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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,

Affirmation in Reply
And in Opposition

Petitioners-Appellants,

Albany County Clerk's
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,

Appeal No. 62134

-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,

ELI VIGLIANO, an attorney duly licensed to practice law in the Courts of the State of New York affirms the following to be true under penalty of perjury:

1. This Affirmation is submitted (i) in reply to Mr. Ciampoli's August 2, 1991 Affirmation in opposition to Appellants' motion; and (ii) in opposition to the unjustified cross-motion calling for sanctions against Petitioners-Appellants, myself and former pro bono counsel, Doris L. Sassower. Indeed, sanctions against Respondent New York State

Board of Elections and Mr. Ciampoli for frivolous and egregious conduct, hereinafter documented, are clearly in order as expressly provided in Part 130.1-1.1.

2. As Mr. Ciampoli expressly acknowledges, I am fully familiar with all the facts and circumstances of this case, and except as otherwise indicated, all of my statements herein are based on direct personal knowledge.

3. The only other papers received from Respondents are from Mr. Dranoff, on behalf of Respondent Miller and from Mr. Malone, on behalf of Respondent Emanuelli, both of which are untimely and not in accordance with CPLR 2214(b). Respondents respectfully request that such papers and any additional late papers that may hereafter be filed with the Court on behalf of any other Respondents be rejected pursuant to CPLR 2214(c). Those Respondents should be deemed to have no opposition to the relief sought.

4. If the untimely papers of Mr. Dranoff and Mr. Malone are not rejected by the Court in accordance with CPLR 2214(c), I respectfully ask that Appellants' motion and the cross-motions be adjourned so as to permit Appellants the opportunity to respond to those papers. I might add that my office confirmed with the Clerk of the Court, Michael J. Novack, that such opportunity would be afforded Appellants in the event Respondents' late papers are accepted for consideration by the Court.

5. Appellants do not object to the delay entailed by

such adjournment, if any, in view of the pendency before the Court of Appeals of their appeal noticed "as of right" based upon the direct involvement of constitutional questions, as to which jurisdiction is being presently determined. To establish such jurisdiction, I have submitted to the Court of Appeals an Appendix extracting references to the constitutional issues raised by Appellants in this Court, as well as in the Lower Court. I have also submitted to the Court of Appeals a Memorandum showing that the proposed appeal involves questions which are novel, of public importance, and which require interpretation of prior decisions of the Court of Appeals and of the Appellate Division. These two documents, submitted herewith as Exhibits "A" and "B" respectively in further support of Appellants' instant motion and in opposition to the cross-motion, substantiate that a compelling public interest demands that leave to appeal to the Court of Appeals be granted so that in the event the appeal is not accepted "as of right", the issues involved herein will be reviewed with this Court's permission.

6. As noted in footnote #5 of Appellants' Memorandum to the Court of Appeals (Exhibit "B"), it is Appellants' intention to withdraw the instant motion if the Court of Appeals accepts their appeal "as of right". Hence, in the interest of judicial economy, Appellants do not believe it would be inappropriate to hold this motion in abeyance pending a decision by the Court of Appeals as to whether it will accept the appeal "as of right", unless this Court is willing to grant immediately

the alternative relief requested by Appellants seeking leave to appeal to the Court of Appeals, without addressing the other issues raised by Appellants.

7. It should be noted further that Mr. Ciampoli has made a motion to dismiss in the Court of Appeals almost identical to that which he has made here.

8. Mr. Ciampoli's instant motion papers, as well as those he filed with the Court of Appeals, are unsupported by any Memorandum of Law in opposition to Appellants' 31-page Memorandum of Law. Moreover, his Affidavit does not cite a single case to sustain his baseless arguments and assertions.

9. Examination of his August 2, 1991 Affidavit shows that Mr. Ciampoli substitutes self-serving, knowingly false statements and speculations for facts. He supplies no documentation at all for his inflammatory, prejudicial and otherwise improper remarks. Indeed, the relevant documentation demonstrates the contrary of that which he wishes the Court to believe and plainly bars Mr. Ciampoli from opposing Appellants' application, and certainly his call for sanctions against them and me for making it.

