SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 17, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

ELECTION LAW CASES

Counsel for any party interested in pursuing an appeal to the Court of Appeals should contact the Court of Appeals immediately upon receipt of this Court's decision.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

340/14

KA 09-01764

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE L. MACK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 17, 2009. The judgment convicted defendant, upon a jury verdict, of gang assault in the first degree. The judgment was reversed by order of this Court entered May 2, 2014 in a memorandum decision (117 AD3d 1450), and the People on June 30, 2014 were granted leave to appeal to the Court of Appeals from the order of this Court (23 NY3d 1027), and the Court of Appeals on June 7, 2016 reversed the order and remitted the case to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (27 NY3d 534).

Now, upon remittitur from the Court of Appeals and having considered the facts and issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is affirmed.

Memorandum: When this case was initially before us, we reversed the judgment convicting defendant upon a jury verdict of gang assault in the first degree (Penal Law § 120.07), concluding that County Court erred in failing to respond to two substantive jury notes that were followed by an additional note stating that the jury had reached a verdict (*People v Mack*, 117 AD3d 1450). Although defendant did not object to the manner in which the court proceeded, we concluded that the court's failure to respond to the two substantive notes constituted a mode of proceedings error that did not need to be preserved (*id*. at 1451). The Court of Appeals reversed, holding that the "alleged error" was not of the mode of proceedings variety because the court read the jury notes into the record, and defense counsel had full "knowledge of all the facts required to object to the trial court's procedure or lack of response to the jury's requests" (*People*

v Mack, 27 NY3d 534, 541). The case was remitted to us "for consideration of the facts and issues raised but not determined on the [initial] appeal" (*id*. at 544).

Inasmuch as we reviewed the other substantive contentions advanced by defendant on appeal and concluded that "they are without merit" (*Mack*, 117 AD3d at 1451), the only remaining issue to be decided is whether we should exercise our power to review defendant's unpreserved contention regarding the unanswered jury notes as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We decline to do so. As the Court of Appeals noted, defense counsel "may have made a strategic choice not to challenge the trial court's procedure," and "may have decided that the jurors were more likely to acquit defendant if they were not given the chance to deliberate further" (*Mack*, 27 NY3d at 543). Such a strategic decision, if made, would have been entirely reasonable considering that the jury had asked for, among other things, a readback of testimony from the key prosecution witness.

Because defense counsel may have had a legitimate, strategic reason for not objecting to the court's procedure, we respectfully disagree with the dissent that defendant was "seriously prejudiced" by the court's taking of the verdict. Indeed, as the Court of Appeals also noted, "[i]f defense counsel considered the judge's intended approach prejudicial, he certainly had an opportunity to ask him to alter course, and it behooved him to do so" (*id.*). Moreover, when this case was last before us, we unanimously rejected defendant's contention that defense counsel was ineffective for failing to object to the court's procedure. Any discussion of prejudice in our prior decision was dictum inasmuch as it was based on our conclusion that there was a mode of proceedings error, which is "immune . . . from harmless error analysis" and "require[s] reversal without regard to the prejudice, or lack thereof, to the defendant" (*Mack*, 27 NY3d at 540).

The dissent suggests that defense counsel may not have objected because, relying upon the *O'Rama* jurisprudence in effect at the time of trial, he anticipated that a new trial would be ordered on appeal as a result of the court's alleged error if defendant were convicted. However, at the time of defendant's trial, as now, the appellate case law in New York supported the People's contention that "the fact that a verdict was reached before the court responded to the jury note[s] implied that the jury had resolved the issue[s] on its own" (*People v Murphy*, 133 AD3d 690, 691, *lv denied* ___ NY3d ___ [June 14, 2016]; *see e.g. People v Sorrell*, 108 AD3d 787, 793, *lv denied* 23 NY3d 1025; *People v Cornado*, 60 AD3d 450, 451, *lv denied* 12 NY3d 913). In any event, remaining silent when the trial court makes an erroneous ruling with the hope of obtaining a reversal on appeal is the type of gamesmanship that the Court of Appeals sought to discourage by determining that the "alleged error" in this case was not a mode of proceedings error (*Mack*, 27 NY3d at 543-544; *see generally People v Nealon*, 26 NY3d 152, 162).

