



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 30, 2019

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. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR MAY 30, 2019 TERM

Case Name

Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
CATTARAUGUS COUNTY *****				
AUGOSTINI, SONDR A. v BERNSTEIN, ALAN				
740.2	CAE 19-01008	05/30/2019	05/30/2019	(88002)
MARSH, NORMAN L. v HALE, JOHN W.				
737	CAE 19-01001	05/30/2019	05/30/2019	(88007)

Total Cases Listed for this county = 2

ERIE COUNTY *****

CRAIG, ANTIONETTE T. v BORRERO, EDELINA				
739	CAE 19-01003	05/30/2019	05/30/2019	(2019-0067)
MCMAHAN, MELANIE A. v ERIE COUNTY BOARD OF ELECTIONS,				
740	CAE 19-01005	05/30/2019	05/30/2019	(2019-0068)
RADLE, BERNICE M., TOLES, JORDAN D. v				
740.1	CAE 19-01006	05/30/2019	05/30/2019	(2019-0061)
REESE, PETER A. v ERIE COUNTY BOARD OF ELECTIONS,				
736	CAE 19-00957	05/30/2019	05/30/2019	(2019-0071)

Total Cases Listed for this county = 4

MONROE COUNTY *****

CORRYN, STEPHEN v BELLO, ADAM				
738	CAE 19-01002	05/30/2019	05/30/2019	(2184-19)

Total Cases Listed for this county = 1

ONEIDA COUNTY *****

MCNIEL, TRAVIS v MARTN, KATRINA				
734	CAE 19-00955	05/30/2019	05/30/2019	

Total Cases Listed for this county = 1

SENECA COUNTY *****

MCDONALD, WILLIAM C. v SENECA COUNTY BOARD OF ELECTIONS,				
735	CAE 19-00846	05/30/2019	05/30/2019	(52795-2019)

Total Cases Listed for this county = 1

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

734

CAE 19-00955

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF TRAVIS MCNIEL,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KATRINA MARTIN, ALSO KNOWN AS KATRINA G. MARTIN,
RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

ROSSI & ROSSI, ATTORNEYS AT LAW, PLLC, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 13, 2019 in a proceeding pursuant to Election Law article 16. The order, insofar as appealed from, granted the petition and invalidated the designating petitions of respondent Katrina Martin for candidacy for the office of Common Council Member, First Ward, in the City of Utica in the June 2019 primary election on the Conservative Party, Republican Party and Independence Party lines.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding seeking to invalidate the designating petitions pursuant to which Katrina Martin, also known as Katrina G. Martin (respondent), sought to be placed on the June 2019 primary election ballots for the Conservative Party, Republican Party, and Independence Party as a candidate for the office of Common Council Member, First Ward, in the City of Utica. Petitioner alleged, inter alia, that respondent did not live at the address that she provided on the designating petitions as her place of residence. Respondent appeals from an order to the extent that it granted the petition and invalidated the designating petitions on that ground, and we reverse the order insofar as appealed from.

Respondent contends that, although she had not yet moved to the address provided as her place of residence on the designating petitions at the time that they were circulated, the designating petitions should not have been invalidated inasmuch as the record establishes that she intended the address to be "that place where [she] maintains a fixed, permanent and principal home" (Election Law § 1-104 [22]). We agree.

The record reflects that respondent was actively engaged in

renovating the property at the address provided on the designating petitions, that respondent signed a temporary lease for a property also located within the relevant voting district, and that respondent intended on permanently residing at the property listed on the designating petitions once renovations were complete. Indeed, Supreme Court expressly noted that it did not "question . . . the integrity of [respondent's] testimony in saying that [it was] her intention to live [at the address]." Notwithstanding the fact that the address listed on the designation petitions was not respondent's current residence and thus did not comply with Election Law § 6-132, "[w]here, as here, there is no proof of any intention on the part of the candidate or of those who have solicited signatures on his [or her] behalf to mislead or confuse, and no evidence that the inaccuracy did or would lead or tend to lead to misidentification or confusion on the part of those invited to sign the petition or seeking to verify his [or her] qualification," the petition should not be invalidated (*Matter of Ferris v Sadowski*, 45 NY2d 815, 817 [1978]; see *Matter of Vescera v Karp*, 131 AD3d 1338, 1339 [4th Dept 2015]; *Matter of McManus v Relin*, 286 AD2d 855, 856 [4th Dept 2001], *lv denied* 96 NY2d 718 [2001]).

