D-4

To be argued by:
SANFORD S. DRANOFF, ESQ.
Time Requested: 15 min.



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

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

Petitioners-Appellants,

Albany Co.
Index No.

6056/90

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

-against-

ANTHONY M. COLAVITA, Esq., Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE, GUY T. PARISI, Esq., DENNIS MEHIEL, Esq., Chairman, WESTCHESTER DEMOCRATIC COUNTY 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-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 of the State of New York, 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.

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# BRIEF OF RESPONDENT-RESPONDENT HOWARD MILLER

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SANFORD S. DRANOFF, ESQ.
Attorney for Respondent-Respondent Howard Miller
P. O. Box 1629 - Suite 900, One Blue Hill Plaza
Pearl River, New York 10965

TABLE OF CONTENTS

## QUESTIONS PRESENTED

1) Does the petition state a cause of action?

The court below held that it did not.

2) Did the court below lack jurisdiction to entertain the proceeding by reason of petitioners-appellants' failure to join indispensable parties?

The court below did not pass upon this question.

3) Did the court lack jurisdiction over respondent-respondent Howard Miller?

The court below did not pass upon this question.

PRELIMINARY COUNTER-STATEMENT

Petitioners-appellants (hereinafter "Petitioners") seek review of an Order of the Hon. Lawrence E. Kahn dated October 16, 1990 (5-7) which granted the motion of respondent-respondent GUY PARISI dismissing this proceeding upon the ground that the petition fails to state a cause of action.[1]

The petition (pp. 13-25) seeks an order:

(a) declaring that a resolution entered into between the Westchester Democrat and Republican Parties in August of 1989 is illegal, invalid, void and against public policy;

(b) that the judicial nominating certificates of the Republican and Democrat parties for the 1990 elections be vacated, annulled and set aside;

(c) directing the reconvening of the Democrat and Republican judicial conventions;

(d) disqualifying and barring respondents-respondents (hereinafter "respondents") NICOLAI, EMANUELLI and MILLER from designation as judicial candidates;

(e) directing the reconvened Judicial Conventions to comply with the Election Law; and

(f) restraining the respondents New York State Board of Elections and Westchester County Board of Elections from printing and placing the names of NICOLAI, EMANUELLI and MILLER on the

[1] This numerical reference and all subsequent ones, unless otherwise noted are to the pages of the Record on Appeal.

ballots for the general election to be held November 6, 1990.

All respondents filed answers to the petition (pp. 86-91 and 103-138) and respondents MILLER, PARISI and COLAVITA filed motions to dismiss the petition upon procedural and jurisdictional grounds, as well as failure of the petition to state a cause of action. Petitioners failed to include in the Record on Appeal the answer and cross-motion of respondent Guy T. Parisi; the motion to dismiss petition on behalf of respondent Miller and the affidavit in opposition of Jay B. Hashmall, Esq., on behalf of respondents Mehiel and Weingarten. Those documents were subsequently included in the Supplemental Record on Appeal.

Oral argument was heard before Justice Kahn on October 12, 1990. On October 16, 1990, Justice Kahn entered an order dismissing the petition. This appeal followed.

## COUNTER-STATEMENT OF FACTS

Contrary to petitioners statement of facts, Exhibit G annexed to the petition (pp. 52-54) is a Resolution entered into between the Westchester Republican and Democrat parties. It was not adopted by the Executive Committee of the Republican Party of Rockland County, nor is there any evidence in the record to indicate that it was in fact adopted by anyone other that the Westchester Committees. It was not a contract and was not binding on any delegate to the Judicial Conventions of either party.

Petitioners "Statement of Facts" is mislabeled. It contains only a bare minimum of facts and is replete with petitioners' arguments. While it is true that in 1990 the late Hon. Theodore A. Kelly retired from the bench in Rockland County, there is no evidence whatsoever that the nomination of respondent HOWARD MILLER by both the Republican and Democrat parties was in any way the result of the Resolution entered into in 1989, more than one year before Judge Kelly's retirement. In fact, respondent MILLER had been a judge for nearly ten years previously and had previously obtained cross-endorsement in the 1980 elections after obtaining the Republican nomination and then prevailing in a Democrat Primary.

Petitioners have not adduced one shred of evidence - or even any allegation of fact - that would warrant the relief sought against respondent MILLER; yet, now, for the first time, in the so-called "Statement of Facts" allege completely dehors the record a "further agreement by the party leaders" (Appellants' Brief, p. 7)

in a desperate attempt to invent some slim thread by which to link respondent MILLER to the claims in their petition.

