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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,

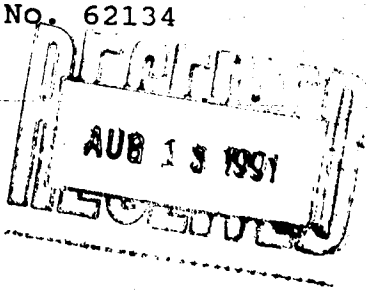
Petitioners-Appellants,

Index No. 6056/90

Appeal No. 62134

for an order, pursuant to Sections 16-100, 16-101, 16-104, 16-106 and 16-116 of the Election Law,

-against-



ANTHONY J. COLAVITA, ESQ., Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE, GUY T. PARISI, Esq., DENNIS MEHIEL, Esq., Chairman, WESTCHESTER DEMOCRATIC PARTY 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.

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MEMORANDUM OF LAW OF RESPONDENT-RESPONDENT HOWARD MILLER IN OPPOSITION TO MOTION AND IN SUPPORT OF CROSS-MOTION

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PRELIMINARY STATEMENT

Although designated as a motion to "renew and reargue" the decision of this court dated May 2, 1991 and the order entered thereon on May 15, 1991, the thrust of petitioners-appellants (hereinafter "appellants") memorandum of law in support is that the court committed "serious and substantial errors," thus conceding that no new proof is being offered but that the court is being asked to treat this motion as one to reargue.

The facts having been previously submitted to this court on the original appeal, they will not be repeated here, except to say that the inflammatory remarks contained under appellants' "Statement of Facts" are erroneous and unfounded.

In November of 1990 the candidates nominated on the petitions which are the subject of this proceeding were elected and took office January 1, 1991.

ARGUMENT

POINT I

THE APPELLATE DIVISION HAD AUTHORITY TO SEARCH THE RECORD AND RENDER A DECISION BASED ON THE JURISDICTIONAL OBJECTIONS RAISED BY RESPONDENTS

Appellants allege that this court "completely disregarded critical facts," and failed to provide appellants with notice of the court's intention to address procedural objections. In support thereof, appellants cite a totally inapposite case - Mihlovan v. Grozavu (72 NY2d 506), which relates to the requirement that a court give notice before converting a preanswer motion to a summary judgment motion. Here, appellants took their appeal "from each and every part" of the lower court order. By the very wording of their own Notice of Appeal, the entire content of that order, including Judge Kahn's decision not to address procedural objections, came up for review. MILLER's responsive papers, including my affidavit and memorandum of law, addressed those procedural objections and, presumably, appellants read those papers, thus providing them sufficient notice of those issues. Inasmuch as appellants did not limit their appeal to specific dispositive aspects of Justice Kahn's order, they cannot be heard to now complain that the Appellate Division did in fact review the entire order.

Section 5501(c) of the Civil Practice Law and Rules specifically requires that the Appellate Division review "questions of law and fact" and under Section 5501(a)(3), it is clear that an

appeal from a final judgment brings up for review "any ruling to which the appellant objected or which was a refusal or failure to act as requested by the appellant...". Even a cursory reading of the CPLR and the papers submitted on this appeal would have placed appellants on notice that technical considerations were under review.

The Appellate Division is not bound by the determination of the lower court (Field v. Public Adm'r of New York County, 10 AD2d 97, 197 NYS2d 652); has the power to grant relief beyond that specifically requested (Costello v. Hoffman, 30 AD2d 530, 291 NYS2d 116); may make findings that the trial court should have made (Maritime Fish Products, Inc. v. World Wide Fish Products, Inc., 100 AD2d 81, 474 NYS2d 281); may consider the merits of an action where only jurisdictional objections are raised (Computersearch Corp. v. ECL Industries, Inc., 142 AD2d 961, 530 NYS2d 386); and may raise issues sua sponte for the first time on appeal (Muscarella v. Muscarella, 93 AD2d 993, 461 NYS2d 621). The failure of the Supreme Court to pass on an issue does not prevent the Appellate Division from doing so (Spitalnik v. Springer, 59 NY2d 112, 463 NYS2d 750, 450 NE2d 670, reargument denied 60 NY2d 702, 468 NYS2d 1027, 455 NE2d 1267). The Appellate Division may search the record and render judgment as warranted by the facts (Kirisits v. State, 107 AD2d 156, 485 NYS2d 890).

