D-3

To be argued by:
Samuel S. Yasgur, Esq.
Time Requested: 20 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of MARIO M. CASTRACAN and VINCENT F. BONELLI, acting Pro Bono Publico,

Petitioner-Appellants,

for an Order, pursuant to Section 16-100, 16-102, 16-104,16-106 and 16-116 of the Election Law,

-against-

ANTHONY M. COLAVITA, ESQ., Chairman, WESTCHESTER COUNTY REPUBLICAN COMMITTEE, GUY T. PARISI, ESQ., DENNIS MEHIEL, ESQ., Chairman, WESTCHESTER COUNTY DEMOCRATIC COMMITTEE, RICHARD L. WEINGARTEN, ESQ., LOUIS A. BREVETTI, ESQ., Hon. FRANCIS A. NICOLAI, HOWARD MILLER, ESQ., ALBERT J. EMANUELLI, ESQ., R. WELLS STOUT, HELENA DONAHUE, EVELYN AQUILA, Commissioners constituting the NEW YORK STATE BOARD OF ELECTIONS, ANTONIA R. D'APICE, MARION B. OLDI, Commissioners constituting the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents.

for an Order declaring invalid the Certificates purporting to designate Respondents HON. FRANCIS A. NICOLAI and HOWARD MILLER, ESQ. as candidates for the office of Justice of the Supreme Court, Ninth Judicial District, and the Petitioners purporting to designate ALBERT J. EMANUELLI, ESQ., a candidate for the office of Surrogate of Westchester County to be held in the general election of November 6, 1990.

Albany County
Clerk's Index No.
6056/90

BRIEF ON BEHALF OF RESPONDENT-RESPONDENT ALBERT J. EMANUELLI, ESQ.

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PRELIMINARY STATEMENT

This is an Appeal from a Decision and Order by Justice Lawrence E. Kahn, Supreme Court, Albany County, dismissing the Petition in this proceeding. Justice Kahn had before him the pleadings, various affidavits and a Motion to Dismiss made by Respondents-Respondents Colavita and Parisi. Justice Kahn heard extensive oral argument on the motion. In fact, the argument advanced by counsel for Petitioners-Appellants lasted almost an hour.

The Petition was utterly devoid of merit. Petitioners-Appellants had waited over a year to institute the proceeding. Petitioners-Appellants were, therefore, time barred and guilty of laches. In addition, Petitioners-Appellants did not have standing and had failed to join a number of necessary and indispensable parties.

Justice Kahn's decision was not in error and should be affirmed.

COUNTER-STATEMENT OF FACTS

The purported Statement of Facts contained in Petitioners-Appellants' brief is replete with misstatements, with unsupported conclusions which are asserted as facts and with averments that go beyond the record below. Accordingly, Respondent-Respondent Emanuelli is compelled to submit this Counter Statement of Facts.

1. The Ninth Judicial District is composed of the Counties of Westchester, Orange, Dutchess, Putnam and Rockland.

2. During the summer of 1989 the Executive Committees of the Republican and Democratic Parties in Westchester County made known their desire to work toward the cross-endorsement of certain qualified persons to urn for specified judicial positions in the Ninth Judicial District. Their intent was well publicized. It was made clear from the outset that the purpose of the effort was to remove, to the extent possible, certain judicial elections from the usual political process and to provide the candidates with the degree of independence that comes with the knowledge that they have been cross-endorsed by both major political parties.

3. In August, 1989 the Executive Committee of the Westchester County Republican Party and the Executive Committee of the Westchester County Democratic Party each passed a resolution expressing their intent to work for the cross-endorsement of certain named persons for certain judicial offices.

4. It is not alleged that any of the political parties in Orange, Dutchess, Putnam or Rockland Counties agreed in advance, whether by resolution or otherwise, to any program or proposal for the cross-endorsement of judicial candidates within the District.

5. The two Westchester resolutions were made public and were widely reported in the newspapers. There were no secret deals.

6. The two resolutions only constituted public announcements of the intention of the two Executive Committees to work for the nomination and election of the named persons:

A. The two resolutions were confined to the intentions of the Executive Committees of the two major political parties in Westchester. They called upon their counterparts in Rockland, Orange, Dutchess and Putnam Counties to provide support to the same

candidates but were not contingent nor dependent on such action from the other Counties in the District.

