

SUPREME COURT: 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,

Albany County
Index No. 6056/90

Petitioners-Appellants,

-against-

AFFIRMATION IN
OPPOSITION TO
REQUEST FOR
PREFERENCE

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 K. WEINGARTEN, Esq., LOUIS A. BREVETTI,
Esq., Hon. FRANCIS A. NICOLAI, HOWARD MILLER,
Esq., ALBERT J. EMANUELLI, Esq., R. WELLS
STOUT, HELENA DONAHUE, EVELYN AQUILLA,
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 Petitions 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)
 : SS.:
COUNTY OF NEW YORK)

I, JAY B. HASHMALL, an attorney duly admitted to

practice law before the Courts of the State of New York, do, under penalties of perjury, hereby affirm to be true as follows:

1. I am a member of the firm of HASHMALL, SHEER, BANK & GEIST, attorneys of record for the Respondents, WESTCHESTER COUNTY DEMOCRATIC COMMITTEE and the past and present Chairmen thereof, DENNIS MEHIEL and RICHARD K. WEINGARTEN. As such I am fully familiar with the facts and circumstances recited below and I execute this affirmation in opposition to the Petitioners-Appellants application for a preference.

2. This matter is not entitled to the normal preference afforded to special proceedings under Article 16 of the Election Law because this is in fact not such a proceeding. This is in actuality an action for declaratory judgment attempting to invalidate resolutions of two bodies, the Westchester County Republican Committee and the Westchester County Democratic Committee which were adopted over one year ago.

3. If this were a special proceeding under the Election Law, the caption would be different, the allegations different and a hearing would have been held by the lower court. The Petitioners would have been proceeding pursuant to the Election Law (Section 16-102) either as aggrieved candidates, party chairmen or objectors not as the caption reads "acting pro bono publico". Further, the Petition would have alleged facts by a person with knowledge concerning defects of the Certificate of Nomination of both (Republican and Democratic) judicial conventions and would have named as Respondents, the Chairman of both conventions, the secretary of both conventions and all

candidates nominated pursuant to said Certificate. None of these facts or allegations are contained in the Petition of the Appellants.

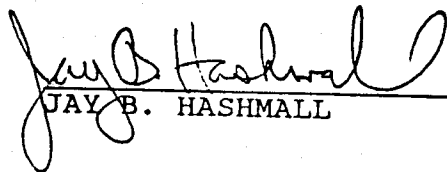
4. In addition, on the submission date of this proceeding, the Petitioners-Appellants attorneys would have had a hearing in order to attempt to prove some of the factual allegations set forth in their petition. No hearing was requested by said attorneys and none occurred because there were no facts alleged or disputed relating to the Certificates of Nomination.

5. This litigation does not involve a challenge under the Election Law to Certificates of Nomination. The lower court properly saw this proceeding for what it really was, an action to challenge the concept of cross-endorsements. That is not an appropriate proceeding pursuant to Article 16 of the Election Law. The issue of whether cross-endorsements is legal or not legal and whether the resolutions adopted by the two major parties in one county within the 9th Judicial District (which consists of five counties and five political parties) is not properly an election proceeding. Petitioners-Appellants did not challenge last year's cross-endorsements, when the resolutions in issue were first adopted. They did not even challenge them this year in time for the 1990 Surrogate's election, i.e., when Respondent EMMANUELLI's designating petitions were filed. The Petitioners-Appellants and their so called "9th Judicial Committee", whatever that committee is, should have commenced

this lawsuit over a year ago with the appropriate parties named. Most of the issues would have already been resolved in the normal course of the judicial process. Fortunately, by reason of Petitioners' use of Article 16 of the Election Law as a subterfuge to get expedited treatment of this lawsuit, the lower court cut through all of the procedural and technical issues and resolved the action on its merits. But now, the appeal can proceed in the normal course of the appellate process without placing an undue burden on Respondents' counsel to interrupt their busy practices to prepare, serve and file briefs on this issue in only a few days.

WHEREFORE, Respondents' MEHIEL, WEINGARTEN and WESTCHESTER COUNTY DEMOCRATIC COMMITTEE respectfully pray that the Petitioners-Appellants application be denied in its entirety together with the costs and disbursements of this application and for such other and further relief as to this Court may deem just, fair and equitable.

Dated: White Plains, New York
October 23, 1990


JAY B. HASHMALL

Index No.

Year 19

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~~AFFIRMATION IN OPPOSITION TO REQUEST FOR PREFERENCE~~

HASHMALL, SHEER, BANK & GEIST
Attorneys for Respondents -Mehiel, Weingarten, Democratic Committee

235 MAMARONECK AVENUE
WHITE PLAINS, NEW YORK 10605
(914) 761-9111

To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

NOTICE OF ENTRY

that the within is a (certified) true copy of a
entered in the office of the clerk of the within named Court on

19

NOTICE OF SETTLEMENT

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:

HASHMALL, SHEER, BANK & GEIST
Attorneys for

235 MAMARONECK AVENUE
WHITE PLAINS, NEW YORK 10605

To: