D-6

To be argued by:
Guy T. Parisi, 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 Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

-vs-

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
STATEBOARD OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondent-Respondents,

Albany County Clerk's
Index No. 6056/90

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
EMANUELLI, Esq., a candidate for the office
of Surrogate of Westchester county to be held in
the general election of November 6, 1990.

BRIEF ON BEHALF OF RESPONDENT-RESPONDENTS COLAVITA AND PARISI

GUY T. PARISI, ESQ.
Attorney for Respondent-Respondent
Colavita
112 Woods End Road
Chappaqua, New York 10514
(914) 238-5048

TABLE OF CONTENTS

POINT I

PETITIONERS FAILED TO NAME AND SERVE ALL NECESSARY PARTIES

Summary proceedings pursuant to Article 16 of the Election Law are completely a creature of statute. The Court has no inherent power to entertain such proceedings. King v. Cohen, 293 N.Y. 435. Institution of these proceedings within the time set forth by the Election Law is jurisdictional in nature and failure to timely join an indispensable party by service of papers upon him is a non-curable defect. Bruno v. Peyser, 54 A.D. 2d 591, 386 N.Y.S. 2d 720, aff'd 40 N.Y. 2d 827 387 Matter of Suthergreen v. Westall 6 A.D. 2d 1014, Buhlman v. LaFever 83 A.D. 2d 895, aff'd 54 N.Y. 2d 775; Matter of Wohl v. Miller 63 NY2d 687; Klammer v. Rockland County Board of Elections 133 AD2d 186; Van Lengen v. Balabanian 50 Misc.2d 271, 26 AD2d 622, aff'd 17 NY2d 920.

By the within proceeding petitioners seek to join separate Article 16 attacks to several different processes of the Republican and Democratic Parties with respect to the designation and nomination of various judicial candidates, all of which are jurisdictionally defective for failure to name and serve necessary parties.

1) FAILURE TO NAME AND SERVE OTHER SUCCESSFUL CANDIDATES NOMINATED AT THE SAME JUDICIAL CONVENTIONS

By paragraph 3 and 5 of the pleadings, Petitioners seek to have this court order that the Westchester Republican and Democratic Parties reconvene their judicial conventions and that said convention be ordered to proceed to the the nominations of

candidates in compliance with law on the grounds that the conventions were not held in compliance with Sections 6-124, 6-126 of the Election Law. If the Court were to issue such an order and declare that the Republican and Democratic Conventions did not comply with the provisions of the Election Law, then the nomination of Judge Joan Lefkowitz and Judge George Roberts who were also successful candidates at said convention, would be materially affected and as such their rights are inextricably interwoven with those of Respondents Nicolai and Miller. Judge Lefkowitz and Judge Roberts are necessary parties and were required to be timely joined since they are vitally interested in this proceeding. Hence, the failure to join all of the candidates nominated at the 1990 Republican and Democratic Judicial Conventions within the time required by 16-102 of the Election Law was a fatal defect mandating the dismissal of this proceeding Martin v. Board of Elections of State of New York 67 NY2d 634.

2) FAILURE TO NAME AND SERVE COMMITTEE ON VACANCIES

Should the petitioners prevail and Respondents Nicolai and Miller be disqualified (Paragraph 4 OTSC) then pursuant to New York Election Law Section 6-148 the Committee to Fill Vacancies named in the certificate of nomination would nominate candidates for said office and as such would be necessary parties to this proceeding. Since the members of the said Committee to Fill Vacancies have not been named and served, jurisdiction has not been obtained over them, mandating a dismissal of the entire proceeding Greenspan v. O'Rourke 27 NY 2d 846; Martin v. Board of Elections, supra.; Cross v. Cohen 50 NYS2d 42.

3) FAILURE TO NAME AND SERVE CONVENTION OFFICERS

Similarly, petitioners in seeking to have this Court order a reconvening of said conventions have failed to name and serve and as such failed to obtain jurisdiction over the officers of the said convention Martin v. Board of Elections, supra. Since said officers are not properly before this court, the within proceeding is fatally defective.