B. The resolutions were NOT agreements. They merely expressed the intentions of each Executive Committee. They were only signed on behalf of each Executive Committee.

C. The resolutions did not provide the proposed candidates with any binding or enforceable interest. Indeed, they could not have. Judicial candidates are nominated by delegates at judicial conventions. Moreover, even if a particular person is nominated or endorsed, primaries can, and often do, ensue. Candidates are not nominated by Executive Committees. Thus, at best, the resolutions merely advised all potential candidates, and the delegates to the judicial conventions, of the names of the persons the two Executive Committees felt should be nominated and the fact that the two Executive Committees would be working for their nomination.

D. The resolutions were not signed by the proposed candidates, nor were the proposed candidates parties to the resolutions. Indeed, as was made clear during the argument below, Respondent-Respondent Emanuelli never even saw the final resolutions until months after they were enacted.

7. The judicial candidates in the Ninth Judicial District were nominated in open judicial conventions. Any person desirous of seeking nomination was free to be involved in the process in Westchester or in any of the other four Counties. Moreover, anyone was free to seek the support of any of the other political parties or to seek a primary.

8. Neither the Petitioners-Appellants, nor anyone else, availed themselves of any of the available procedures to challenge any of the nominations for judicial office in 1989.

9. To the best of our knowledge, the only complaint made with respect to the 1989 judicial nominations was made not by either of the Petitioners-Appellants but by one of the co-counsel for the Petitioners-Appellants. That complaint was not in the form of a challenge but in the form of a letter to the State Board of Elections. That letter challenged the 1989 judicial convention of the Democratic Party. That letter was not served on any of the candidates or on any of the parties to this proceeding. That

letter did not follow the procedure set forth in the Election Law, for contesting nominations. That letter complaint was rejected by that State Board of Elections on May 25, 1990. Neither Mr. Vigliano, the author of the letter, nor anyone else, brought an Article 78 proceeding or in any other way sought to contest the determination of the New York State Board of Elections dismissing his complaint.

10. In its May 25, 1990 letter the New York State Board of Elections informed Mr. Vigliano, who is co-counsel for Petitioners-Appellants, and who publically describes himself as chairman of a "group" interested in judicial elections in the Ninth Judicial District, that a nomination of a candidate for public office may only be contested in a "... proceeding instituted in Supreme Court by an aggrieved candidate, chairman of a party committee, or a person who has filed objections. The opportunity for a person to file objections expires 10 days after the holding of such convention." (May 25, 1990 letter of the State Board of Elections to Eli Vigliano, Page 1, last paragraph).

11. Whether or not co-counsel Vigliano had previously consulted the Election Law to determine the proper procedure for contesting a nomination, he was at least aware of the proper procedure upon receipt of the letter from the State Board of Elections in May, 1990. He was also aware, based on the aforesaid resolutions, of the intentions of the Executive Committees of the

two major parties in Westchester with respect to the judicial nominations for 1990. Yet, in spite of specific notice to counsel, there was no compliance with the statutory requirements in the commencement of this proceeding. Petitioners-Appellants are not aggrieved candidates. Neither is chairman of a party committee. Neither filed objections prior to instituting this proceeding.

12. This proceeding is predicated on the claim of Petitioners-Appellants that the resolutions passed by the Executive Committees in Westchester, in August, 1989 was somehow improper. On September 26, 1990, thirteen months after the resolutions were passed, Petitioners-Appellants sought to enjoin the election of some, but not all, of the judicial candidates who were running in the 1990 election. Inexplicably, Petitioners-Appellants neither served nor sought to make parties to this proceeding a number of persons and entities who were necessary and indispensable to a resolution of the claims they presented. They did not join a number of the judicial candidates who were named in the 1989 resolutions and who ran for election to judicial office with cross-endorsements. They did not name the political parties in Orange, Dutchess, Putnam and Rockland Counties which had also nominated some of the subject candidates. They did not name the Boards of Elections in Orange, Dutchess, Putnam and Rockland

Counties. Thus, the Petition did not give the court jurisdiction over persons and entities who were necessary and indispensable to the litigation.