The objections raised to the convening of the respective Nominating Conventions are insufficient as a matter of law to warrant vacatur of the Nominating Certificates.

## POINT I

### THE RESOLUTION OF AUGUST 1989 IS NOT A CONTRACT

Although petitioners consistently refer to the Resolutions entered into on August 23 and 24, 1989 by the Democrat and Republican parties, respectively (hereinafter the "Resolution"), as a "contract", the Resolution is, by its terms, nothing more than a proclamation of policy. The Resolution was entered into only by the Westchester County Committees. Westchester is but one of the five counties which comprise the Ninth Judicial District. The resolution was not binding on the delegates to the Judicial Conventions, who were free to nominate whomever they chose.

Petitioners are fully aware that the electors of the judicial district in which the candidates are to serve do not directly elect the justices of the Supreme Court, despite the wording of Article 6, Section 6(c) of the New York State Constitution. While the electorate votes at the general election, the nominees are chosen by judicial conventions, where the delegates of the electorate cast votes. In the 1990 Judicial Conventions, every delegate was free to nominate any candidate. Thus, there was no impairment of the constitutional right of the people to elect their judges.

## POINT II

### CROSS-ENDORSEMENT FOR JUDICIAL CANDIDATES HAS BEEN UPHELD AS CONSTITUTIONAL BY THE COURT OF APPEALS

Petitioners' main argument is that cross-endorsements are violative of the constitution. That contention cannot be sustained.

The clear intent of the petition is to prohibit multi-party nominations. The issue of nominations by more than one party has been litigated and re-litigated in New York State for over 20 years. The Court of Appeals has consistently upheld and supported the validity of multi-party candidacies, particularly in judicial elections. Efforts to restrict candidates from accepting nominations from more than one party began with Matter of Callahan (208 NY59, 93 NE 262), wherein the Court of Appeals stated:

> "*** if the legislature does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention, committee, or body to nominate as its candidate any person who is qualified for the office.
>
> * * *
>
> "What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another."

The Court of Appeals did permit a political party to enact a by-law restricting a candidate from accepting any other designation or nomination of any party or independent body in order to receive that party's nomination (Yevoli v. Cristenfeld, 322 NYS2d 22, 66 Misc.2d 156, affd. 322 NYS2d 750, 37 AD2d 153, rev. 324 NYS2d 317, 29 NY2d 591, 272 NE2d 989). In a subsequent case, however, the Court made it clear that such a restriction was not applicable to judicial candidates (Rosenthal v. Harwood, 35 NY2d 469, 363 NYS2d

937).

Judicial office has traditionally been excluded from both party by-laws and statute. In 1971, the Legislature prohibited party candidates from receiving the nomination of any independent group for the same office for the same year, and vice-versa - but specifically excluded candidates for judicial or statewide races (see L. 1971, Ch. 1179). In 1973, the Court of Appeals found unconstitutional even that limited statutory restriction on multi-party endorsements (Devane v. Touhey, 33 NY2d 48, 349 NYS2d 361, 304 NE2d 229) and, in the subsequent recodification of the Election Law, that provision was dropped.

In Rosenthal v. Harwood, supra, which struck down, insofar as it was applicable to judicial candidates, the by-law requiring the declination of other party nominations by a candidate the Court of Appeals decided to "confront the issue frontally." In doing so, it noted:

> "Although the political elective process for the judiciary makes judicial candidates political party candidates, they are not as others. They may not indorse one another. They may not attack one another. They may not indorse or attack candidates, of their own or another party, for nonjudicial office. *** They are, in short, to be as nonpartisan as the selection of Judges by election permits (Code of Judicial Conduct, Consol. Laws, c. 30, Canon 7, Judiciary Law Appendix).
>
> * * *
>
> "The right of franchise exercisable by the voter and the right of a judicial candidate to appear on more than one line on the ballot converge to strike down this by-law."

Inasmuch as the Court of Appeals has determined this very issue, the petition fails to state a legally sustainable cause of action.