4) FAILURE TO NAME AND SERVE OTHER CROSS-ENDORSED CANDIDATES

Petitioners seek to declare an alleged "Contract for Cross Endorsement" entered into by and between the Republican and Democratic Parties as void (Paragraph 1 OTSC). The alleged "Contract for Cross Endorsement" includes the candidacy of Judge Adrienne Hoffman Scancarelli, Judge J. Emmett Murphy and Justice Samuel G. Fredman and as such their rights would be affected should petitioners prevail. Since their candidacies would be affected they are necessary parties and should have been named and served. Greenspan v. O'Rourke supra; Martin v. Board of Elections of New York supra; Stefano v. Longo 115 AD2d 348.

5) FAILURE TO NAME AND SERVE ROCKLAND, ORANGE, DUTCHESS AND PUTNAM COUNTY BOARD OF ELECTIONS

Petitioners seek an order prohibiting Respondents Nicolai and Miller from appearing on the November 1990 General Election Ballot for the office of Justices of the Supreme Court. Justice of Supreme Court are elected by Judicial District and the 9th Judicial District inludes Westchester, Rockland, Dutchess, Orange and Putnam Counties. Any restraining order must be directed against those Boards of Elections as well and failure to join them is fatally defective.

6) FAILURE TO NAME AND SERVE THE CHAIRMAN AND SECRETARY OF THE REPUBLICAN STATE COMMITTEE

Petitioners by their specifications of objections (Exhibit B paragraph 1) allege that the delegates and alternate delegates to the Republican Judicial Convention were not elected in accordance with the geographical and proportional requirement for the election of delegates and alternate delegates prescribed by Section 6-124 of the Election Law.

Section 6-124 provides in pertinent part: "The number of delegates and alternates, if any, shall be determined by party rules..."

The rules of the New York Republican State Committee provide:

> 19. JUDICIAL CONVENTION. The following shall be the basis of representation in future Judicial Conventions:
>
> First District Sixth District
> Second District Ninth District
> Fifth District Tenth District
> Eleventh District
>
> Each Assembly District or appropriate portion thereof elects one delegate and one additional delegate for each 2,500 votes or major fraction thereof cast for Republican candidate for Governor at the last gubernatorial election.

Hence, by the specification number 1, petitioners are challenging the rules of the New York Republican State Committee and as such, the Chairman and Secretary of the New York Republican State Committee are necessary parties and should have been named and served Greenspan v. O'Rourke supra; Battipaglia v. Executive Committee of Queens County 191 NYS2d 288.

POINT II
PETITIONERS LACK STANDING

Petitioners by this proceeding seek to join challenges to the form of the General Election Ballot pursuant to Section 16-104 of the Election Law, to the casting and canvassing of ballots pursuant to Section 16-106 of the Election Law, and to the proceeding of the Republican and Democratic Judicial Convention pursuant to 16-102 of the Election Law. Respondents submit that Petitioners lack standing under all three sections of the Election Law.

Challenge to the Form of Ballot

Subdivision 1 of Section 16-104 of the New York Election Law provides as follows:

> "The form and content of any ballot, or portion thereof, to be used in an election,... may be contested in a proceeding instituted in the Supreme Court by an aggrieved candidate or by the chairman of any party committee or independent body" (emphasis added).

Petitioners herein not being aggrieved candidates or the chairman of any party committee or independent body, have no standing to challenge the form or content of the November 7, 1990 General Election Ballot. Hence, to the extent that this proceeding seeks relief pursuant to 16-104 of the Election Law it should be dismissed.

Challenge to Casting of Ballots

Similarly New York Election Law Section 16-106(1) provides in pertinent parts:

> "The casting or refusal to cast challenged ballots... may be contested in a proceeding instituted in the Supreme or county Court, by a candidate or the chairman of any party committee..." (emphasis added)

Petitioners not being either a candidate or chairman of a party committee lack standing to commence this proceeding pursuant to Section 16-106.

