SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 13, 2020

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. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED MAY 13, 2020

_____	560.1	CAE 20 00539	JORDAN D. TOLES V ROBERT QUINTANA
_____	560.2	CAE 20 00547	LISA SAUNDERS V EMIN E. EGRIU
_____	560.3	CAE 20 00555	JAMES J. MONTO, III V JASON BAY ZEIGLER

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

560.1

CAE 20-00539

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

IN THE MATTER OF JORDAN D. TOLES AND
JONATHAN D. RIVERA, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERT QUINTANA, ERIE COUNTY BOARD OF ELECTIONS,
JEREMY ZELLNER, AS COMMISSIONER OF THE ERIE
COUNTY BOARD OF ELECTIONS, AND RALPH MOHR, AS
COMMISSIONER OF THE ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS.

VANDETTE PENBERTHY LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR PETITIONERS-APPELLANTS.

JOSEPH A. MATTELIANO, BUFFALO, AND JAMES OSTROWSKI, FOR RESPONDENT-
RESPONDENT ROBERT QUINTANA.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered April 27, 2020 in a proceeding pursuant to Election Law article 16. The order denied the petition to invalidate the designating petition of respondent Robert Quintana.

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

Memorandum: Petitioners commenced this proceeding pursuant to Election Law article 16 seeking to invalidate the designating petition of respondent Robert Quintana as a Democratic candidate for the office of New York State Assembly Member for the 149th Assembly District. Quintana's designating petition, which contained 928 signatures, was submitted to respondent Erie County Board of Elections (Board). However, upon the Board's consideration of the objections that were registered by petitioner Jordan D. Toles, 681 of the signatures were invalidated, leaving 247 valid signatures. The parties agree that the designating petition must have at least 150 valid signatures for Quintana to secure a place on the ballot for the June 23, 2020 primary. Following a hearing, Supreme Court invalidated three additional signatures and otherwise denied the petition. At issue on this appeal are challenges to 96 signatures on the designating petition.

Petitioners contend that the court should have struck sheets 10, 13, and 16 from the designating petition because the subscribing witness, Quintana's daughter, committed fraud. At the hearing, petitioners presented testimony that three of the purported signers

did not sign the designating petition. Quintana's daughter was subpoenaed but did not appear. The court struck the only two signatures on sheet 10 and one signature on sheet 16 but rejected petitioners' request to strike 26 additional signatures on sheets 13 and 16, holding that petitioners failed to establish that those sheets were the product of fraud.

We conclude that the court erred in refusing to strike the 26 signatures on sheets 13 and 16. Where a subscribing witness falsely swears to a designating petition sheet and does not testify at the hearing, the court may declare that all of the designating petition sheets subscribed by that witness are invalid (*see Matter of Bloom v Power*, 21 Misc 2d 885, 890 [Sup Ct, Kings County 1959], *affd* 9 AD2d 626 [2d Dept 1959], *affd* 6 NY2d 1001 [1959]; *see also Matter of Haas v Costigan*, 14 AD2d 809, 810-811 [2d Dept 1961], *affd* 10 NY2d 889 [1961]; *Matter of Burns [Sullivan]*, 199 Misc 1005, 1007-1008 [Sup Ct, Queens County 1951], *affd* 278 App Div 1023 [2d Dept 1951], *affd* 303 NY 601 [1951]). Here, inasmuch as Quintana's daughter failed to testify at the hearing and petitioners established that three of the signatures on the designating petition had not been signed by the purported signer, we conclude that the court should have stricken the 26 signatures on sheets 13 and 16.

Petitioners also seek the invalidation of 45 printed signatures on the designating petition on the ground that they failed to correspond to the voter registration forms that petitioners obtained from the Board and submitted to the court as part of their case in chief. Given the illegibility of some of the printed signatures on the designating petition, the exact number of corresponding voter registration cards that petitioners submitted is unclear, but the parties agree in their briefs that petitioners submitted only 31 voter registration cards as part of their case in chief.