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

735

CAE 19-00846

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF WILLIAM C. MCDONALD,
PETITIONER-APPELLANT,

V

ORDER

SENECA COUNTY BOARD OF ELECTIONS, CARL J. SAME,
COMMISSIONER, AND TIFFANY S. FOLK, COMMISSIONER,
RESPONDENTS-RESPONDENTS.

WILLIAM C. MCDONALD, PETITIONER-APPELLANT PRO SE.

DAVID K. ETTMAN, COUNTY ATTORNEY, WATERLOO, FOR
RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered May 1, 2019 in a proceeding pursuant to Election Law article 16. The order dismissed the petition.

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

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

736

CAE 19-00957

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF PETER A. REESE,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY BOARD OF ELECTIONS, JEREMY ZELLNER,
AS COMMISSIONER OF ERIE COUNTY BOARD OF ELECTIONS,
RALPH MOHR, AS COMMISSIONER OF ERIE COUNTY BOARD
OF ELECTIONS, AND LYNN M. DEARMYER-LEE,
RESPONDENTS-RESPONDENTS.

PETER A. REESE, PETITIONER-APPELLANT PRO SE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS ERIE COUNTY BOARD OF ELECTIONS,
JEREMY ZELLNER, AS COMMISSIONER OF ERIE COUNTY BOARD OF ELECTIONS,
AND RALPH MOHR, AS COMMISSIONER OF ERIE COUNTY BOARD
OF ELECTIONS.

JESSICA A. KULPIT, BUFFALO, AND VANDETTE PENBERTHY, LLP, FOR
RESPONDENT-RESPONDENT LYNN M. DEARMYER-LEE.

Appeal from an order of the Supreme Court, Erie County
(Christopher J. Burns, J.), entered May 9, 2019 in a proceeding
pursuant to Election Law article 16. The order upheld the
determination of respondent Erie County Board of Elections
invalidating the designating petition of petitioner.

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 validate his designating petition
for the position of Erie County Executive. The designating petition
was invalidated by respondent Erie County Board of Elections (Board),
based upon objections filed by Lynn M. Dearmyer-Lee (respondent), on
the ground that it lacked a sufficient number of valid signatures.
Supreme Court dismissed the petition, and petitioner appeals.

As an initial matter, we decline to consider the request for
declaratory relief raised by petitioner in his brief inasmuch as the
petition itself "does not seek declaratory relief" (*Matter of Burros v
Village of Dansville*, 242 AD2d 935, 935 [4th Dept 1997]).

We reject petitioner's contention that respondent failed to

adequately specify the grounds for her objections to petitioner's designating petition (see Election Law § 6-154 [2]; 9 NYCRR 6204.1). In any event, in this proceeding to validate his designating petition, petitioner had the burden of establishing the validity of the designating petition (see *Matter of Boniello v Niagara County Bd. of Elections*, 131 AD3d 806, 807 [4th Dept 2015]), and we conclude that he failed to meet that burden.

Petitioner further contends that the Board violated the Open Meetings Law by precluding him from filming its meeting to review respondent's objections to the designating petition (see Public Officers Law § 103 [d] [1]). Even assuming, arguendo, that "the Board's meeting to review objections to petitioner's designating petition, which did not involve deliberation on a matter of public policy, could be deemed subject to the Open Meetings Law" (*Matter of Krauss v Suffolk County Bd. of Elections*, 153 AD3d 1211, 1213 [2d Dept 2017]; see generally *Matter of Perez v City Univ. of N.Y.*, 5 NY3d 522, 528 [2005]), we note that " '[n]ot every breach of the "Open Meetings Law" automatically triggers its enforcement sanctions' " (*Matter of Max v Ward*, 107 AD3d 1597, 1600 [4th Dept 2013], quoting *Matter of New York Univ. v Whalen*, 46 NY2d 734, 735 [1978]; see § 107 [1]). We conclude that petitioner has "failed to show good cause why . . . we should exercise our discretion" to impose the requested sanctions against the Board (*Max*, 107 AD3d at 1600 [internal quotation marks omitted]).

We have reviewed petitioner's remaining contentions and conclude that none warrants reversal or modification of the order.

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

737

CAE 19-01001

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF NORMAN L. MARSH,
PETITIONER-APPELLANT,

V

ORDER

JOHN W. HALE, CANDIDATE,
CORTNEY SPITTLER AND KEVIN C. BURLESON,
COMMISSIONERS, CONSTITUTING THE CATTARAUGUS
COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS.