Challenge to Judicial Convention

Petitioner Castracan alleges that he is an enrolled Republican (Paragraph 1 of Petition) and Petition Bonelli alleges he is an enrolled Democrat (Paragraph 2 of Petition) and as such each seek an order directing this court to reconvene both the Republican and Democratic Judicial Conventions for the Ninth Judicial District.

The Court of Appeals has held that it is of no interest to non-party members that the formalities of an endorsement have not been followed. Wylder v. Christenfeld 35 NY2d 719 (Also see Matter of Stempel v. Albany County Board of Elections 60 NY 2d 801; DiRosa v. Dodd, 514 F.Supp. 258, D.C.N.Y. 1981; Krupczak v. Mancini 133 AD2d 288; Friedman v. Lafever 122 AD2d 903; Bennett v. Justin 77 AD2d 960; Liepshutz v. Palmateer 112 AD2d 1098, aff'd 65 NY2d 963.

Hence, to the extent that Castracan seeks to reconvene the Democratic Judicial Convention, he lacks standing to do so. Similarly, to the extent that Bonelli seeks to have this court reconvene the Republican Judicial Convention, he lacks standing to do so.

Furthermore, each petitioner being neither a candidate aggrieved nor a chairman of a party committee lacks standing to object to the Judicial Conventions. While it may be argued that New York Election Law Section 16-102(1) permits an objector to commence a proceeding to contest the nomination of any candidate, a close reading of the statute indicates a limitation of the standing of an objector. Section 16-102(1) in pertinent parts provides:

> "the nomination or designation of any candidate for any public office...may be contested in a proceeding instituted in the Supreme Court...by a person who shall have filed objection, as provided in this chapter ... (emphasis added).

New York Election Law 6-154 sets forth the parameters for a voter to file objections:

> "(2) Written objections to any certificate of designation or nomination or to a nominating or designating petition, a petition for an opportunity to ballot for public office or to a certificate of acceptance, a certificate of authorization, a certificate of declination or a certificate of substitution relating thereto may be filed by any registered voter to vote for such public office".(emphasis supplied)

Reading Section 16-102(1) together with Section 6-154(2) evidences an intent by the Legislature to give an individual voter standing only to object to documents, (election petitions or certificates) and not to procedures. This distinction is even more apparent when read in the light of Wydler v. Christenfeld, supra, where the Court of Appeals restricted the standing to challenge the formality of the authorization proceedures of a political party to a member of that political party, while Section 6-154 would grant any voter the right to object to the certificate itself.

It would be contrary to the Wydler ruling and the command of Section 6-154 to permit petitioners who were not delegates to the Judicial Convention (having no legal right to be in attendance) to object to the proceeding of said convention.

Clearly, petitioners could not gain 16-102 objector standing to commence a court proceeding challenging the procedure of the Judicial Convention by merely filing an objection to the certificate of nomination. Concededly a candidate aggrieved or a party chairman has standing under 16-102 and could have challenged the proceeding of the Ninth Judicial District Convention. It is submitted that Petitioners could only gain standing as objectors to challenge the face of the certificate of nomination not the procedures.

Therefore, this proceeding should be dismissed for lack of standing.

POINT III

AN OBJECTION TO THE DESIGNATION OF JUSTICE EMANUELLI AS SURROGATE IS TIME BARRED

Justice Emanuelli was designated as the Republican Democratic and Conservative Candidate for Westchester County Surrogate with designating petitions filed by the respective political parties between July 9 and 12, 1990. The petitions having been timely filed and facially correct were presumed valid (NYS Election Law 6-154(1).[1]

In accordance with the provisions of New York Election Law, more particularly Section 6-154, the last day to file general objections to said petitions was July 15, 1990, the last day to commence a legal proceeding to invalidate said petitions was July 26, 1990.

The 14 day limitation period within which an invalidating proceeding must be instituted is mandatory Van Lengen v. Balabanian 17 NY 2d 920, Matter of Buhlmann v. LeFever 54 NY 2d 775, Grable v. LeFever 84 Ad 2d 584.

Petitioners not having filed objections to said petitions by July 15, 1990 and not having timely commenced a legal proceeding by July 26, 1990, with respect to said petition are now time barred.

