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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, 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.

Albany County Clerk's
Index No. 6056/90

Appeal No. 62134

REPLY MEMORANDUM OF LAW OF PETITIONERS-APPELLANTS IN SUPPORT OF THEIR MOTION TO REARGUE OR, ALTERNATIVELY, FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

ELI VIGLIANO, Esq.
Attorney for Petitioners-Appellants

Preliminary Statement

Appellants rest on their Memorandum of Law filed with their moving papers, essentially unrebutted by counsel for Respondents-cross-movants, only three of whom have filed Opposing Memoranda of Law. Mr. Dranoff's Memorandum of Law requires reply, which will be brief. His more egregious statements and omissions will be addressed, not necessarily in the order in which they appear.

The Argument

A. Mr. Dranoff's Point I ignores the fact that the issue is not the Court's sua sponte power to search the Record, but its duty, in so doing, to observe fundamental due process requirements--affording Appellants the opportunity to supplement the Record to include material information omitted in the good faith belief that such issues were not before the Court. Even if it were only a matter of discretion, it is respectfully submitted that to deny such opportunity--in a case such as this where the public interest issues are of extraordinary and compelling importance--must constitute an abuse of discretion.

The facts alleged at page 4 of Doris L. Sassower's Affidavit, sworn to on July 25, 1991, concerning what took place before Justice Kahn, are uncontradicted by the cross-moving Respondents. The Record shows clearly that neither Appellants nor Respondents included the propriety of Justice Kahn's failure to rule on the procedural objections among their "Questions Presented" on appeal, and that Appellants thereafter expressly

proceeded on the basis that any objection to the propriety of his failure to so rule was unpreserved and not before this Court, when they submitted their Reply Brief and when oral argument was had on March 25, 1991.

At the very least, the due process question (as raised also by Justice Kahn's failure to accord Appellants the evidentiary hearing to which they were entitled as a matter of law before they could be precluded for "absence of proof") warrants leave for further appellate review, even if same were not their entitlement as a matter of right. Mr. Dranoff's Affirmation in support of his motion to dismiss Appellants' appeal in the Court of Appeals, a copy of which he annexes to his cross-motion papers, ignores basic law relative to this aspect.

Notwithstanding that a substantial constitutional question must be directly involved to sustain an appeal as of right, the law is clear that:

> "...where the decisive question is whether a judgment is the result of due process, an appeal lies to the Court of Appeals as a matter of right, even though in determining that question the court must give consideration to the proper construction and effect of a statute",

and not solely its constitutionality. 11 Carmody-Wait 71.25, citing Valz v. Sheepshead Bay Bungalow Corp., 249 NY 122., cert. den. 278 U.S. 647 ( ).

Contrary to the attempt by cross-moving counsel, and particularly Mr. Dranoff, to minimize the importance of this case and to pervert the truly substantial and far-reaching issues

it raises, Appellants are not seeking "a statute prohibiting cross-endorsements" or "requiring a political party to nominate a separate candidate". What is involved in this case is a particular political agreement implemented by deliberate and corrupt misuse of the permissible multi-endorsement mechanism. It is that agreement which Appellants submit should be declared a nullity because it is violative of the Election Law, the state and federal constitutions, violative of ethical mandates of the Code of Judicial Conduct and the Rules of the Chief Administrator of the Courts, and therefore illegal, unethical and against public policy. All that is necessary is for the courts to recognize it as such. That is the function of the Courts, not the Legislature.

Appellants do not contend that a judicial candidate is barred from freely accepting the endorsement of another party in which he is not registered, but only that he cannot be required to accept it as the price of getting his party's nomination. What the Court of Appeals said in Harwood v. Rosenthal, 35 N.Y. 2d 469 needs to be clarified and extended to make this clear. Appellants are not seeking legislation, but rather a dispositive judicial declaration, as in Harwood, that this time the party bosses went too far--the Resolution reflecting the Three-Year Deal, like the party by-law struck down in Harwood, must likewise be stricken down as the illegal, unethical agreement that it is.

B. In Point II, Mr. Dranoff's argument that the

failure to join the non-cross-endorsed judicial candidates nominated at the 1990 conventions as well as the 1989 cross-endorsed judicial candidates, required dismissal ignores the following:

1. salient statutory authority and case law brought to this Court's attention in Point II of Appellants' Memorandum of Law dated July 5, 1991. Thus, it is unrebutted by Mr. Dranoff that: (a) this Court is empowered under CPLR 103 to convert this proceeding into a declaratory judgment action, against which the Statute of Limitations has not run; (b) even in the case of necessary parties, non-joinder can be excused under CPLR 1001(b) "... when justice requires", as it surely does in this case, with its transcendent public interest issues; (c) there are two separate causes of action pleaded, and the 1989 judicial candidates were clearly not necessary parties to the cause of action relative to the fraud committed at the 1990 conventions; and (d) persons aggrieved by an order of a lower court have a right of appeal, even if they were not parties to the proceeding (11 Carmody-Wait Sec. 71.25) and hence could have been brought in even at an appellate stage.

Without citing any law, Mr. Dranoff states at page 5 that "Invalidation of the certificate as to the parties named in this action results, ipso facto, in invalidation of the candidacies of the other nominees". Such statement by him is belied by the Board of Elections. As shown by the document annexed hereto as Exhibit "A", the Westchester County Board of

Elections last month invalidated the nomination of Terry Ruderman, Esq., as the Conservative Party candidate for Family Court Judge, on the ground that there was an insufficient number of valid signatures while, at the same, refusing to strike the nomination of their candidate for County court, Hon. J. Emmett Murphy, whose name appeared on the self-same Petition. The Appellate Division, as well as the Court of Appeals considering the issue in the case of Sady v. Murphy, nonetheless, refused my request on behalf of the Sady Appellants to invalidate the candidacy of Judge Murphy on the Conservative line and sustained the position of the County Board of Elections.

The relief of reconvening the conventions is a non-issue. Such requested relief was predicated on the original Petition being adjudicated prior to Election Day, when reconvening was still possible. At this post-election posture of the case, resulting through no fault of Appellants, it is within the Court's power to fashion other more appropriate remedies. Were it otherwise, this Court's action in failing to grant Appellants' rightful preference would constitute state action irreparably prejudicing their constitutionally and statutorily-protected voting rights.

Conclusion

None of the Respondents have refuted applicable legal authorities cited and discussed in Petitioners' Memorandum of Law--conspicuously ignoring Points Two and Three relative to the Court's power under CPLR 1003 to order addition of parties deemed

"indispensable", thereby avoiding the draconian penalty of dismissal, as well as its power under CPLR 103 to convert this proceeding into a declaratory judgment action to avoid the loss of the huge investment of time and money expended by civic-minded individuals, such as Appellants, in their courageous and commendable effort to vindicate the public interest in safeguarding the franchise.

Respectfully submitted,

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