C-5

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,

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-

NOTICE OF
CROSS-MOTION

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,

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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S I R S:

PLEASE TAKE NOTICE that upon the annexed affirmation of SANFORD S. DRANOFF, ESQ., dated October 25, 1990, and the exhibits annexed thereto, and all the pleadings and proceedings heretofore

had herein, a cross-motion will be made pursuant to CPLR 5526 , at an Appellate Term of this Court, at the courthouse thereof, Albany, New York, on the 29th day of October, 1990, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order dismissing this appeal and imposing sanctions upon petitioners for failure to file a complete Record on Appeal, and for such other and further relief as to this court may seem just and proper.

Dated: October 25, 1990
Pearl River, New York

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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,

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,

AFFIRMATION

-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, Commis-
sioners constituting the NEW YORK STATE
BOARD OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

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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

SANFORD S. DRANOFF, ESQ., an attorney duly admitted to practice in the courts of the State of New York affirms the

following to be true under penalties of perjury:

1. I am the attorney for respondent-respondent HOWARD MILLER and make this affirmation in opposition to petitioners-appellants' application for a preference in the hearing of this appeal and in support of respondent-respondent MILLER's cross-motion for dismissal of the appeal and sanctions for failure to file a complete Record on Appeal.

2. Application for Preference. Petitioners rely on CPLR 5521, which leaves to the discretion of the court the granting of any preference in the hearing of an appeal, and upon Section 800.16 of the Rules of the Third Department, which state:

> "Appeals in proceedings brought pursuant to any provision of the Election Law shall be prosecuted upon a single-copy record and seven copies of a brief and appendix pursuant to the method specified in section 800.4(b) of this Part. Such appeal shall be given preference and shall be brought on for argument on such terms and conditions as the presiding justice may direct upon application of any party to the proceeding."

The petition borders on frivolous. Because of the multitude of jurisdictional and procedural defects and irregularities, the "merits" of the petition should not even be reached. Moreover, Petitioners-appellants, other than reiterating their arguments before the Supreme Court, and their efforts in preparing this appeal, advance no cause of action under Article 16 of the Law which would entitle this case to a preference, let alone an order directing a special session of this court. While petitioners-appellants make vague references to alleged violations of the Election Law during the respective Judicial Conventions of the

Republican and Democrat Parties, the allegations, which are denied by respondents-respondents, do not rise to the level of impropriety required for the reassembling of the conventions, i.e. - that the conventions as constituted were "characterized by such frauds or irregularities as to render impossible a determination as to who rightfully was nominated..." (Aurelio v. Cohen, 44 NYS2d 145, aff. 266 AD 603, 44 NYS2d 11, aff. 291NY 645, 51 NE2d 930).

Petitioners-appellants' primary contentio[illegible]ressed by the lower court decision, is an attack on cross-endorsements by political parties and, in particular, a Resolution of th[illegible] and Republican Parties entered into in 1989. The matter of cross-endorsements has been litigated time and time again over the last twenty years, and the Court of Appeals has repeatedly upheld multi-party candidacies, particularly in judicial races. Annexed hereto and made a part hereof as Exhibit A is the memorandum of submitted on behalf of respondent-respondent MILLER in the lower court proceeding, which details the court decisions [illegible]ting to cross-endorsements. The lower court correctly noted th[illegible] an issue for the legislature, not the courts. Clearly [illegible] should not be compelled to grant a preference to an issue whi[illegible] has already been decided by the Court of Appeals and which is properly a legislative consideration.

Further, the Resolution petitioners-appellants attack was entered into in 1989! Petitioners-appellants felt no sense of urgency for more than a year, but now have the audacity to ask this court to come back - in Special Session - to hear their appeal.

3. Cross-Motion to Dismiss Appeal. Petitioners-appellants have presented to this court a grossly incomplete and improperly prepared Record on Appeal. The unbound document, consisting of approximately 140 loose pages (in violation of Rule 800.5 of this Court) lacks subject matter headings (in violation of CPLR Rule 5526), and, despite the certification by MS. SASSOWER that the Record is true and complete (pp. 139-140, Record on Appeal), omits the following critical documents:

a. Answer and cross-motion of GUY T. PARISI, ESQ. (Exhibit B annexed hereto). It is this cross-motion of MR. PARISI for an order dismissing the petition that was granted judgment appealed from, yet that cross-motion is conspicu absent from the Record on Appeal;

b. Motion to Dismiss Petition on behalf of respondent MILLER with supporting affirmations by HOWARD MILLER and mysel (Exhibit C annexed hereto);

c. Affidavit in Opposition of Jay B. Hashmall, behalf of respondents MEHIEL and WEINGARTEN (Exhibit D ann hereto).

In preparing the Record on Appeal, petitioners-appellants utilized the method of selective inclusion deplored in 2001 Real Estate v. Campeau Corp., 148 AD2d 315, 538 NYS2d 531 (1st Dept., March 7, 1989), which earned the appellants in that case an appellate division rebuke and an affirmation of the summary judgment granted against it. The court also granted awarded costs and disbursements against the appellant. In the Practice Commentary of McKinney's

Consolidated Laws of New York, 1990 Cumulative Annual Pocket Part, p. 185, David D. Siegel, Esq. notes that the practice of selective inclusion in a record on appeal involves a risk of "even stiffer money assessment, including an attorney's fee and even a penal sanction under the recently adopted Part 130 of the Rules." We respectfully request that this Court not only dismiss the appeal for failure to comply with the CPLR, but that sanctions be imposed against petitioners-appellants in the amount of $1,500, representing attorneys' fees and disbursements on behalf of respondent-respondent MILLER on this motion.

Dated: October 25, 1990
Pearl River, New York

Sanford S. Dranoff