With respect to the proof of guilt, defendant did not challenge

on appeal the weight or sufficiency of the evidence, and there is ample evidence supporting the jury's verdict. The eyewitness who saw defendant attack the victim with a bottle knew defendant from the neighborhood, having seen him "quite a few times." It was not as though she were identifying a stranger. The testimony of the jailhouse informant also was corroborated by defendant himself, who, during a recorded telephone conversation from jail with his father, essentially acknowledged that he made the damaging admissions to the informant. We therefore respectfully disagree with the dissent that justice would be served by the exercise of our discretionary power to review defendant's unpreserved contention.

All concur except CARNI and SCUDDER, JJ., who dissent and vote to reverse in accordance with the following memorandum: In our view, defendant was "seriously prejudiced" by County Court's failure to comply with its core requirement pursuant to CPL 310.30 to respond to a substantive jury note requesting further legal instruction on, inter alia, "the meaning of reasonable doubt," before accepting a verdict (*People v Louridо*, 70 NY2d 428, 435). Thus, upon remittitur from the Court of Appeals (*People v Mack*, 27 NY3d 534), we would review, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), defendant's contention that the court's failure to respond to the note constitutes reversible error, reverse the judgment, and remit the matter for a new trial. We therefore respectfully dissent.

As we explained in our prior decision (*People v Mack*, 117 AD3d 1450), defendant was convicted of gang assault in the first degree (Penal Law § 120.07), which resulted in the death of the victim from two stab wounds. A police witness testified that 75 to 100 people may have witnessed the attack, but the only evidence implicating defendant was the testimony of two witnesses, i.e., an eyewitness and a jailhouse informant. The eyewitness was a 19-year-old woman who viewed the incident, which occurred at dusk, from a distance of 150 feet. The eyewitness advised the police on the night of the attack that she could not identify the perpetrator. She subsequently testified, however, that she had told that to the police because she was afraid. The eyewitness identified defendant in a photo array several weeks after the attack. The jailhouse informant admitted in his testimony that he had received a benefit for his testimony, that he had seen news accounts that defendant had been charged in connection with the victim's death, and that he was a friend of the victim's brother. Thus, in our view, the evidence against defendant was not overwhelming. Defendant testified that he was at his home in another city on the evening of the crime, and five defense witnesses testified either that defendant was at his home, or that he was not part of the attack on the victim.

The jury advised the court at 5:42 p.m. that it was deadlocked, after deliberating for approximately five hours, which included requests for readbacks of certain testimony of both the eyewitness and the jailhouse informant. The court instructed the jury to continue deliberating and, at 6:02 p.m., advised counsel that it would stand in recess until 7:30 p.m. There is no indication in the record that the jury was aware of the recess and, from 6:02 p.m. until the court

reconvened at 7:51 p.m., the jury sent three notes, two of which were substantive. At issue here is the note sent at 6:20 p.m., wherein the jury requested "instructions regarding the importance of a single witness in a case versus multiple witnesses and the meaning of reasonable doubt read back to us." The court received a final note at 7:54 p.m., three minutes after it had reconvened, stating that the jury had come to a verdict. The court accepted the verdict without addressing the jury's request and with no objection from defense counsel. Although " '[n]ot every failure to comply with a jury's request for information during deliberation is reversible error' " (*Lourido*, 70 NY2d at 435), we concluded in our prior decision that the error in failing to respond to the request for further legal instruction on these critical issues " 'seriously prejudiced' " defendant (*Mack*, 117 AD3d at 1451, quoting *Lourido*, 70 NY2d at 435). We adhere to our position that the error, despite the lack of preservation, warrants reversal.