SHANE AND FIRKEL PC, OLEAN (ERIC FIRKEL OF COUNSEL), FOR
PETITIONER-APPELLANT.

LEWIS & LEWIS, P.C., OLEAN (EDWARD A. SUNDQUIST OF COUNSEL), FOR
RESPONDENT-RESPONDENT JOHN W. HALE, CANDIDATE.

RALPH M. MOHR, LANCASTER, FOR RESPONDENT-RESPONDENT CORTNEY SPITTLER,
COMMISSIONER, CONSTITUTING THE CATTARAUGUS COUNTY BOARD OF ELECTIONS.

Appeal from an order (denominated judgment) of the Supreme Court, Cattaraugus County (Dennis Ward, J.), entered May 9, 2019 in a proceeding pursuant to Election Law article 16. The order denied the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

738

CAE 19-01002

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF STEPHEN CORRYN, OBJECTOR,
MATTHEW SCARFIA, OBJECTOR, CHERYL DINOLFO,
CANDIDATE AGGRIEVED AND GREGORY J. DEVLIN,
CANDIDATE AGGRIEVED,
PETITIONERS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

ADAM BELLO, CANDIDATE, JOSEPH D. MORELLE, JR.,
CANDIDATE, FRANK MACKAY, AS CHAIRMAN OF NEW YORK
STATE COMMITTEE OF INDEPENDENCE PARTY, WILLIAM BOGARDT,
AS SECRETARY OF EXECUTIVE COMMITTEE OF NEW
YORK STATE COMMITTEE OF INDEPENDENCE PARTY,
RESPONDENTS-APPELLANTS-RESPONDENTS,
NEW YORK STATE BOARD OF ELECTIONS, ET AL.,
RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF NEW YORK STATE COMMITTEE
OF INDEPENDENCE PARTY, EXECUTIVE COMMITTEE OF
INDEPENDENCE PARTY, FRANK M. MACKAY, AS CHAIRMAN
OF NEW YORK STATE COMMITTEE OF INDEPENDENCE
PARTY, WILLIAM BOGARDT, AS SECRETARY OF NEW YORK
STATE COMMITTEE OF INDEPENDENCE PARTY, ADAM J.
BELLO, CANDIDATE AGGRIEVED, JESSICA L. LEARY,
OBJECTOR, JOSEPH D. MORELLE, JR., CANDIDATE
AGGRIEVED AND JOSEPH L. D'ANGELO, OBJECTOR,
PETITIONERS-APPELLANTS-RESPONDENTS,

V

NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS E.
FRENCH AND THOMAS FERRARESE, AS COMMISSIONERS
OF MONROE COUNTY BOARD OF ELECTIONS, RESPONDENTS,
STEPHEN CORRYN, AS CHAIRMAN OF MONROE COUNTY
COMMITTEE OF INDEPENDENCE PARTY, LYNELLEN P.
CORRYN, AS SECRETARY OF MONROE COUNTY COMMITTEE
OF INDEPENDENCE PARTY, CHERYL DINOLFO,
CANDIDATE, GREGORY J. DEVLIN, CANDIDATE, AND
MONROE COUNTY INDEPENDENCE PARTY,
RESPONDENTS-RESPONDENTS-APPELLANTS.
(PROCEEDING NO. 2.)

GREENBERG TRAUIG, LLP, ALBANY (ROBERT M. HARDING OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS ADAM BELLO, CANDIDATE, JOSEPH D. MORELLE, JR., CANDIDATE, FRANK MACKAY, AS CHAIRMAN OF NEW YORK STATE COMMITTEE OF INDEPENDENCE PARTY, WILLIAM BOGARDT, AS SECRETARY OF EXECUTIVE COMMITTEE OF NEW YORK STATE COMMITTEE OF INDEPENDENCE PARTY IN PROCEEDING NO. 1 AND PETITIONERS-APPELLANTS-RESPONDENTS NEW YORK STATE COMMITTEE OF INDEPENDENCE PARTY, EXECUTIVE COMMITTEE OF INDEPENDENCE PARTY, FRANK M. MACKAY, AS CHAIRMAN OF NEW YORK STATE COMMITTEE OF INDEPENDENCE PARTY, WILLIAM BOGARDT, AS SECRETARY OF NEW YORK STATE COMMITTEE OF INDEPENDENCE PARTY, ADAM J. BELLO, CANDIDATE AGGRIEVED, JESSICA L. LEARY, OBJECTOR, JOSEPH D. MORELLE, JR., CANDIDATE AGGRIEVED AND JOSEPH L. D'ANGELO, OBJECTOR, IN PROCEEDING NO. 2.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS STEPHEN CORRYN, OBJECTOR, MATTHEW SCARFIA, OBJECTOR, CHERYL DINOLFO, CANDIDATE AGGRIEVED AND GREGORY J. DEVLIN, CANDIDATE AGGRIEVED IN PROCEEDING NO. 1 AND RESPONDENTS-RESPONDENTS-APPELLANTS STEPHEN CORRYN, AS CHAIRMAN OF MONROE COUNTY COMMITTEE OF THE INDEPENDENCE PARTY, LYNELLEN P. CORRYN, AS SECRETARY OF MONROE COUNTY COMMITTEE OF INDEPENDENCE PARTY, CHERYL DINOLFO, CANDIDATE, GREGORY J. DEVLIN, CANDIDATE, AND MONROE COUNTY INDEPENDENCE PARTY, IN PROCEEDING NO. 2.

