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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Index No. 6056/90

Petitioners-Appellants,

MEMORANDUM OF LAW

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

-vs-

ANTHONY J. 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,

Respondent-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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PRELIMINARY STATEMENT

By Decision and Order dated October 17, 1990, Honorable
Lawrence E. Kahn dismissed Petitioner's-Appellant's petition on the
grounds that it failed to state a cause of action. The Appellate
Division, Third Department, by decision dated May 2, 1991 and order

dated and entered on May 15, 1991, affirmed the decision and order of the trial court.

In the motion dated July 25, 1991, Petitioners-Appellants have moved to reargue the determination and order of the Appellate Division. In addition, Petitioners-Appellants have made a motion to renew. That motion seems directed at that portion of the Appellate Division's decision which held that another basis for dismissal of this proceeding is Petitioner's-Appellant's failure to serve the Attorney General.

Respondent-Emanuelli submits this memorandum of law in opposition to Petitioner's-Appellant's motion to reargue and renew and in support of Respondent-Emanuelli's cross-motion for counsel fees, costs and sanctions.

STATEMENT OF FACTS

In their prayer for relief, Petitioners/Appellants ask the Court to declare that certain resolutions passed in 1989 by the Executive Committees of the Democratic and Republican parties were illegal and that judicial nominations which may have been affected or influenced by these resolutions were invalid. In the order to show cause and throughout their petition, Petitioners-Appellants completely mischaracterized these resolutions as contracts. In denominating them as contracts, Petitioners-Appellants display a complete misunderstanding of the resolutions as well as the law of contracts.

There was nothing binding or enforceable about these resolutions. None of the candidates named in the resolutions had

any enforceable rights.

Unequivocally, the resolutions were mere statements by the respective Executive Committees of their intention to support certain highly qualified candidates. Indeed, it was their intention to promote a non-partisan judiciary composed of lawyers with unquestionable litigation skills, unblemished reputations, distinguished civic careers and responsible judicial temperament.

In addition to declaring these resolutions illegal, Petitioners-Appellants seek to void the 1990 Republican and Democratic judicial nominating conventions. They ask the Court to order that the Westchester Republican County Committee and the Westchester Democratic County Committee reconvene these conventions and proceed to select new candidates for Supreme Court and Surrogate Court. Moreover, Petitioners-Appellants have requested an order prohibiting the candidates who were nominated at the 1990 conventions, including Judge Emanuelli, from seeking office. They have asked the court to disqualify and bar these candidates from seeking judicial office.

Interestingly, with regard to Judge Emanuelli, Petitioners-Appellants never challenged his designating petitions, nor did they seek to compete for the nomination of either party for the judicial position in the Surrogate Court. Instead, they waited until just prior to the 1990 elections to bring this suit.

The Trial Court found that Petitioners-Appellants had failed to state a cause of action. The court determined that Petitioners-Appellants did not show that the Judicial Nominating Conventions

were legally deficient in any respect under the Election Law.

The Appellant Division, Third Department, affirmed the trial court's decision and order. The Justices of that court found that Petitioners-Appellants had failed to join necessary parties in this proceeding under the Election Law and that because of this failure, the petition had to be dismissed.

The Court also felt that Petitioner's-Appellant's failure to serve the Attorney General was another basis for dismissal. However, the court did not specifically rely on that grounds for the dismissal.

Finally, the court expressed grave doubts about the standing of Petitioners-Appellants to bring this suit.

Petitioners-Appellants now seek to reargue the decision and order of the Appellate Division based upon the alleged misapplication of the law of joinder by the Appellate Division. In addition, Petitioners-Appellants seek to renew on the grounds that the court was unaware of a letter from the State Board of Elections which purportedly allowed Petitioners-Appellants to disregard the law (CPLR 2214[d]) by not serving the Attorney General with a copy of the petition.

Finally, Petitioners-Appellants argued for the first time, that all of the Judges on the Appellate Panel who were cross-endorsed should have recused themselves.

