respondent GBOE reviewed and invalidated the designated petitions on March 31, 2021, the same day notice was given via e-mail to Petitioners and at least one Petitioner was told over the telephone. Petitioners do not controvert this fact or articulate how this timeline was manipulated by Respondents to Petitioners' detriment other than conclusory statements.

Beyond these two arguments, the arguments raised at oral argument for the first time are not plead in the Petition and not properly before the Court. While Petitioners point to paragraph 12 of the Petition for this extension at oral argument, this does not apply. Paragraph 12 has the

condition precedent “[i]n the alternative if the Respondent [GBOE] reviewed the designating petitions filed by [Petitioners] as deficient on their own violation, without the filing of written and specific objections by a qualified objectors,” does not apply to the instance case because Respondent GBOE did not do this. This paragraph, plead in the alternative, does not apply to these facts since the Respondent Objector triggered the review—not the GBOE.

Even if paragraph 12 applied, the next clause is that the Petitioners should have been given three business days from the date of such determination to cure the violation of failing to number each sheet. Petitioners were given notice on March 31, 2021 when the determination was made. Petitioners did not cure the defect. Petitioners did not outline what efforts, if any, they made to attempt to cure the designating petitions. Notwithstanding, the numbering of sheets is not the only deviation in the designating petitions.

As for the second argument that the use by Respondent Objector of the State Board of Elections specifications form somehow implicated section 6204.1 on the Respondent GBOE is simply unsupported in law. It is also not plead in the Petition. It is unclear how the Objector’s actions could result in an adoption of a regulation by the County. The Court does not entertain these grounds.

The only other section of the Petition where it could be argued that Petitioner had the right to raise these new arguments would have been under paragraph 15, wherein Petitioners “request leave and reserve the right to submit upon the argument and hearing of this application, evidence by the way of affidavits, testimony, and documentary proof to substantiate and support this application.” The only offering of proof made was by counsel’s oral argument which was without probative value because he did not have personal knowledge (*see Delosh v Amyot*, 186 AD3d 1793, 1794–75 [3d Dept 2020]). Petitioners did not request a hearing, offer an affidavit, testimony, or other documentary proof to contest the grounds raised by Respondent Objector’s written and filed specifications by someone with personal knowledge. Petitioners did not move to amend or conform the pleadings. The only possible attempt was via e-mail posing a question to the Court, which was immediately and forcibly objected to by both Respondents as untimely. Petitioners did not file reply papers. Petitioners did not make any further request after the objections to timeliness in an effort to submit a motion or to amend. Petitioners did not request or so move at oral argument, even after Respondents objected on the record again. Petitioners are bound to the allegations raised in the Petition, which does not contest the grounds for the specifications. It cannot be raised at

oral argument for the first time. No request was made at oral argument to conform the arguments or facts to the pleadings.

Notwithstanding, while Election Law rules for designating petitioners provides that “[t]he provisions of this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevent of fraud” (Election Law § 6-134), the failure of each designating petition to include the number of signatures prior to the witness statement is not curable. (See Election Law § 6-134 [9] [requiring the number of signatures to be written *before* or in the presence of the subscribing witness]; see also *Zunno v Fein*, 175 AD2d 935, 935 [2d Dept 1991] [“Supreme Court also properly invalidated the signatures witnessed by a subscribing witness who signed the subscribing witness statement without filling in the number of signatures witnessed.”]; but see, *c.f.*, *Etkin v Thalmann*, 287 AD2d 775 [3d Dept 2001] [finding “substantial compliance” under Election Law § 6-134 [9] where the first page had the correct number of witness signatures but pages 2 through 17 were signed and the witness signature numbers were left blank, and the subscribing witness corrected the defect within the time limit to do so by re-filing photocopies and entering the correct number on each page]). Unlike *Etkin*, no signature numbers were provided upon filing, the defect was not corrected within the time limit to do so, and the designating petitions are incurably defective.

The only designating to contain the number of witness signatures, Petitioner Katherine L. Stone, who failed to include the subscribing witness’ full address and the district, which are fatal as they were not cured. Petitioner Stone’s designating petition also failed to have the full date of the election which is fatal and incurable (see *O’Connor v Salerno*, 105 AD2d 487, 488 [3d Dept 1984] [finding the State Board of Elections and Supreme Court “erred in *not* sustaining petitioner’s objection to the nominating petition on the basis that the date of the election was improperly stated on the pages of the petition. The application in this proceeding should have been granted and the nominating petition declared invalid.”] [emphasis added]).

The Court finds it unnecessary to address the further defects of the designating petitions inasmuch as Petitioners failed to plead with any particularity that these defects were substantively proper.

To the extent not specifically addressed above, the parties’ remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby


ORDERED that Petition is **DISMISSED**, and all other relief requested therein is **DENIED** in its entirety.

This constitutes the Decision and Order of the Court. Please note that Chambers has filed the original Decision and Order with the County Clerk via NYSCEF. The prevailing party (Respondent GBOE) must comply with CPLR R. 2220 with regard to Notice of Entry.

IT IS SO ORDERED.

DATED: April 26, 2021
Catskill, New York

ENTER :



HON. LISA M. FISHER
SUPREME COURT JUSTICE

The Court considered all papers submitted and filed on NYSCEF, including 1 through 17, and the transcript provided by the Court Reporter to chambers, particularly the following:

- Petition, filed April 7, 2021; signed order to show cause, filed April 8, 2021;
- Answer, of GBOE, filed April 12, 2021; affirmation in opposition, of Kaplan, Esq., with exhibits, filed April 12, 2021; memorandum of law, filed April 14, 2021;
- Affirmation in opposition, of Sharp, Esq., filed April 12, 2021; memorandum of law, filed April 12, 2021; answer, filed April 12, 2021; and
- Transcript, miscellaneous correspondence and affidavits of service, as filed on NYSCEF.