Appeal and cross appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered May 3, 2019 in proceedings pursuant to Election Law article 16. The judgment and order, inter alia, denied in its entirety the petition in proceeding No. 1 and granted in part and denied in part the petition in proceeding No. 2.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting judgment in favor of petitioners-respondents-appellants as follows:

It is ADJUDGED and DECLARED that the certificates of authorization issued by the Monroe County Committee of the Independence Party designating petitioner-respondent Cheryl Dinolfo as an Independence Party candidate for the office of Monroe County Executive and designating petitioner-respondent Gregory J. Devlin as an Independence Party candidate for the office of Monroe County Legislator for the 17th District in the primary election to be held on June 25, 2019 are valid,

and as modified the judgment and order is affirmed without costs.

Memorandum: In these consolidated proceedings pursuant to, inter alia, Election Law article 16 and CPLR 3001, respondents-petitioners-appellants (respondents) appeal, and petitioners-respondents-appellants (petitioners) cross-appeal from a judgment and order that, among other things, determined that the conflicting sets of Wilson-

Pakula certificates of authorization (certificates) with respect to candidates for public office in Monroe County issued by the State Executive Committee of the New York State Committee of the Independence Party, a petitioner in proceeding No. 2, and the Monroe County Committee of the Independence Party (County Committee) were both valid. We conclude that Supreme Court properly determined that both sets of certificates were valid for reasons stated in its decision. Inasmuch as respondents in their petition sought a declaration that the certificates issued by the County Committee are invalid, however, the court should have made a declaration in favor of petitioners with respect to that issue (*see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Matter of Max v Ward*, 107 AD3d 1597, 1601 [4th Dept 2013]), and we modify the judgment and order accordingly.

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

739

CAE 19-01003

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF ANTIONETTE T. CRAIG,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

EDELINA BORRERO, ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK T. HOUSH OF COUNSEL), FOR
PETITIONER-APPELLANT.

VANDETTE PENBERTHY, LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR RESPONDENT-RESPONDENT EDELINA BORRERO.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTTH OF
COUNSEL), FOR RESPONDENT-RESPONDENT ERIE COUNTY BOARD OF ELECTIONS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.) entered May 2, 2019 in a proceeding pursuant to Election Law article 16. The order upheld the determination of respondent Erie County Board of Elections and adjudged that petitioner candidate Antionette T. Craig will not appear on the primary election ballot for the Democratic Party as a candidate for the City of Buffalo Common Council.

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

Memorandum: Petitioner commenced this proceeding pursuant to Election Law § 16-102 seeking an order validating her designating petition to be placed on the primary election ballot for the Democratic Party as a candidate for the City of Buffalo Common Council. Supreme Court dismissed the petition, and petitioner appeals.

Petitioner contends that her designating petition substantially complied with Election Law § 6-132 (2) and that, in determining that the "statement of witness" portion of her designating petition did not substantially comply with the requirements of section 6-132 (2), respondent Erie County Board of Elections (Board) exceeded its ministerial authority (*see generally Schwartz v Heffernan*, 304 NY 474, 480 [1952]). We reject those contentions. The designating petition did not substantially comply with section 6-132 (2) because it failed to include, among other things, any language in the witness statements

identifying the party affiliation of the witnesses (see *Matter of Bailey v Power*, 12 Misc 2d 105, 106 [Sup Ct, Queens County 1958], *affd* 6 AD2d 996 [2d Dept 1958]; see generally *Matter of Hochhauser v Grinblat*, 307 AD2d 1007, 1008 [2d Dept 2003]). Moreover, that defect " 'appear[s] on the face of the [designating] petition' and, as such, concerns a ministerial objection within the power of [the Board] to review" (*Matter of Scavo v Albany County Bd. of Elections*, 131 AD3d 796, 797 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]).