The Court of Appeals and the majority correctly note that defense counsel "may have made a strategic choice not to challenge the trial court's procedure" (*Mack*, 27 NY3d at 543). The Court of Appeals used that reasoning, however, as part of its explanation for declining to include the circumstance at issue here in the category of those errors that encompass "a 'very narrow exception' to the preservation rule" (*id.* at 540). We cannot agree with the majority that the reasoning employed by the Court of Appeals to limit the category of errors that constitute mode of proceedings errors should be applied to our determination whether to exercise our interest of justice jurisdiction. We also disagree with the majority that a strategic choice of counsel to remain silent when the court advised the parties that it would accept the verdict should be used as a ground to decline to exercise our interest of justice jurisdiction under the facts presented here. Indeed, as the majority properly notes, we concluded that defendant was not denied effective assistance of counsel. In other words, in addition to the potential strategic choices the Court of Appeals addressed (*see Mack*, 27 NY3d at 543-544), counsel may have anticipated under the *O'Rama* jurisprudence in effect at the time of trial that this Court would grant defendant a new trial, which indeed we did. Notwithstanding the appellate authority from other Departments cited by the majority, the determination whether the violation of the court's core responsibility pursuant to CPL 310.30 to provide a meaningful response to the substantive jury notes constituted a mode of proceedings error was not definitively decided until the Court of Appeals decided in this case that it was not (*see id.* at 544). In our view, the determination whether to exercise our interest of justice jurisdiction should not be based upon possible defense strategies or tactics. Instead, the determination whether to exercise our interest of justice jurisdiction should be based on whether justice would be served. In our view, justice would be served under the facts presented here.

As we stated in our prior decision "there are few moments in a criminal trial more critical to its outcome than when the court responds to a deliberating jury's request for clarification of the law . . . [T]he request for a readback of the instruction on reasonable

doubt, *the determination of which is the crux of a jury's function,* and for a readback of the instruction regarding the importance of a single witness in a case versus multiple witnesses, demonstrates the confusion and doubt that existed in the minds of the jury with respect to . . . crucial issue[s] . . . The jury is *entitled* to the guidance of the court and may not be relegated to its own unfettered course of procedure" (*Mack*, 117 AD3d at 1451 [internal quotation marks omitted and emphasis added]). The jury waited over 1½ hours for a response to its request for the clarification of those crucial legal instructions before rendering a verdict. In our view, unlike a factual issue that the jury may resolve on its own (*see id.*), the jury could not resolve "the meaning of reasonable doubt" or "the importance of a single witness in a case versus multiple witnesses" without further guidance from the court. We therefore conclude that reversal is warranted in the interest of justice because defendant was seriously prejudiced as a result of the court's failure to comply with its "core responsibility under the statute . . . to provide a meaningful response to the jury" before accepting the verdict (*People v Kisoon*, 8 NY3d 129, 134; *see* CPL 310.30; *People v O'Rama*, 78 NY2d 270, 277).

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1410

CA 15-00305

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

RALPH MISSELL, PLAINTIFF-APPELLANT,

V ORDER

ASIA FOOD MARKET, INC., HANSON AGGREGATES, INC.,
AND HANSON AGGREGATES, NEW YORK, INC.,
DEFENDANTS-RESPONDENTS.

ASIA FOOD MARKET, INC., THIRD-PARTY PLAINTIFF,

V

EXCELL HVAC & APPLIANCE SERVICES, INC.,
THIRD-PARTY DEFENDANT-RESPONDENT.

DAVIDSON FINK LLP, ROCHESTER (ANDREW M. BURNS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-RESPONDENT ASIA FOOD MARKET, INC.

BARCLAY DAMON, LLP, ROCHESTER (PAUL A. SANDERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HANSON AGGREGATES, INC. AND HANSON AGGREGATES, NEW YORK, INC.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered November 26, 2014. The order granted the motions of defendants for summary judgment dismissing the amended complaint and dismissed the amended complaint and the third-party complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on December 2 and 3, 2015, and January 22, and 25, 2016, and filed in the Monroe County Clerk’s Office on January 27, 2016,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

162

CA 15-01330

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

SHAWN LASKER, PLAINTIFF-RESPONDENT,

V ORDER

4950 GENESEE STREET, LLC, ET AL., DEFENDANTS,
AND GREENMAN-PEDERSEN, INC., DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (MARC C. PANEPINTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GOLDBERG SEGALLA, LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR DEFENDANTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered November 25, 2014. The order denied the motion of defendant Greenman-Pedersen, Inc. to dismiss the plaintiff's complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 9, 2016, and filed in the Erie County Clerk's Office on March 30, 2016,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

