State of New York
Court of Appeals

OPINION

No. 57
In the Matter of Ramona Ferreyra et al.,
Appellants,
v.
Carmen E. Arroyo,
Respondent,
Board of Elections in the City of New York,
Respondent.

Daniel R. Bright, for appellants
Stanley K. Schlein and Edmond J. Pryor, for respondent Arroyo

PER CURIAM:

This appeal presents the issue whether the designating petition submitted by respondent Carmen E. Arroyo should be invalidated because it is permeated by fraud as a matter of law. We conclude that in the circumstances of this case the designating petition should be declared invalid.

It is true that the bar for establishing fraud is a high one. "Fraud must be proved by clear and convincing evidence" (Matter of Robinson v Edwards, 54 AD3d 682, 683 [2d Dept 2008]; see Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 349-350 [1999])—a standard that has been defined as proof that "makes it highly probable that the alleged activity actually occurred" (People v Warrior, 57 AD3d 1471, 1472 [4th Dept 2008] [internal quotation marks omitted]; see People v Britton, 31 NY3d 1019, 1024 [2018]). Nevertheless, where appropriate, a court may also conclude that, "because of its magnitude[,]" fraud and irregularity established by clear and convincing evidence "so 'permeated' the [designating] petition as a whole to call for its invalidation" (Matter of Proskin v May, 40 NY2d 829, 830 [1976]; see Matter of Aronson v Power, 22 NY2d 759, 760 [1968]; cf. Matter of Ferraro v McNab, 60 NY2d 601, 603 [1983]).

Based on the undisputed facts of this matter, which establish, among other things, "that 512 out of 944 signatures submitted in the [designating] petition are backdated to dates preceding the candidate's receipt of the blank petition pages," and that "14 of the 28 subscribing witnesses" swore that those signatures were placed on the designating petition before the blank petition pages were obtained from the printer (Matter of Ferreyra v Arroyo, ___ AD3d ___, ___ [1st Dept, May 14, 2020] [Gesmer, J., dissenting]; cf. Election Law § 6-134 [3]), the lower courts should have concluded that this is one of those rare instances in which the designating petition is so "permeated" by fraud "as a whole as to call for its invalidation" (Proskin, 40 NY2d at 830; see Aronson, 22 NY2d at 760).

Accordingly, the Appellate Division order should be reversed, without costs, and the petition to invalidate the designating petition granted.

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STEIN, J. (dissenting):

The majority applies an amorphous standard to effectively hold that respondent's designating petition was permeated with fraud as a matter of law. In so holding, the

majority disregards our long-settled standard of review and erroneously interjects itself into a factual determination reserved for the courts below. I, therefore, respectfully dissent.

"[T]he question of permeation of fraud and irregularities" is "usually a question of fact" to be resolved by the factfinder (Matter of Pilat v Sachs, 42 NY2d 984, 984 [1977]; see Matter of Rittersporn v Sadowski, 48 NY2d 618, 619 [1979]). Moreover, where this Court is presented with affirmed findings of fact, our review is limited to whether the record contains support for those findings (see Matter of Rittersporn, 48 NY2d at 619; Matter of Pilat, 42 NY2d at 984; compare Matter of Proskin v May, 40 NY2d 829 [1976]; Matter of Aronson v Power, 22 NY2d 759 [1968]).

Here, although the backdated pages "might well have supported an inference . . . that there was a fraudulent intent which infected the petition," our precedent plainly holds that "whether to draw th[is] inference is . . . a question of fact" (Matter of McKenna v Ruiz, 40 NY2d 815, 816 [1976]; see Matter of Quinones v Bass, 45 NY2d 811, 813 [1978]). The referee, Supreme Court, and the Appellate Division—entities with fact-finding power that we do not possess—each resolved this question in respondent's favor and were not persuaded, to a clear and convincing degree, that respondent either participated in the fraud or that the irregularities rose to a sufficient level to infect the remainder of the designating petition. Inasmuch as the record here is comprised almost entirely of documentary evidence and there was no direct evidence indicating that the defect was the result of fraudulent intent, as opposed to inadvertent human error, a rational factfinder may reasonably decline to draw such an inference. Nor is there any specter of fraud surrounding the more than 240 valid signatures on other pages of the designating petition as it is

conceded that those pages did not suffer from a similar irregularity (compare Matter of Lerner v Power, 22 NY2d 767, 768 [1968]). In my view, "we cannot hold on this record that [an] inference [of fraud] was compelled as a matter of law" (Matter of McKenna, 40 NY2d at 816), and the majority impermissibly usurps the role of the factfinder and exceeds the jurisdiction of this Court to reach the contrary conclusion.

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Order reversed, without costs, and petition to invalidate the designating petition granted. Opinion Per Curiam. Judges Rivera, Fahey, Garcia and Wilson concur. Judge Stein dissents in an opinion in which Chief Judge DiFiore and Judge Feinman concur.

Decided May 21, 2020