1. No objections and no other petitions having been filed, Respondent Emanuelli is deemed nominated by said parties, there being no other petitions filed. Hunting v. Powers 20 NY 2d 680.

POINT IV

THE WITHIN PROCEEDING IS BARRED BY THE DOCTRINE OF LACHES

It is well settled that where a plaintiff has unreasonably and inexcusably neglected to assert a right by commencing a court proceeding to the prejudice of the defendant, the suit is barred on the grounds of laches Carmody-Wait 2d Section 13:33.

In the instant case, petitioners by Order to Show Cause dated September 26, 1990 seek the following relief:

1. Declaring that a certain cross endorsement "agreement" entered into by the Democratic and Republican Parties on August 23, 1989 and August 24, 1989, respectively, is invalid.

2-A. Declaring that all actions taken in implementation of the "agreement" are invalid.

2-B. Declaring the Certificate of Nomination of the Republican and Democratic Judicial Conventions on September 18, 1990 and September 24, 1990 are invalid.

3. Directing the reconvening of the Republican and Democratic Judicial Conventions.

4. Disqualifying Respondents Nicolai, Miller and Emanuelli as the Judicial Candidates in the November 1990 General Election.

5. Enjoining the Respondent State Board of Elections and Westchester County Board of Elections from placing the name of Respondents Nicolai, Miller and Emanuelli as candidates on the November 1990 General Election.

The resolution adopted by Respondent Westchester Republican County Committee and the Westchester Democratic County Committee that Petitioners seek to invalidate also involves the candidacies of Respondent Emanuelli and Justice Samuel G. Fredman in the November 7, 1989 General Election.

The aforesaid candidates were nominated by the respective Democratic and Republican Judicial Conventions pursuant to New York Election Law Section 6-124, and 6-126 on September 19, 1989 and September 25, 1989 respectively, and certificates of nominations were filed between September 21, 1989 and September 26, 1989 pursuant to 6-158(6) of the Election Law.

The delegates to the said Judicial District convention were elected in the September 12, 1989 Primary Election of each political party pursuant to New York Election Law Section 6-124. The said delegates were designated by the petitions of each respective party circulated between June 6, 1989 and July 13, 1989 pursuant to Sections 6-134(6) and 6-158(1) of the Election Law respectively.

The decision of both Republican and Democratic Parties to endorse the same judicial candidates in the November 1989 General Election was a matter of public record since March 1, 1989, [exhibit 1(a), (b), (c), (d)]; petitioners and their attorney knew or should have known of the intentions of Republican and Democratic Parties, and as such had an opportunity to institute a court proceeding.[1]

1. It should be noted that an associate of petitioner's attorney, one Eli Vigliano, who coincidentally was the notary on the verification of the within proceeding, filed a complaint with the New York State Board of Election on November 1, 1989 regarding the September 9, 1989 Democratic Judicial Conventions, the substance of the complaint being essentially the same as the substance of the within proceeding. See Exhibit 2.

The resolutions adopted on August 23, and 24, 1989 by the Democrtic and Republican Parties respectively additionally involved the candidacies for Justice of the Supreme Court, Ninth Judicial District, Judge of the Family Court, and Westchester Surrogate in the November 6, 1990 General Election.

As in the 1989 General Election, the delegates to the 1990 Ninth Judicial District Conventions were elected and the 1990 candidates for Family Court and Surrogate Court were nominated in the September 11, 1990 Republican and Democratic Primary Election pursuant to 6-124 of the Election Law. Similarly the said delegates and candidates for Family and Surrogates Court were designated by petitions circulated between June 5, 1990 and July 12, 1990 pursuant to 6-134(6) and 6-158(1) of the Election Law.