467

KA 12-02150

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT A. NAUHEIMER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT A. NAUHEIMER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 8, 2012. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that he was deprived of effective assistance of counsel because his attorney failed to recognize and pursue a justification defense at trial pursuant to Penal Law § 35.20 (3), which permits the use of deadly physical force "to prevent or terminate the commission or attempted commission" of a burglary. We reject that contention. There is no dispute that defendant killed the unarmed victim, who was an acquaintance of defendant, by stabbing him in the chest with a 10-inch butcher knife inside the home in which defendant lived. The knife struck the victim's heart, causing his death. Instead of pursuing a justification defense at trial, defense counsel argued that defendant did not intend to kill the victim, and that the stabbing was accidental. There is no evidence in the record that the victim was committing a burglary, and the defense pursued by counsel was consistent with defendant's trial testimony. Notably, defendant did not testify that he stabbed the victim to prevent him from committing a burglary; instead, he testified that the stabbing was accidental. If, as defendant claimed, the stabbing was accidental, it could not have been justifiable under Penal Law § 35.20 (3). In any event, we note that defense counsel's strategy was not wholly unsuccessful, inasmuch as the jury acquitted defendant of murder in the second degree and convicted him of manslaughter in the

first degree as a lesser included offense.

Although defense counsel could have argued that defendant did not intend to kill the victim, but that, even if he did, defendant did so to prevent or terminate a burglary, the "hazardous" nature of pursuing inconsistent defenses is well established, "for it not only risks confusing the jury as to the nature of the defense but may well taint a defendant's credibility in the eyes of the jury" (*People v DeGina*, 72 NY2d 768, 777; *see People v Myers*, 283 AD2d 258, 259, *lv denied* 96 NY2d 922). Under the circumstances, counsel's failure to request a justification charge "may have been based on a reasonable strategic determination that such a charge would be counterproductive and difficult to reconcile with the accidental [stabbing] claim" (*People v Poston*, 95 AD3d 729, 730-731, *lv denied* 19 NY3d 1104; *see generally People v Benevento*, 91 NY2d 708, 712-713; *People v Rivera*, 71 NY2d 705, 708-709). To the extent that defendant contends that defense counsel did not understand the law as it related to justification under Penal Law § 35.20 (3), such contention is based on matters outside the record and is appropriately raised by way of a CPL 440.10 motion (*see People v Youngs*, 101 AD3d 1589, 1589, *lv denied* 20 NY3d 1105; *People v Paduano*, 84 AD3d 1730, 1731).

We have reviewed defendant's remaining contentions raised in his main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment.

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

569

CA 15-01762

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

MICHAEL R. EBELING, PLAINTIFF-APPELLANT,

V ORDER

JOSHUA R. WALKER AND KEVIN J. KERL, INC., DOING BUSINESS AS CARMASTERS COLLISION & GLASS, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (THOMAS D. SEAMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered July 7, 2015. The order denied the motion of plaintiff for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties, and filed in the Erie County Clerk's Office on February 22, 2016,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

654

CAE 16-01389

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION OF BRENT P. SHELDON, OBJECTOR, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SALLY A. JAROSZYNSKI, PURPORTED CANDIDATE FOR CHAUTAUQUA COUNTY FAMILY COURT JUDGE, RESPONDENT, NORMAN P. GREEN, COMMISSIONER, CHAUTAUQUA COUNTY BOARD OF ELECTIONS, RESPONDENT-APPELLANT, AND BRIAN C. ABRAM, COMMISSIONER, CHAUTAUQUA COUNTY BOARD OF ELECTIONS, RESPONDENT-RESPONDENT.

MICHAEL ROBERT CERRIE, DUNKIRK, FOR RESPONDENT-APPELLANT.

SEAN W. CONNOLLY, FREDONIA, FOR PETITIONER-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SALLY A. JAROSZYNSKI, FALCONER, RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered August 12, 2016 in a proceeding pursuant to the Election Law. The order, insofar as appealed from, invalidated signatures on the designating petition of respondent Sally A. Jaroszynski.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Respondent Norman P. Green, Commissioner of the Chautauqua County Board of Elections, appeals from an order that, inter alia, invalidated the designating petition of respondent Sally A. Jaroszynski by which Jaroszynski sought to be designated as a Conservative Party candidate for the office of Chautauqua County Family Court Judge in the September 13, 2016 primary election. We agree with petitioner that Green is not aggrieved by the order, and we therefore conclude that this appeal must be dismissed (*see Matter of Terranova v Fudoli*, 66 AD3d 1530, 1531; *Matter of Carney v Davignon*, 289 AD2d 1096, 1097; *Matter of Mantello v Board of Elections of Rensselaer County*, 265 AD2d 592, 593; *Matter of Brown v Starkweather*, 197 AD2d 840, 841, *lv denied* 82 NY2d 653). We further note that Jaroszynski did not take an appeal from the order (*see* CPLR 5515 [1]). Therefore, any contentions raised by her are beyond our review (*see*

Hecht v City of New York, 60 NY2d 57, 61; *see also Matter of Carroll v Chugg*, 141 AD3d 1106; *see generally Matter of Espinoza v Berbary*, 288 AD2d 934, 934).