POINT I

PETITIONERS-APPELLANTS FAILED TO JOIN NECESSARY AND INDISPENSABLE PARTIES.

Petitioners-Appellants contend that the resolutions passed by the two Executive Committees in August, 1989 was improper. Petitioners-Appellants also contend that, notwithstanding the fact that the nominations which they challenge were the product of separate judicial conventions and, in the case of Respondent-Respondent Emanuelli, the filing of designating petitions, the existence of the resolutions somehow tainted nominations which were made subsequent to the passage of the resolutions.

If Petitioners-Appellants were correct, which they most certainly are not, it would follow that all of the cross-endorsed nominations of persons named in the resolutions would have to be declared invalid. Clearly, Petitioners-Appellants cannot contend that the resolutions were improper, that the resolutions somehow rendered the nominating process invalid and then conversely contend that, mysteriously, only some of the subsequent nominations were invalid, that only the nominations of persons they didn't like were invalid. Yet that is exactly the result sought by Petitioners-Appellants. The resolutions in question dealt with the intention of the Executive Committees to work for the nomination of six named individuals over a three-year period. Five of the six have already been elected to the bench. Yet

Petitioners-Appellants only join two of those six persons in this proceeding. The position of Petitioners-Appellants is, at best, manifestly absurd.

In their resolutions, the two Executive Committees resolved to support the cross-endorsement of the Hon. Joseph Juidice and the Hon. Samuel G. Fredman for judicial office in 1989. Both men were cross-endorsed and were elected. Neither was joined as a party in this proceeding.

In those same resolutions the Executive Committees resolved to support the cross-endorsement of the Hon. Adrienne Hoffmann Scancarelli for re-election to the Family Court, Westchester County, in 1990. Judge Scancarelli was nominated and elected in 1990. Petitioners-Appellants did not join Judge Scancarelli as a party in this proceeding.

In those same resolutions the Executive Comnittees resolved to work for the cross-endorsement of Judge Emmet Murphy for election to the County Court in Westchester County in 1991. Petitioners-Appellants did not join Judge Murphy in this proceeding.

Petitioners-Appellants seek a judicial determination that the resolutions were improper and that any nominations resulting from or impacted by the passage of the resolutions was likewise

invalid. While it is clear that the resolutions were not improper and that, in any event, none of the nominations of persons named in the resolutions was improper, if a determination of the type sought by Petitioners-Appellants were to be rendered it would obviously affect Justice Juidice, Justice Fredman and Judge Scancarelli and could also affect Judge Murphy. Any such determination could place in question the validity of their elections. Accordingly, they are necessary parties.T he failure to join them is unexplained fatal. (Marin v. Board of Elections, 67 N.Y.2d 634, 499 N.Y.S.2d 664 [1986]).

Petitioners-Appellants cannot pick and choose which of a group of persons, who would be affected by the determination they seek, should be allowed to participate in the case. Justice Kahn's decision must be affirmed. (Sahler v. Callahan, 92 A.D.2d 976, 460 N.Y.S.2d [3rd Dept., 1983]).

POINT II

PETITIONER-APPELLANTS ARE GUILTY OF MANIFEST LACHES AND ARE TIME BARRED.

This is not a case in which the issues of laches and time bar can even be debated or argued by Petitioners-Appellants. The failure to proceed properly and timely is so gross as to be beyond comprehension especially when no excuse is even offered for the thirteenth month delay.

The nomination and election of persons to public office is conducted according to proscribed statutory schedules. The statutory provisions put everyone on notice as to what is required and when it is required. Filing a designating petition, or other required documents, just one day late, can be fatal. (See, Bruno v. Peyser, 54 A.D.2d 591, 386 N.Y.S.2d 720 [3rd Dept., 1976], aff'd, 40 N.Y.2d 823; 387 N.Y.S.2d 563 [1976]; Van Lengen v. Balabanian, 17 N.Y.2d 920, 272 N.Y.S.2d 143 [1966]). The statutory scheme provides for expedited judicial review of Election Law cases to insure that the issues can be resolved in a timely manner and thus assure that the election cycles will go forward in an orderly manner. Petitioners-Appellants totally disregarded all of the statutory time limits. They leisurely waited thirteen months and then instituted this proceeding seeking to have the court upset selected nominations and elections of

particular persons they, for reasons undisclosed, seek to unseat. The conduct of Petitioners-Appellants is inexcusable and fatal to their case.