## POINT III

## THE PETITION FAILS TO STATE A CAUSE OF ACTION AGAINST RESPONDENT HOWARD MILLER

The petition identifies respondent MILLER, correctly, as the Republican and Democrat nominee for judicial office. Other than that one fact, respondent MILLER is never mentioned again until the "WHEREFORE" clause, in which petitioners make the conclusory allegation that respondent MILLER was a "party" and "accessory" to a "Three-Year Plan" (hereinafter the "Plan") entered into by other respondents. Such a conclusory allegation is insufficient as a matter of law to sustain the petition (see Feingold v. Joseph E. Marx Co. 191 Misc. 42, 74 NYS2D 869, affd. 273 AD 959, 79 NYS2d 307). When a pleading alleges no facts constituting a wrong, but only general conclusions, it may be dismissed for insufficiency (Kalmanash v. Smith, 291 NY 142, 51 NE2d 681; see, also, Torre v. Torre, 9 Misc.2d 655, 173 NYS2d 314; Chaffee v. Glens Falls Nat. Bank & Trust Co., 125 NYS2d 626; Kahn v. Wait, 270 AD 785, 59 NYS2d 452, lv. to app. den., 270 AD 867, 61 NYS2d 528). A pleading must allege facts, not conclusions, and a conclusion without facts is an immaterial allegation (Fieger v. Glen Oaks Village, 206 Misc. 137, 132 NYS2d 88, affd. 285 AD 539, 136 NYS2d 539, affd. 309 NY 527, 132 NE2d 492).

Legal conclusions cannot be utilized to support material facts by inference (Manno v. Mutual Ben. Health and Acc. Assn., (18 Misc.2d 80, 187 NYS2d 709; Gamson v. Robinson, 286 AD 827, 141

NYS2d 883). Nor may bare allegations of wrongdoing based on undisclosed facts support a cause of action (O'Brien v. City of Rome, 262 AD 940, 29 NYS2d 456).

The petition alleges, essentially, a "Plan" pursuant to which the Republican and Democrat parties agreed to support candidates for judicial office, and that the Plan purportedly disenfranchised voters. The Plan, allegedly conceived in 1989, does not refer to respondent MILLER and is irrelevant to his candidacy, which resulted from the retirement of the HON. THEODORE A. KELLY, an event neither contemplated by nor even mentioned in the Plan.

Bi-partisan support was previously received by respondent MILLER by the Republican and Democrat parties in a 1980 election for County Court Judge. That year, respondent MILLER obtained the Democrat endorsement after obtaining a substantial plurality in the Democrat primary against the Democrat nominee, Terrence Ryan, Esq. Thus, bi-partisan support of respondent MILLER is not without precedent and there is no basis for any claim that such support for him in the current election resulted from the Plan.

## POINT IV

## THE COURT LACKS JURISDICTION OF THIS MATTER

Not only does the petition fail to state a cause of action, the petition is barred for lack of jurisdiction.

### A. Subject Matter Jurisdiction.

In Matter of Aurelio v. Cohen (44 NYS2d 145, aff. 266 AD 603,

44 NYS2d 11, aff. 291 NY 645, 51 NE2d 930), a 1943 proceeding requesting the court to direct reassembling of the two judicial conventions of the Democratic and Republican parties, the Court noted (pp. 147, 148) that it:

> "... may not add to, or change, the provisions of the statute, and may not consider arguments based solely upon ethical grounds or upon supposed considerations of public policy. If any change in the law is thought desirable it must be sought from the legislature.
>
> * * *
>
> "The Court is not authorized to direct a reassembling of the conventions in the present case. It may only do so 'where a convention *** has been characterized by such frauds or irregularities as to render impossible a determination as to who rightfully was nominated***' Election Law, Section 330, subd.2. Here, so far as appears, there were no frauds or irregularities in the conventions and there is no difficulty in determining who was nominated."

After recodification of the Election Law in 1976, the issue of the court's jurisdiction arose again. In citing Section 16-100 (formerly Section 330 under which Aurelio was decided), the court in Austin v. Delligatti (137 AD2 530, 520 NYS2d 994 [1987]) held:

> "Section 16-100 vests the Supreme Court with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in Article 16, under the following circumstances:
>
> 1. Proceedings as to designations and nominations, primary elections, etc. (Section 16-102)
>
> * * *
>
> It is well settled that there exists no inherent power to extend judicial review of election matters beyond that set forth in the Election Law. This was so under former Election Law Section 330, Narel v. Kerr, 22 A.D.2d 979, 254 NYS2d 568 (3rd Dept. 1964), and remains the rule under Article 16. Further, any extension of the summary remedies provided by the Election Law must come from the Legislature. Hogan v. Supreme Court, 281 NY 572, 24 NE2d