It is well settled that "[t]o prevent fraud and allow for a meaningful comparison of signatures when challenged, a signature on a designating petition should be made in the same manner as on that signatory's registration form" (*Matter of Lord v New York State Bd. of Elections*, 98 AD3d 622, 623 [2d Dept 2012]; *see Matter of LaMarca v Quirk*, 110 AD3d 808, 810 [2d Dept 2013]; *Matter of Henry v Trotto*, 54 AD3d 424, 426 [2d Dept 2008]). As the party attacking the validity of the designating petition, petitioners bore the burden of proof (*see Matter of Salka v Magee*, 164 AD3d 1084, 1087 [3d Dept 2018], *lv denied* 31 NY3d 914 [2018]; *Matter of LaMendola v Mahoney*, 49 AD2d 798, 798 [4th Dept 1975]). We conclude that, while petitioners established that 31 of the printed signatures that had a corresponding voter registration card showing a script signature should be stricken, petitioners failed to meet their burden with respect to the 14 printed signatures on the designating petition that lacked a corresponding voter registration card. Contrary to petitioners' contention, the letter from the Board's attorney stating that there was no voter information on file for some printed signatures was not in proper evidentiary form and thus was, without more, insufficient to shift the burden to Quintana.

In view of our determination that petitioners failed to meet their burden of proof with respect to the invalidity of 14 of the printed signatures, it is unnecessary to address their remaining arguments because Quintana would have a sufficient number of valid signatures to be placed on the ballot even if petitioners were to prevail on those contentions.

Entered: May 13, 2020

Mark W. Bennett
Clerk of the Court

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

560.2

CAE 20-00547

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

IN THE MATTER OF LISA SAUNDERS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMIN EDDIE EGRIU, RESPONDENT-APPELLANT,
NEW YORK STATE BOARD OF ELECTIONS, AND PETER S. KOSINSKI, DOUGLAS KELLNER AND ANDREW SPANO, COMMISSIONERS OF AND CONSTITUTING THE NEW YORK STATE BOARD OF ELECTIONS, RESPONDENTS.

JAMES OSTROWSKI, BUFFALO, AND JEFFREY M. BINDER, P.C. & ASSOCIATES, WHITE PLAINS, FOR RESPONDENT-APPELLANT.

JEROME D. SCHAD, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered April 28, 2020 in a proceeding pursuant to Election Law article 16. The order granted the petition and invalidated the designating petition of respondent Emin Eddie Egriu.

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

Memorandum: Petitioner commenced this proceeding seeking to invalidate the designating petition pursuant to which Emin Eddie Egriu (respondent) sought to be placed on the June 2020 primary election ballot for the Democratic Party as a candidate for the office of Representative in Congress from the 26th Congressional District of New York.

On the last day for filing a designating petition, respondent filed three volumes of signature sheets, with separate cover sheets for each volume. The cover sheet for the first volume was labeled "Libertarian Party" and stated that it was volume one of three. The cover sheets for the second and third volumes were labeled "Democratic Party" and stated that they were volumes two of three and three of three, respectively. Respondents New York State Board of Elections, Peter S. Kosinski, Douglas Kellner and Andrew Spano, Commissioners of and constituting the New York State Board of Elections (Board), thereafter sent respondent two notices informing him that his Libertarian Party designating petition and his Democratic Party designating petition both failed to comply with regulations regarding the volume numbers listed on the cover sheets (*see generally* 9 NYCRR

6215.2 [a]), and giving him three business days to cure the defects. The following business day, respondent filed three new cover sheets, which were titled "amended" cover sheets. The first was labeled "Libertarian Party" and stated that it was volume one of one. The second and third were labeled "Democratic Party" and stated that they were volumes one of two and two of two, respectively. The Board ultimately determined that the amended cover sheets were sufficient and the designating petitions were presumptively valid.