We have reviewed petitioner's remaining contention and conclude that it is without merit.

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

740

CAE 19-01005

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF MELANIE A. MCMAHAN,
PETITIONER-APPELLANT,

V

ORDER

ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENT-RESPONDENT,
ET AL., RESPONDENT.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK T. HOUSH OF COUNSEL), FOR
PETITIONER-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTTH OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 2, 2019 in a proceeding pursuant to Election Law article 16. The order upheld the determination of respondent Erie County Board of Elections and adjudged that petitioner candidate Melanie A. McMahan will not appear on the primary election ballot for the Democratic Party as a candidate for the City of Buffalo Common Council.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in *Matter of Craig v Borrero* (- AD3d - [May 30, 2019] [4th Dept 2019]).

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

740.1

CAE 19-01006

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF JORDAN D. TOLES,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

BERNICE M. RADLE, RESPONDENT-APPELLANT,
AND ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENT-RESPONDENT.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK T. HOUSH OF COUNSEL), FOR
RESPONDENT-APPELLANT.

VANDETTE PENBERTHY, LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR PETITIONER-RESPONDENT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTTH OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 2, 2019 in a proceeding pursuant to Election Law article 16. The order upheld the determination of respondent Erie County Board of Elections and adjudged that respondent candidate Bernice M. Radle will not appear on the primary election ballot for the Democratic Party as a candidate for the City of Buffalo Common Council.

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

Memorandum: Petitioner commenced this proceeding pursuant to Election Law § 16-102 seeking to invalidate a designating petition to place Bernice M. Radle (respondent) on the primary election ballot for the Democratic Party as a candidate for the City of Buffalo Common Council. While the proceeding was pending, respondent Erie County Board of Elections (Board) determined that the designating petition was invalid. In a subsequent attorney affirmation in the proceeding commenced by petitioner, respondent contended that the Board exceeded its ministerial authority in invalidating the designating petition, and requested that Supreme Court validate it. Supreme Court declined to validate the designating petition, and respondent appeals.

Inasmuch as respondent did not bring a petition to validate her designating petition, the court "acted properly in not validating signatures which had been declared invalid by the Board" (*Matter of*

Rodriguez v Nieves, 242 AD2d 350, 350 [2d Dept 1997]; see *Matter of Krueger v Richards*, 59 NY2d 680, 682-683 [1983]).

Respondent's remaining contention concerning allegations of fraud is not properly before us. The court made no determination of fraud against her, and she is therefore not an aggrieved party with respect to that issue (see generally CPLR 5501, 5511; *Matter of Carney v Davignon*, 289 AD2d 1096, 1097 [4th Dept 2001]).

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court

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

740.2

CAE 19-01008

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF SONDR A M. AUGOSTINI,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ALAN BERNSTEIN, DONNA M. VICKMAN, GINGER D. SCHRÖDER, ET AL., RESPONDENTS-APPELLANTS, CATTARAUGUS COUNTY BOARD OF ELECTIONS, KEVIN C. BURLESON AND CORTNEY SPITTLER, COMMISSIONERS OF AND CONSTITUTING THE CATTARAUGUS COUNTY BOARD OF ELECTIONS, RESPONDENTS-RESPONDENTS, CATTARAUGUS COUNTY INDEPENDENCE PARTY, ET AL., RESPONDENTS.

SHANE AND FIRKEL PC, OLEAN (ERIC M. FIRKEL OF COUNSEL), FOR RESPONDENTS-APPELLANTS ALAN BERNSTEIN, ET AL.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (GINGER D. SCHRÖDER OF COUNSEL), FOR RESPONDENTS-APPELLANTS DONNA M. VICKMAN AND GINGER D. SCHRÖDER.

LEWIS & LEWIS, P.C., OLEAN (EDWARD A. SUNDQUIST OF COUNSEL), FOR PETITIONER-RESPONDENT.

RALPH M. MOHR, LANCASTER, FOR RESPONDENT-RESPONDENT CORTNEY SPITTLER, COMMISSIONER OF AND CONSTITUTING THE CATTARAUGUS COUNTY BOARD OF ELECTIONS.

JEROME D. SCHAD, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT KEVIN C. BURLESON, COMMISSIONER OF AND CONSTITUTING THE CATTARAUGUS COUNTY BOARD OF ELECTIONS.