The resolutions of the two Executive Committees were passed in August, 1989. They were well publicized immediately after their passage. There is no claim whatever that Petitioners-Appellants were unaware of the passage of the two resolutions. Yet Petitioners-Appellants sat on their hands for thirteen months. They did not bring an Election Law challenge with respect to the resolutions when they were passed and made public. They did not challenge the judicial nominations for the 1989 elections. If it is their contention that the two aforesaiud resolutions were improper and tainted the nominations, then Petitioners-Appellants had to challenge those nominations, pursuant to the Election Law,, in a timely challenge in the fall of 1989. Petitioners-Appellants did not challenge the 1989 judicial elections. They did not seek judicial review of the May 25, 1990 determination of the State Board of Elections dismissing Eli Vigliano's complaint. They did not timely challenge the designating petitions which were filed on behalf of Justice Emanuelli in July, 1990. They did not seek to participate in the judicial conventions or timely seek to have persons with standing challenge those conventions. Rather, they continued to lurk silently in the background and do nothing for thirteen months, while the parties, the delegates to the judicial conventions and the candidates acted in the well founded belief

that they were proceeding properly and while other persons who had been named in the resolutions had been elected and were serving in office for almost a year. Finally, more than a year after the passage of the resolutions, Petitioners-Appellants came out of hiding and commenced this proceeding making gross accusations of impropriety. Such conduct cannot be condoned. (See, Harriman Woods Associates v. Town of Monroe, 1990 N.Y.App.Div. LEXIS 15268 (App. Div. 3rd Dept., decided December 13, 1990), Kennedy v. Croton-on-Hudson, 1990 N.Y.App.Div. LEXIS 14292 (App. Div. 2nd Dept., decided November 26, 1990).

If the Petitioners-Appellants were proceeding in good faith, if they really believed that the process was flawed, then they had an obligation to the Court, to the participants in the process and to the voters to bring their claim properly and timely. They did not. For that reason alone, the Petition was properly dismissed by Justice Kahn.

POINT III

PETITIONERS-APPELLANTS LACKED STANDING TO INSTITUTE THE PROCEEDING.

Challenges to an election are governed by the Election Law (see, for example, Election Law, Sections 16-102, 16-104 and 16-106). Petitioners-Appellants do not meet any of the standing tests set forth in the Election Law.

Neither of the Petitioners-Appellants was, or claimed to be, an aggrieved candidate. Had an aggrieved candidate brought the Petition, one of the defects of the Petition could have been avoided, though the Petition would still have had to have been dismissed on other grounds.

Neither of the Petitioners-Appellants was, or claimed to be, the chairman of a party committee or independent body.

Neither of the Petitioners-Appellants claimed that he had filed objections to any of the documents set forth in Election law Section 6-154. Instead, Petitioners-Appellants asserted that they intended to file objections in the future.

The legislature was specific in the granting of standing to challenge a nomination. Meeting the statutory tests is jurisdictional. Petitioners-Appellants failed to meet the

statutory requirements. By their failure they also failed to convey jurisdiction on the Trial Court, and on this Honorable Court, to hear their claims.

POINT IV

THE TRIAL COURT PROPERLY DISMISSED THE PETITION SINCE IT FAILED TO STATE A CAUSE OF ACTION.

Justice Kahn was not in error when he dismissed the Petition for failure to state a cause of action. Even accepting all of the arguably factual averments of the Petition as true, the record before Justice Kahn showed that:

1. In August, 1989, the Executive Committees of the Republican and Democratic parties in Westchester County each passed a resolution expressing its intent to work for the cross-endorsement of certain named persons to be judicial candidates in 1989, 1990 and 1991.

2. The resolutions were merely resolutions of two Executive Committees which openly expressed their intentions with respect to the nomination of certain judicial candidates.