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

655

CAE 16-01394

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION OF BRENT P. SHELDON, OBJECTOR, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHERRY A. BJORK, PURPORTED CANDIDATE FOR CHAUTAUQUA COUNTY FAMILY COURT JUDGE, NORMAN P. GREEN, COMMISSIONER, CHAUTAUQUA COUNTY BOARD OF ELECTIONS AND BRIAN C. ABRAM, COMMISSIONER, CHAUTAUQUA COUNTY BOARD OF ELECTIONS, RESPONDENTS-RESPONDENTS.

SEAN W. CONNOLLY, FREDONIA, FOR PETITIONER-APPELLANT.

BURGETT & ROBBINS, LLP, JAMESTOWN (ROBERT A. LIEBERS OF COUNSEL), FOR RESPONDENT-RESPONDENT SHERRY A. BJORK, PURPORTED CANDIDATE FOR CHAUTAUQUA COUNTY FAMILY COURT JUDGE.

Appeal from an order of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered August 15, 2016 in a proceeding pursuant to the Election Law. The order, among other things, determined that the designating petition by which respondent Sherry A. Bjork sought to be designated a Republican Party candidate for the office of Chautauqua County Family Court Judge in the September 13, 2016 primary election has sufficient signatures and is valid.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to Election Law article 16 seeking to invalidate the designating petition of respondent Sherry A. Bjork by which Bjork sought to be designated a Republican Party candidate for the office of Chautauqua County Family Court Judge in the September 13, 2016 primary election. Of the 1221 signatures on the designating petition, petitioner objected to 362, and a third party objected to 25. The Chautauqua County Board of Elections (Board of Elections) sustained 176 of petitioner's objections and all of the third party's objections, with an overlap of 20 sustained objections between the two objectors. Inasmuch as the petition was left with more than the required 1000 signatures, the Board of Elections determined that the petition was valid.

As an initial matter, we conclude that Supreme Court properly entertained Bjork's challenge to the determination of the Board of

Elections invalidating certain signatures. Bjork's affidavit in opposition to the petition "was adequate to alert the petitioner[] that the signatures previously declared invalid would be contested" (*Matter of Halloway v Blakely*, 77 AD2d 932, 932; *cf. Matter of Nagubandi v Polentz*, 131 AD3d 639, 641).

With respect to the two signature sheets that the Board of Elections invalidated because the witness statements were printed on separate sheets that were stapled to the signature sheets, we conclude that the court properly validated those sheets on the ground that they substantially complied with the requirements of Election Law § 6-132 (2) (*see Matter of DiNonno v Castioni*, 43 AD3d 476, 476-477, *lv denied* 9 NY3d 804; *Matter of Bay v Santoianni*, 264 AD2d 488, 489, *lv denied* 93 NY2d 817; *Matter of Rothstein v Healey*, 23 AD2d 758, 758).

Contrary to petitioner's further contention, the court was not required to invalidate all of the signature sheets notarized by Laura Greenwood. There was no evidence of mistake or tampering with respect to five of the signature sheets notarized by Greenwood, and thus petitioner failed "to overcome the presumption of regularity" attached to those signature sheets (*Matter of Napier v Salerno*, 74 AD2d 960, 960).

Finally, we reject petitioner's challenge based on the addresses listed on the petition. "[T]he fact that the address appearing on a voter's registration record differs from the address provided by that voter on the petition he or she signed does not provide a basis for invalidating the signature at issue" (*Matter of Curley v Zacek*, 22 AD3d 954, 957, *lv denied* 5 NY3d 714; *see Matter of Bray v Marsolais*, 21 AD3d 1143, 1146; *Matter of Hudson v Board of Elections of City of N.Y.*, 207 AD2d 508, 509).

Entered: August 17, 2016

Frances E. Cafarell
Clerk of the Court