Appeal from an order (denominated judgment) of the Supreme Court, Cattaraugus County (Dennis Ward, J.), entered May 20, 2019 in a proceeding pursuant to Election Law article 16. The order, insofar as appealed from, granted the petition in part.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed in its entirety.

Memorandum: Petitioner commenced this proceeding pursuant to Election Law article 16 seeking an order invalidating a certificate of authorization (authorization) issued by respondent Cattaraugus County Independence Party (Party), and the designating petitions of certain

candidates alleged to have been named therein (candidate respondents). According to the authorization, the candidates designated therein were authorized at the Party's March 2, 2019 meeting. However, petitioner alleged that one of the candidate respondents, Donna M. Vickman, could not have been authorized at that meeting because the office for which she was running was not yet vacant on that date. Petitioner further alleged that the chairwoman and secretary of the Party knew or had reason to know that Vickman was not authorized on March 2, but nevertheless submitted the authorization and, thus, the entire authorization should be invalidated because it was permeated with fraud. Supreme Court agreed with petitioner and issued an order invalidating the authorization and designating petitions with respect to all but one candidate respondent, who had been named as a party but was, in fact, not included on the authorization. Candidate respondents appeal.

At the outset, we reject petitioner's contention that the order appealed from was one entered on default, from which no appeal would lie (*see generally Vaca v Village View Hous. Corp.*, 170 AD3d 619, 620 [1st Dept 2019]; *Matter of 144 Stuyvesant, LLC v Goncalves*, 119 AD3d 695, 696 [2d Dept 2014]).

We agree with candidate respondents that the court improperly struck their answer, filed on April 24, 2019, based on alleged defects in the verification and denials. CPLR 3026 provides that "[p]leadings shall be liberally construed" and that "[d]efects shall be ignored if a substantial right of a party is not prejudiced." Here, we conclude that petitioner did not establish substantial prejudice from any alleged defect in the verification, and thus candidate respondents' answer should not have been stricken on that ground (*see Matter of Angletti v Morreale*, 131 AD3d 808, 810 [4th Dept 2015], *affd* 25 NY3d 794 [2015]; *Matter of Harder v Kuhn*, 153 AD3d 1119, 1120 [3d Dept 2017]; *cf. Matter of Atwood v Pridgen*, 142 AD3d 1278, 1279 [4th Dept 2016], *lv denied* 28 NY3d 945 [2016]; *see generally* CPLR 3020 [d]). Moreover, "the CPLR does not provide for the striking of improper denials" (*Gilberg v Lennon*, 193 AD2d 646, 646 [2d Dept 1993]).

Furthermore, we note that candidate respondents properly raised standing as an affirmative defense in their April 24 answer, and we agree with candidate respondents that petitioner lacked standing to commence this proceeding pursuant to Election Law article 16. A condition precedent to commencing a proceeding as an objector pursuant to section 16-102 is compliance with the requirements of section 6-154, including that the objector be a "voter registered to vote for such public office" (§ 6-154 [2]).

Here, petitioner served her specifications of objections upon Vickman and upon the chairwoman and the secretary of the Party only, and not on any of the other candidate respondents listed on the authorization. Petitioner, however, lacked standing to challenge the designating petition of Vickman or to challenge the authorization as it pertained to Vickman, who was running for public office in the Town of Farmersville, because petitioner was not a resident of that town (*see* Election Law § 6-154 [2]; *Matter of Liotti v Nassau County Bd. of*

Elections, 171 AD2d 769, 769 [2d Dept 1991]; see also *Matter of Luthmann v Gulino*, 131 AD3d 636, 637 [2d Dept 2015], lv denied 25 NY3d 914 [2015]).

In addition, because petitioner served her specifications of objections upon Vickman and upon the chairwoman and the secretary of the Party only, we conclude that petitioner lacked any other basis for standing to challenge the authorization (*cf. Matter of Hardwick v Ward*, 109 AD3d 1223, 1224 [4th Dept 2013], lv denied 22 NY3d 851 [2013]). Under the circumstances, petitioner lacks standing to challenge the authorization, and thus petitioner's challenge to the designating petitions of the other candidate respondents is foreclosed inasmuch as it is based on the challenge to the authorization on which they were included. We thus conclude that the order should be reversed insofar as appealed from and the petition dismissed. In view of our determination, we do not address candidate respondents' remaining contentions.

Entered: May 30, 2019

Mark W. Bennett
Clerk of the Court