POINT II

THE APPELLATE DIVISION DID NOT ERR IN HOLDING THAT INDISPENSABLE PARTIES WERE NOT JOINED AND THAT SUCH NONJOINDER REQUIRED DISMISSAL OF THE PROCEEDING

Appellants' claim that all necessary parties were joined, or could have been added, is supported by cases which are not applicable here. It must be borne in mind that the petition seeks to invalidate, not only the nominating petitions, but the entire Republican and Democratic conventions at which all candidates for 9th Judicial District judicial office in 1990 - including the Hon. Joan Lefkowitz and George Roberts, Esq. - were nominated. Appellants contest the procedures by which judicial candidates were nominated - yet seek to convince the court that those same procedures, denoted by appellants as "illegal and fraudulent", when applied to Judge Lefkowitz and Mr. Roberts - are somehow untainted. Certainly if the appellants were successful in obtaining the relief sought in their petition, the conventions would have had to be reconvened, and there is no guarantee that Judge Lefkowitz and Mr. Roberts would again be their respective Party's nominee. To recognize this fact, and then to allege that their interests are not inextricably entwined with those of MILLER and the Hon. Francis Nicolai, is absurd.

In Matter of Lucariello v. Commissioner of Chataqua County Board of Elections (138 AD2d 1012, 324 NYS2d 850), the petitioner

sought to have his certificate of nomination accepted for filing and validated. Although the other contender for nomination was named on petitioner's certificate, he was found not to be a necessary party, apparently because the contender's own certificate of nomination was not at issue. Matter of Michaels v. New York State Board of Elections (154 App.Div. 2d 873, 546 NYS2d 736) is similarly distinguishable: the parties alleged to be indispensable were the Conservative Party or its political subdivision, not another candidate on the same nominating petition, Here, the certificate of nomination of the judicial candidates lists both Judge Lefkowitz and Mr. Roberts on the same certificate as the candidates which are parties to this action. Invalidation of the certificate as to the parties named in this action results, ipso facto, in invalidation of the candidacies of the other nominees.

The Appellate Division correctly observed that the 1989 candidates were also indispensable parties. If appellants' claim that a "cross-endorsement agreement" (which appellants still fail to show applies to MILLER) is found to be illegal, the beneficiaries of that agreement - the 1989 candidates - will be profoundly affected.

It is unclear how appellants would have had Judge Lefkowitz and Mr. Roberts "added" as parties "at this post-election juncture" in view of the expiration of the applicable statute of limitations as to those persons. Appellants' failure to serve an indispensable party cannot be cured after the expiration of the applicable statute of limitations, nor by self-serving statements that those

parties should have intervened or been impleaded. The service of Specifications of Objections is not a substitute for service of a petition commencing a special proceeding.

MILLER raised the issue of nonjoinder both in his answer and on the cross-motion; even had he not done so, it could be raised on the court's own motion at any stage of the case (Schmidt v. Schmidt, 99 AD2d 775, 472 NYS2d 26; Albert C. v. Joan C., 1100 AD2d 803, 488 NYS2d 188) and the court may always consider whether there has been a failure to join a necessary party (City of New York v. Long Island Airports Limousine Service Corp., 48 NY2d 469, 423 NYS2d 651, 399 NE2d 538). Therefore, the Appellate Division appropriately searched the record and made the determination that the failure to join necessary parties was fatal to this proceeding.

POINT III

SERVICE UPON THE ATTORNEY GENERAL IS STATUTORILY REQUIRED

Appellants urge that the Appellate Division erred in its finding that failure to serve the Attorney General under CPLR 2214 mandated dismissal of the proceeding, apparently upon the grounds that the Board of Elections and the Attorney General "waived" compliance with the statute. Although there have been cases in which the Attorney General appeared without being served, the decision cited by appellants made clear that approval of the failure to comply with the statute was not intended (Duffy v. Schenck, 73 Misc.2d 72, 341 NYS 2d 31, aff'd 42 AD2d 774, 346 NYS2d

616).

Appellants do not argue that the Board of Elections is not a state body and that CPLR 2214 requires service upon the Attorney General. The legislature did not provide for exceptions to the statute, nor for procedures whereby a state body, or the Attorney General, may waive compliance.

CONCLUSION

Appellants have failed to carry their burden of demonstrating that the court made an error of law requiring reargument and the motion should be denied.

Dated: August 8, 1991

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