POINT I

THE COURT DID NOT MISAPPREHEND THE LAW OR OVERLOOK

MATERIAL FACTS

Petitioners-Appellants seek an order granting reargument on the alleged grounds that the court misapprehended the law of joinder. This claim must fail.

Petitioners-Appellants seek to have the court declare illegal resolutions adopted in 1989 by the Executive Committees of the Republican and Democratic parties in Westchester County. Petitioners-Appellants mischaracterize as contracts these resolutions which merely pledged bi-partisan support for certain extremely qualified candidates.

Petitioners-Appellants ask for an order directing these political parties to reconvene the 1990 judicial nominating conventions. They ask the Court to direct the parties to proceed to nominate candidates for these judicial offices.

Petitioners-Appellants neither served nor sought to make several necessary and indispensable persons and entities, who would be inequitably affected, parties to this action (McGoey v. Black, 100 AD2d 635 [2nd Dept. 1984]); Matter of Greenspan v. O'Rorke, 27 NY2d 846 [1970]). The court correctly ruled that rights of all the candidates nominated at the 1990 judicial nominating conventions held by the Republican and Democratic parties in Westchester County were inextricably interwoven and that they were necessary parties to this suit.

Petitioners-Appellants failed to join, among others, Justice Joan Lefkowitz and George Roberts. They were on the 1990 certificates of nomination of the Democratic and Republican parties respectively.

Manifestly, Petitioner's-Appellant's failure to join all candidates nominated at the 1990 judicial nominating conventions within the time required by Election Law 16-102, paragraph 2, required dismissal of the petition (Matter of Marin v. Board of Elections of State of N.Y., 67 NY2d 634 [1986]). Having searched the record, the Court's determination was correct (see Maritime Fish Products, Inc. v. World Wide Fish Products, Inc., 100 AD2d 81 [1st Dept. 1984]; Kirisits v. State of N.Y., 107 AD2d 156 [4th Dept. 1985]).

POINT II

THE COURT MUST DENY PETITIONER'S-APPELLANT'S MOTION

FOR RENEWAL

Petitioners-Appellants appear to argue that they are entitled to renewal because the Appellate Division was unaware of a letter (attached to their motion papers as Exhibit "C") from the State Board of Elections. They claim that in this letter the Attorney General explicitly opted not to be involved in these proceedings. Petitioners-Appellants are not entitled to renewal.

First, there is no indication that the court based its determination on this grounds. In fact, the court merely states in a footnote that another basis for dismissal of the proceeding was Petitioner's-Appellant's failure to serve the Attorney General.

Even if this was one of the reasons that the Appellate Court affirmed the trial court's decision and order, the letter attached to the motion papers is not from the Attorney General. Moreover, it is dated long after the petition was served, and it merely

states that,

" . . . it is no longer necessary to serve the Attorney General with papers during the remaining proceedings." (emphasis added)

The State Board of Elections is clearly a State body. Accordingly, Petitioners-Appellants were required to serve both the State Board of Elections and the Attorney General (CPLR 2214 [d]). The Statute does not provide that service upon the Attorney General may be waived. Moreover, failure to serve is a jurisdictional defect (See DeCarlo v. DeCarlo, 110 AD2d 806 [2nd Dept. 1985]).

Unequivocally, because of Petitioner's-Appellant's failure to serve the Attorney General, there was no jurisdiction over another necessary party. Again, the court was correct in noting this was another grounds for dismissal of the petition.

POINT III

CROSS-ENDORSEMENT OF JUDICIAL CANDIDATES

IS PERMITTED UNDER THE LAW OF THIS STATE

Petitioner's-Appellant's claim that this case revolves around the legality of cross-endorsement of judicial candidates (Petitioner's-Appellant's Memorandum of Law, page 7). That issue has already been decided.