472 (1939). There is a long line of cases which have taken the position that Special Term has no inherent power in election proceedings - it has only those powers provided under the Election Law. McGuinness v. DeSapio, 9 65, 191 NYS2d 793 (1st Dept. 1959). The Supreme Court has no inherent power to expand judicial review of election matters beyond that provided by statute. It has only such powers as are given by statute. Corrigan v. Board of Elections, 38 AD 2d 825, 329 NYS2d 857 (2nd Dept. 1972); Kranis v. Monserrat, 63 Misc.2d 119, 310 NYS2d 521 (Sup. Ct., Kings Co., 1970); Quinn v. Kehoe, 61 Misc.2d 392, 305 NYS2d 701 (Sup. Ct., Schenectady Co., 1969); Application of Oster, 42 Misc.2d 432, 248 NYS2d 328 (Sup. Ct., Onondaga Co., 1964); Application of Hanley, 31 Misc.2d 1069, 222 NYS2d 670 (Sup. Ct., Washington Co. 1961). 'In election cases a court may only exercise the powers granted to it within the framework of the procedures prescribed by the statute. Under the circumstances, Special Term, having no proceeding before it brought pursuant to section 330 of the Election Law, was powerless to initiate a proceeding or treat the Article 78 proceeding as such." Mansfield v. Epstein, 5 NY2d 70, 74, 180 NYS2d 33, 154 NE2d 368 (1958); Kane v. Republican Committee of the Town of Huntington, 17 707, 230 NYS2d 761 (2nd Dept. 1962), aff'd 12 NY2d 658, 232 NYS2d 36, 185 NE2d 12. Also, see, Harwood v. Meisser, 41 AD2d 531, 339 NYS2d 270 (2nd Dept. 1973) aff'd 31 NY2d 1000, 341 NYS2d 452, 293 NE2d 827."

Petitioners have not alleged in the petition any violation under Article 16 of the Election Law. Furthermore, specifications of petitioner's objections have not been served upon respondent MILLER in accordance with Section 6204.1 of the Rules and Regulations of the State Board of Elections.

Absent a violation of Article 16 of the Election Law, the court is without jurisdiction to hear this proceeding. However, even assuming, arguendo, that the court entertained jurisdiction on the issue of the invalidation of the nominating designation, unless the court finds, by clear and convincing evidence (Thomas v. Simon, 89 AD2d 952, 454 NYS2d 98; Simcuski v. Saeli, 44 NY2d

442,452, 406 NYS2d 259, 377 NE2d 713) that "there has been a fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected" (Election Law, Section 16-102), the court cannot order the reconvening of judicial conventions. Although a particular nomination may be voided, unless fraud or unlawful conduct in the making of the nomination can be shown, the court cannot order the reconvening (In re Kaufman, [3rd Dept., 1947], 272 App.Div. 980, 72 NYS2d 625).

B. LACK OF PERSONAL JURISDICTION OVER RESPONDENT MILLER

This proceeding was required by Section 16-102 of the Election Law to be commenced by September 28, 1990. The mere signing of the order to show cause does not commence the proceeding (Matter of Tombini, 177 Misc. 148, 149, 30 NYS2d 79, 82, affd. 262 App.Div. 956, 30 NYS2d 106). What is required is delivery of the process to the person to be served not later than on the last day on which the proceeding may be commenced (King v. Cohen, 293 NY 435, 57 NE2d 748, 750; Matter of Constantino, 286 NY 681, 36 NE2d 914). Service by mail is not deemed complete so long as the person to be served did not actually receive delivery (Moore v.Milhim [2nd Dept.1985], 109 AD2d 810, 486 NYS2d 326, citing Matter of Thompson v. New York State Bd. of Elections, 40 NY2d 814, 815, 387 NYS2d 567, 355 NE2d 796; Matter of Burton v. Coveney, 32 NY2d 842, 346 NYS2d 269, 299 NE2d 682).

The order to show cause in this proceeding provided for "personal" service upon respondent MILLER, and directed such

service to be made by delivery of the papers to his office. CPLR 308 prescribes permissible methods of personal service. Although the court is authorized to direct the manner of service, when "personal service" is directed, CPLR 308 must be followed. The court cannot, in effect, amend the personal service provisions of CPLR 308 by providing that the mere delivery of the papers to respondents' offices, without the required mailing, be deemed good and sufficient service.