In her petition to invalidate respondent's designating petition, petitioner alleged that the three volumes constitute an improper multiparty designating petition. Petitioner further alleged that respondent failed to file a timely Democratic Party designating petition because the cover sheet to the first volume identified all three volumes as a single petition for the Libertarian Party, which is a fatal defect not subject to cure. Supreme Court invalidated the designating petition and directed the Board to remove respondent's name from the ballot for the Democratic Party primary. Respondent appeals, and we affirm.

"The three-day cure provision for designating petitions (Election Law § 6-134 [2]) is available for technical violations of the regulations" (*Matter of May v Daly*, 254 AD2d 688, 689 [4th Dept 1998], *lv denied* 92 NY2d 806 [1998]). The errors in the originally-filed cover sheets here, however, were not mere violations "of some technical requirement having no logical bearing upon the underlying purpose of preventing fraud" (*Matter of Hogan v Goodspeed*, 196 AD2d 675, 678 [3d Dept 1993], *affd in part and appeal dismissed in part* 82 NY2d 710 [1993]). The cover sheets identified one petition only, and the cover sheet to the first volume labeled it a petition for the Libertarian Party. To permit respondent to submit amended cover sheets after the deadline for filing designating petitions in order to separate volumes two and three of the originally-filed petition into a new petition for the Democratic Party "would undermine procedural safeguards against both fraud and confusion" inasmuch as the original filing would lead interested parties to conclude that no separate Democratic Party designating petition had been filed (*Matter of Balberg v Board of Elections in the City of N.Y.*, 109 AD3d 910, 912 [2d Dept 2013]). Thus, contrary to respondent's contention, because the errors in the original cover sheets could "serve to frustrate the filing of general objections pursuant to Election Law § 6-154," they were not technical violations subject to cure (*Matter of Armwood v McCloy*, 109 AD3d 558, 560 [2d Dept 2013], *lv denied* 21 NY3d 861 [2013]), and the court therefore properly granted the petition.

Contrary to respondent's further contention, the regulatory provisions at issue here do not violate the First Amendment of the United States Constitution. It is well settled that "when a state election law 'imposes only reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights, then 'the State's important regulatory interests are generally sufficient to justify the restrictions' " (*Lerman v Board of Elections in City of N.Y.*, 232 F3d 135, 145 [2d Cir 2000], *cert denied* 533 US 915 [2001], quoting *Burdick*

v Takuski, 504 US 428, 434 [1992]; *see Prestia v O'Connor*, 178 F3d 86, 88 [2d Cir 1999], *cert denied* 528 US 1025 [1999]). We conclude that the reasonable and nondiscriminatory restrictions here impose a minimal burden on candidates and are rationally related to the State's interest in "facilitat[ing] the discovery of fraud and irregularity in designating petitions" (*Matter of Staber v Fidler*, 65 NY2d 529, 534 [1985]; *see Matter of Carnahan v Ward*, 44 AD3d 1249, 1250 [4th Dept 2007]).

Entered: May 13, 2020

Mark W. Bennett
Clerk of the Court

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

560.3

CAE 20-00555

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND BANNISTER, JJ.

IN THE MATTER OF JAMES J. MONTO, III,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JASON B. ZEIGLER, RESPONDENT-APPELLANT-RESPONDENT,
AND ONONDAGA COUNTY BOARD OF ELECTIONS,
RESPONDENT.

JOSEPH T. BURNS, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT-RESPONDENT, AND JASON B. ZEIGLER, RESPONDENT-APPELLANT-RESPONDENT PRO SE.

COTE & VANDYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered May 5, 2020 in a proceeding pursuant to Election Law article 16. The order granted the petition to invalidate the designating petition of respondent Jason B. Zeigler.

It is hereby ORDERED that said cross appeal is unanimously dismissed, the order is reversed on the law without costs, and the petition is dismissed.