In the eighteen (18) months between the public announcement of the major parties decision to cross endorse judicial candidates and the commencement of this proceeding, two election cycles have been completed without petitioners seeking court intervention. The petitioners' failure to commence a proceeding with respect to the "cross-endorsement" resolutions until September 22, 1990 more than 13 months after the resolutions were adopted, was clearly an unreasonable length of time (especially where the legislature has imposed a short statute of limitaion of 10-14 days in order to meet the exigencies of preparing ballots and conducting elections for public office Town of Islip Committee of Conservative Party v. Leo 71 AD 2d 624), and has resulted in injury not only to Respondents Nicolai, Miller, and

Emanuelli, but also to the other candidates who were nominated by the Republican and Democratic Parties, to wit, (Scancarelli, Fredman and Murphy who have not been made party to this proceeding) to the extent that should petitioners prevail the aforesaid parties have no remedy at this late date to seek election on other ballot lines.

Moreover, Petitioners' delay in commencing this action could leave major political parties without candidates for the November 6, 1990 General Election since vacancies created on or after October 25, 1990 will not be filed until the November, 1991 General Election (New York Election Law Section 6-150). Given the probability that any decision on the merits will be appealed to the Court of Appeals, it is unlikely that such decision will be finally determined by October 25, 1990.

Hence, to permit petitioners to go forth with this proceeding would prejudice the rights of the general electorate, whom petitioners allegedly seek to protect, in so far as the voters could be without any candidates for the subject judicial offices in the November 1990 General Election.

Therefore, this proceeding should be dismissed on the grounds that it is barred by the doctrine of laches.

POINT V

PETITIONERS FAILED TO STATE A CAUSE OF ACTION

The thrust of petitioners claim is that Respondents Colavita, Weingarten and Mehiel, on behalf of the Republican and Democratic Parties respectively, acting with one another as part of a common plan conspired to violate the New York Election Law and the Constitution of the State of New York by entering in to an agreement to disenfranchise the electors of the Ninth Judicial District and deprive them of their constitutional right to choose Justice of Supreme Court (Paragraph 18 Petition).

The truth, in fact, is that no one was or will be deprived of any right to designate, nominate or elect Justices of the Supreme Court in and for the Ninth Judicial District or any other judicial office. As previously set forth in Point IV of this Memorandum, Petitioners and the electorate at large had advanced and sufficient notice that the two major political parties in Westchester County were going to endorse the same candidates for Justice of the Supreme Court, Judge of the Family Court, Judge of the County Court and Judge of the Surrogate's Court in the 1989, 1990 and 1991 general election.

If anyone was dissatisfied with the decision of the major political parties they could have fielded delegates to the 1989 and or 1990 Judicial Conventions in and for the Ninth Judicial District as well as fielded candidates for Surrogate and Family Court in the Republican, Democratic, Conservative, Liberal and Right to Life 1990 Primary Elections. It should be noted that because of an exemption granted by the legislature a judicial candidate is not required to be a member of a political party in

order to enter that party's primary. Hence, either of the petitioners herein could have been candidates in any or all of the five party primaries.[1]

If petitioners, their attorneys or anyone else was dissatisfied with the choice of the two major political parties for judicial offices in the 1989 or 1990 General Election, they had a vehicle to challenge those choices. The fact that they elected not to challenge those candidates either in court (see Point II) or at the ballot box, but rather waited until the eleventh hour to commence a frivilous lawsuit bespeakes of their sinister motives. It is apparent that their failure to use the process is a manifestation of their true intention to frustrate the political process. It is submitted that the inspiration for this lawsuit comes not from the burning bush, but rather from the roaring axe.

Clearly, if petitioners had a genuine objection to the candidacies of the two major political parties with the time given by the advance notice, they could have mounted a primary challenge to the candidates of those political parties.[2] Petitioners failure to do so is an indication of either their lack of support or lack of good faith, neither of which should not be sanctioned by this court.

1. NYS Election Law Section 6-120 (1) and (4) provide that a designating petition to nominate a person as a candidate for party nominations, except as a candidate for judicial office, shall be valid only if the person designated on the petition is an enrolled member of the party designation.

2. It is a rare situtation for a political party to announce who its candidates will be two years in advance. Typically political parties announce their choice for candidates weeks before the time to circulate designating petitions which has proven to be sufficient time to mount a primary challenge where there is a good faith disagreement with the decisions of the committees of a political party.