The court could direct expedient service pursuant to CPLR 308(5) only upon a showing that personal service was impracticable. Absent such a showing, expedient service is improper (Markoff v. South Nassau Community Hosp., 61 NY2d 283, 473 NYS2d 766, 461 NE2d 1253; Inglesias v.Baptist Medical Center, 94 AD2d 738, 462 NYS2d 489). There was no showing whatsoever in the petition that personal service pursuant to subdivisions 1-4 of CPLR 308, could not be made.

In addition, although the court may direct how service is to be made, due process requirements must be met and service must be reasonably calculated to give timely notice (Buhlmann v. LeFever, (1981) 83 AD2d 895, 442 NYS2d 529, affd. 54 NY2d 775, 443 NYS2d 154, 426 NE2d 1184). There must be delivery (Matter of Constantino, supra). In this case, the order to show cause was served at respondent MILLER's office at approximately noon on the last day for service, only a few hours before the commencement of Yom Kippur, a religious holiday observed by respondent MILLER. On that date, respondent MILLER was engaged during the day in a

meeting with clients away from his office. After that meeting he returned to his home for the holiday observance. At no time on that date was respondent MILLER present in his office. Under the circumstances, mere delivery to respondent MILLER's office on a holiday was not "reasonably calculated to give timely notice" and respondent MILLER did not receive delivery within the statutory period.

C. FAILURE TO JOIN INDISPENSABLE PARTIES

Petitioners seek to vacate, annul, and set aside the Certificates of Nomination of both the Republican and Democrat parties. The Certificates contain not only the names of the respondents MILLER and NICOLAI, but, also, those of candidates George H. Roberts and Joan Lefkowitz. Were the Certificates to be vacated, annulled, and set aside, as petitioners request, the nominations of Roberts and Lefkowitz, along with respondents MILLER and NICOLAI, would also be vacated. Certainly, Roberts and Lefkowitz have identical interests and legal rights which would be affected by the issuance of a judgment vacating, annulling, and setting aside their nominations.

The failure to serve a candidate whom a petition seeks to remove from the ballot constitutes a jurisdictional defect, since a candidate is a necessary party (In Re Murphy, 82 NYS2d 239; Lyden v. Katz, 14 AD2d 820, 221 NYS2d 452, revd. on other grnds. 10 NY2d 891, 223 NYS2d 512, 179 NE2d 514; Stefano v. Longo, 115 AD2d 348, 495 NYS2d 817, lv. to app. den. 66 NY 2d 602, 496 NYS2d 1026, 487 NE2d 910; Farley v. Mahoney, 130 Misc.2d 455, 496 NYS2d 607).

The entire proceeding must be dismissed where a necessary party is not joined (Sahler v. Callahan, 92 AD2d 976, 460 NYS2d 643). Sahler involved a proceeding similar to the case at bar in which petitioners sought to invalidate a certificate of nomination and the ordering of a new caucus. The court held, in dismissing the petition, that a nominee is a person who:

> "... might be 'inequitably affected' since invalidation would disqualify her as a candidate for public office at the March 15, 1983 election. Similarly, if a new caucus were held Selma Cramer would run the risk of not being nominated. Accordingly, we conclude that Selma Cramer is a necessary party who was improperly served with the order to show cause thereby depriving the trial court of the requisite jurisdictional predicate to entertain the proceeding."

Certainly, the omission of Roberts and Lefkowitz, both of whom would be disqualified as candidates and would run the risk of not being renominated, are indispensable parties to this proceeding. Inasmuch as petitioners have failed to name and serve those parties, the court was without jurisdiction to hear this matter.

Petitioners also seek to enjoin, restrain, and prohibit the State of New York Board of Elections and the Westchester Board of Elections from printing and placing the names of the respondent candidates on the ballots to be used at the November 6, 1990 General Election. However, the Ninth Judicial District is composed of the Counties of Rockland, Putnam, Orange, Dutchess and Westchester. Nevertheless, these county boards of elections are not named as parties to this suit.

D. FAILURE TO COMPLY WITH CPLR 2214(d)

CPLR 2241(d) states:

"(d) *** An order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county."

Service upon the Attorney General is mandatory (Randall v. Toll, 72 M.2d 305, 339 NYS2d 72) and failure to serve constitutes a jurisdictional defect (DeCarlo v. DeCarlo, [2nd Dept. 1985] 110 AD2d 806, 488 NYS2d 228).