Manifestly, cross-endorsement of judicial candidates is specifically permitted under the law of this state (Rosenthal v. Harwood, 35 NY2d 469 [1974]). In Rosenthal, the court talked of the judicial candidate's right to appear on more than one line on the ballot (id. at 475). The court stated:

" . . . in our view, the exaction of agreements against cross-indorsements falls over the line into the

forbidden area."

The Court of Appeals found that cross-endorsements were an acceptable way to free candidates for judicial office from much of the political manipulation that attends the normal election process.

Moreover, the State Legislature has explicitly approved the concept of cross-endorsements. The Election Law (§7-104[5][b]) provides for specific forms of ballots for candidates who receive nominations from more than one political party. This legislation applies to all elections, including those for judicial positions.

POINT IV

PETITIONERS-APPELLANTS HAVE ENGAGED IN FRIVOLOUS CONDUCT AND RESPONDENT-EMANUELLI IS ENTITLED TO COUNSEL FEES, COSTS AND SANCTIONS.

Without a doubt, Petitioners-Appellants are using the judicial process as a weapon to inflict financial hardship on Judge Emanuelli. Claiming to act in the public interest, they have sought at every turn to make these proceedings more expensive for the Respondents. This motion to reargue is another example of Petitioners-Appellants abuse of the system.

Their motion to renew and reargue is utterly without merit in law or fact. Their sole legal argument is that the Appellate Division misapplied the law of joinder.

Most of their papers deal with the unsupported and unconscionable contention that the Justices of the Appellate Division, Second Department have engaged in a conspiracy to silence

them and that the Justices of the Third Department, some of whom were cross-endorsed, decided this case against Petitioners-Appellants because they feared for their own job security.

As set forth more fully in the affidavit in support of the cross-motion for counsel fees, costs and sanctions, the only way to stop Petitioner's-Appellant's reprehensible conduct is to make them pay for their transgressions. They must understand that there are financial consequences for their malicious use of the judicial system. Accordingly, pursuant to 22 N.Y.C.R.R. 130-1.1, the Court should grant Judge Emanuelli counsel fees in the amount of \$8,400.00 for the unnecessary and substantial legal fees caused by Petitioner's-Appellant's frivolous abuse of the process of this Court and for costs and sanctions.

CONCLUSION

Based on all the reasons set forth in the affidavit of Mark K. Malone, Esq. and the accompanying supporting papers, it is respectfully requested that the Court deny Petitioner's-Appellant's motion in its entirety and grant Judge Emanuelli's cross-motion for attorney's fees, costs and sanctions.

Dated: White Plains, New York
August 12, 1991

Respectfully submitted:

HALL, DICKLER, LAWLER, KENT &
FRIEDMAN

BY: MARK K. MALONE, ESQ.
11 Martine Avenue
White Plains, New York 10606
(914) 428-3232

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on

19

Dated,

Yours, etc.,

HALL, DICKLER, LAWLER, KENT & FRIEDMAN

Attorneys for

Office and Post Office Address

11 Martine Avenue
WHITE PLAINS, N.Y. 10606
(914) 428-3232

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,

HALL, DICKLER, LAWLER, KENT & FRIEDMAN

Attorneys for

Office and Post Office Address

11 Martine Avenue
WHITE PLAINS, N.Y. 10606
(914) 428-3232

To

Attorney(s) for

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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,

Petitioners-Appellants,

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

-vs-

ANTHONY J. COLAVITA, ESQ., Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE, GUY T. PARISI, ESQ., DENNIS MEHIEL, ESQ., Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, et al.,
Respondents-Respondents.

MEMORANDUM OF LAW OF RESPONDENT, EMANUELLI IN OPPOSITION TO PETITIONERS-APPELLANTS MOTION TO REARGUE AND IN SUPPORT OF CROSS-MOTION FOR COUNSEL FEES

HALL, DICKLER, LAWLER, KENT & FRIEDMAN

Attorneys for Respondent, Emanuelli

Office and Post Office Address, Telephone

11 Martine Avenue
WHITE PLAINS, N.Y. 10606
(914) 428-3232

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for