3. None of the other political parties in the Ninth Judicial District passed such resolutions.

4. None of the persons proposed as candidates in the resolutions were parties to the resolutions.

5. The resolutions were not contracts nor were they binding or enforceable documents. They were merely expressions of intent. Petitioners-Appellants, desperately seeking to find a basis for their claim, continually characterize the resolutions as contracts. But they are not contracts and no amount of characterization by the Petitioners-Appellants can work such a transformation on the resolutions. They are resolutions of two Executive Committees of two political parties in Westchester County. They are not enforceable in court. Had either Executive Committee later changed its mind such action might have antagonized the other Executive Committee politically, but such a change of mind would not have been actionable. Moreover, the proposed candidates were not signatories or parties to the resolutions.

6. The persons who were nominated as judicial candidates in 1989 were nominated by judicial conventions. No judicial proceeding was brought by anyone as to contest those conventions.

7. With respect to the 1990 elections, Justice Emanuelli's designating petitions, to run as a candidate of the Democratic, Republican and

Conservative Parties for Surrogate in the 1990 election were all filed by July 12, 1990. The last day to file objections to those petitions was July 15, 1990. The last day to commence a legal proceeding to invalidate those petitions was July 26, 1990 (Election Law, Section 6-154). This proceeding was not instituted within the statutory period. That failure is fatally defective as to Petitioners-Appellants' claim with regard to Justice Emanuelli. The Petition must be dismissed with respect to Justice Emanuelli on that ground alone.

8. The judicial candidates who ran for the judicial positions in the Ninth Judicial District, in 1990, as candidates of the Democratic and Republican parties, were nominated in judicial conventions on September 19, 1990 and September 25, 1990.

9. There is no claim that Petitioners-Appellants had sought nomination and had been deprived of such nomination.

10. Not all of the judicial nominees in the 1990 election were cross-endorsed. There were more candidates than there were vacancies, requiring that the voters choose from among the candidates.

11. Petitioners-Appellants had no standing to institute the action. Neither was an aggrieved candidate. Neither was a chairman of a party committee or independent body (Election Law, Section 16-104.) Neither had filed any objections within the statutory period. Rather, Petitioners-Appellants stated that they intended to file objections. Petitioners-Appellants' other ploy was to cavalierly style themselves, in the caption, as acting pro bono publico. Adding Latin to a caption cannot create a cause of action where none exists.

12. Petitioners-Appellants failed to join necessary and indispensable parties and were guilty of laches in the extreme (see Points I and II herein).

13. Petitioners-Appellants pled no facts to support their conclusory assertions. The only facts before the trial court were that the resolutions had been passed by the Executive Committees of the Republican and Democratic parties in Westchester

County, that there had been judicial conventions, and that a number of judicial candidates, including persons not named in the resolutions, had been nominated to run for judicial office.

14. There was no factual averment that any of the judicial candidates had agreed to anything improper nor were any such facts offered to Justice Kahn. Quite the contrary. It was made clear before Justice Kahn that the nominees were well aware of the legal and ethical obligations imposed on judicial candidates and on judges and that they intended to honor and comply with all such requirements, both in spirit and in fact.

Justice Kahn's decision was clearly correct. The Petition did not state a cause of action. The cross-endorsement of judicial candidates is not improper. Quite the contrary (Rosenthal v. Harwood, 35 N.Y.2d 469, 363 N.Y.S.2d 937 [1974]). The Petition was not timely brought (see Point I hereof). The Petitioners-Appellants had no standing (see Point III hereof). The Petitioners-Appellants had failed to join necessary and indispensable parties (see Point II hereof). Under the circumstances it would have been error for justice Kahn to have done anything other than to have dismissed the Petition.

CONCLUSION

THE LOWER COURT'S ORDER AND JUDGMENT DISMISSING THIS PROCEEDING SHOULD BE AFFIRMED IN ITS ENTIRETY WITH COSTS AND SANCTIONS. THE PROCEEDING WAS FATALLY DEFECTIVE BECAUSE IT FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED, WAS BARRED BY THE STATUTE OF LIMITATIONS AND LACHES, FAILED TO JOIN INDISPENSABLE PARTIES AND THE PETITIONERS-APPELLANTS LACKED STATUTORY STANDING.

Dated: White Plains, New York
December 17, 1990

Yours, etc.,

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