E. FAILURE TO COMPLY WITH SECTION 6204.1(b) OF THE RULES AND REGULATIONS OF THE STATE BOARD OF ELECTIONS.

Section 6204.1(b) of the Rules and Regulations of the New York State Board of Elections requires that:

"(b) No specifications of objections to any petition will be considered by the Board unless the objector filing the specifications personally delivers or mails by registered or certified mail a duplicate copy of the specifications to each candidate for public office named on the petition. ***"

Matter of Moran v. Board of Elections of City of New York (122 AD2d 908, 506 NYS2d 7), was a proceeding under section 16-102 of the Election Law, in which the Appellate Division held that:

"Pursuant to the regulations of the New York City Board of Elections, the citizen objectors were required to serve a duplicate copy of their written specifications of objections to the first named person on the committee on vacancies on the petition objected to prior to filing with the board of elections. The record shows that this duplicate copy was mailed on the last day permitted and was sent by certified mail to an incorrect address. As a result, the specifications were not received until an additional 14 days had passed. Such service failed to satisfy the jurisdictional condition precedent to the commencement of a proceeding pursuant to Election Law Section 16-102. The dismissal of the proceeding was therefore proper (cf. Matter of Buhlmann v. LeFever, 83

AD2d 895, 442 NYS2d 529, affd. 54 NY2d 775, 443 NYS2d 154, 426 NE2d 1184)."

Petitioners failed to personally deliver or mail by certified or registered mail a duplicate copy of the specifications to respondent MILLER and petitioners' time to do so has expired.

## POINT IV

## THIS ACTION IS BARRED BY LACHES

Petitioners commenced this proceeding to challenge the nomination of respondent MILLER under sections 16-100, 16-102, 16-104, 16-106 and 16-116 of the Election Law. However, the grounds upon which petitioners base their allegations are founded upon a purported agreement consummated (according to the petition) in August and September of 1989. Thus, petitioners' cause of action, if any, arose after the 1989 Judicial Conventions. Petitioners had ten days to bring a proceeding at that time, but failed to do so. The action is thus-time barred.

## CONCLUSION

For the foregoing reason, the judgment of the lower court should be affirmed and the petition dismissed with costs.

Dated: December 14, 1990
Pearl River, New York

SANFORD S. DRANOFF, ESQ.
Attorney for Respondent
HOWARD MILLER, ESQ.
Office & P. O. Address
P. O. Box 1629
One Blue Hill Plaza
Suite 900
Pearl River, New York 10965
(914-735-6200)

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

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

Petitioners-Appellants,

Index No.
6056/90

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

AFFIDAVIT OF
SERVICE

-against-

ANTHONY M. COLAVITA, Esq., Chairman,
et al

Respondents-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 of the State of New York, 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.

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STATE OF NEW YORK

COUNTY OF ROCKLAND

MARY KATE GALLAGHER, being duly sworn, deposes and says that she is not a party to the action, is over the age of 18 years, and resides at Pearl River, New York. On December 14, 1990 I served two true copies of the foregoing brief of respondent Howard Miller by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressees as indicated below:

Doris L. Sassower, P.C. (BY FEDERAL EXPRESS)
Attorney for Petitioners
283 Soundview Avenue
White Plains, New York 10606

Hall, Dickler, Lawler, Kent & Friedman, Esqs.
Attn.: Sam Yasgur, Esq.
Attorneys for Respondent ALBERT J. EMANUELLI, ESQ.
11 Martine Avenue
White Plains, New York 10606

Marilyn J. Slaaten, Esq.
Westchester County Department of Law
Attorneys for Respondents Antonia R. D'Apice,
Marion B. Oldi, Commissioners constituting
the Westchester Board of Elections
600 Michaelian Office Bldg.
148 Martine Avenue
White Plains, New York 10601

Aldo V. Vitagliano, Esq.
Attorney for respondent Guy T. Parisi, Esq.
150 Purchase Street
Rye, New York 10580

John Ciampoli, Esq.
Attorney for New York State Board of Elections
One Commerce Plaza
P. O. Box 4
Albany, New York 12260

Hashmall, Sheer, Bank & Geist, Esqs.
Attorneys for respondents Dennis Mehiel and Richard L.
Weingarten
235 Mamaroneck Avenue
White Plains, New York 10605

Thomas J.Abinanti, Esq.
Attorney for respondent Nicolai
6 Chester Avenue
White Plains, New York 10601

Scolari, Brevetti, Goldsmith & Weiss, P.C.
Attorneys for respondent Brevetti
230 Park Avenue
New York, New York 10169

Attorney General of the State of New York
The Capitol
Albany, New York 12247

Mary Kate Gallagher

Sworn to before me this
14th day of December, 1990.