Memorandum: In this proceeding pursuant to Election Law § 16-102, Jason B. Zeigler (respondent) appeals and petitioner cross-appeals from an order that, inter alia, invalidated a designating petition to place respondent on the primary election ballot for the Democratic Party as a candidate for Syracuse City Court Judge. Preliminarily, we reject respondent's contention on appeal that the proceeding was untimely commenced (*see generally Matter of Parietti v Sampson*, 117 AD3d 830, 832, 834-835 [2d Dept 2014]).

We agree with respondent, however, that Supreme Court erred in invalidating his designating petition after concluding that he had personally participated in fraudulent activity, which must be established by clear and convincing evidence (*see Matter of Burman v Subedi*, 172 AD3d 1882, 1883 [3d Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Duck v Mannion*, 164 AD3d 1103, 1104 [4th Dept 2018], *lv denied* 31 NY3d 914 [2018]). That standard requires evidence that "makes it highly probable that what [a party] claims is what actually happened" (PJI 1:64), i.e., evidence " 'that is neither equivocal nor open to opposing presumptions' " (*Matter of Seon v New York State*

Dept. of Motor Vehs., 159 AD3d 607, 613 [1st Dept 2018]), and it "forbids relief whenever the evidence is loose, equivocal, or contradictory" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 220 [1978] [internal quotation marks omitted]). Here, the court based its determination to invalidate the designating petition on the testimony of a single signatory, who stated that although respondent was the subscribing witness on the petition that she signed, her signature was actually witnessed by a younger man of a different race. While such evidence may warrant invalidation of a designating petition (*see Matter of Haskell v Gargiulo*, 51 NY2d 747, 748 [1980]; *Matter of Mattice v Hammond*, 131 AD3d 790, 790-791 [3d Dept 2015]), cross-examination of the signatory—during which she acknowledged signing four City Court petitions, including one for an individual whose description was similar to that of respondent—called her testimony on direct examination into question. Even granting due deference to the court's assessment of witness credibility (*see generally Matter of Farrell v Cayuga County Bd. of Elections*, 288 AD2d 844, 844 [4th Dept 2001]), we cannot conclude that the signatory's equivocal and self-contradictory testimony constituted clear and convincing evidence that respondent engaged in fraud (*see George Backer Mgt. Corp.*, 46 NY2d at 220).

Petitioner's cross appeal must be dismissed on the ground that he is not aggrieved by the order (*see Matter of Giordano v Westchester County Bd. of Elections*, 153 AD3d 821, 823 [2d Dept 2017], *lv denied* 29 NY3d 915 [2017]; *see generally National Fuel Gas Distrib. Corp. v Push Buffalo [People United for Sustainable Hous.]*, 104 AD3d 1307, 1308 [4th Dept 2013]). Although his contentions can still be considered as alternative grounds for affirmance on respondent's appeal (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Giordano*, 153 AD3d at 823), we conclude that respondent's apparent failure to administer to one signatory "an oath . . . 'calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs' " (*Matter of Bonner v Negron*, 87 AD3d 737, 738 [2d Dept 2011], quoting CPLR 2309 [b]) did not, on its own, constitute evidence of fraud requiring invalidation of his designating petition (*see Matter of Vincent v Sira*, 131 AD3d 787, 788-789 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *Bonner*, 87 AD3d at 739-740; *Matter of Nolin v McNally*, 87 AD3d 804, 805-806 [3d Dept 2011]). On the whole, the hearing testimony established that the subscribing witnesses, including respondent, substantially complied with the requirements of Election Law § 6-132 (3) (*see Matter of Dwyer v Pellegrino*, 164 AD3d 1088, 1089 [3d Dept 2018]; *Matter of Finn v Sherwood*, 87 AD3d 1044, 1045 [2d Dept 2011]). We therefore reverse the order and dismiss the petition.

Entered: May 13, 2020

Mark W. Bennett
Clerk of the Court