10. It cannot be emphasized too strongly that Mr. Ciampoli represents a state agency charged with the duty of protecting the public interest by safeguarding the sanctity of the franchise. Rather than blocking appellate review and obstructing an adjudication on the merits of the legality and constitutionality of the Three-Year Deal, Mr. Ciampoli should be

joining in Appellants' efforts to that end. This is equally true of the other Respondents--lawyers and public officials who enjoy a public trust. It is unconscionable for Respondent public officials--including sitting judges--to attempt to duck a decision on the merits--all the while that they are simultaneously proclaiming the legality and constitutionality of the three-year judge-bartering contract, as well as its supposed benefit to the voting public. Particularly because they are holders of a public trust, the Court should hold Respondents to the highest standards, expecting that they will not obstruct on technical grounds.

11. Appellants' instant motion and all their prior papers have addressed the serious injury to the public interest being caused, inter alia, by Respondents, including the State Board of Elections, by reason of the misconduct alleged in the Petition. Mr. Ciampoli's complete silence as to the impact and importance of these issues on the public must be deemed an admission of the truth of the facts alleged concerning the severe injury to the public interest. Parenthetically, it may be noted that Mr. Dranoff and Mr. Malone, who represent sitting judges, in their papers, likewise ignore the transcendent public issues involved, which are the basis for this lawsuit and for the instant motion to this Court.

12. Mr. Ciampoli makes numerous serious misstatements of material fact, for which he has no foundation whatsoever. In paragraph 8, he states that a Notice of Appeal:

> "was issued over the signature of Doris Sassower after the Appellate Division, Second Department had issued an order suspending Ms. Sassower from the practice of law...".

Mr. Ciampoli makes this statement notwithstanding the fact that the Notice of Appeal annexed to his papers clearly shows that (a) there is no such signature by Doris Sassower; and that (b) the attorney of record identified therein was not Doris L. Sassower, but Doris L. Sassower, P.C., a professional corporation not suspended by the Order of Suspension.

13. In paragraph 9, Mr. Ciampoli states, again falsely, that a second Notice of Appeal:

> "was issued over the signature of Eli Vigliano, Esq. after several of the attorneys for the various respondents notified the Court of Appeals of the facts detailed in paragraph '8' hereinabove."

Again, Mr. Ciampoli makes such statement--despite the copy of the Notice of Appeal, annexed to his papers, which clearly does not support his factual allegation, i.e. there is no signature of Eli Vigliano.

14. That Mr. Ciampoli is not being candid with the Court is further shown by the letter I wrote to the Clerk of the Court of Appeals, dated July 5, 1991 (annexed hereto as Exhibit "C"), a copy of which was sent to counsel for all Respondents, including Mr. Ciampoli. That letter explains the circumstances under which the first Notice of Appeal was filed on behalf of the

attorney of record, Doris L. Sassower, P.C., and the further fact that "Doris L. Sassower did not prepare or file the Notice of Appeal".

15. Mr. Ciampoli knows that notwithstanding the failure to reply to said letter or to furnish any legal authority for their contention that said Notice of Appeal was "'a nullity' by reason of the suspension of Doris L. Sassower", Ms. Sassower immediately consented to a substitution to obviate any question arising as to the validity of the Notice of Appeal theretofore filed. Such decision and refiling of a Second Notice of Appeal was made prior to any ruling by the Court of Appeals that the objections of Respondents' counsel had any merit or that a substitution of the corporate attorney of record was required. To date, there has been no ruling or communication from the Court of Appeals on that question.

16. Thus, there is no justification whatever for Mr. Ciampoli's defamatory assertions in Paragraph 12 of his Affirmation concerning his allegation that I "aided and abetted Ms. Sassower's flagrant violation of the Appellate Division, Second Department's suspension order...". As Mr. Ciampoli should know, any violation resulting from the filing of the Notice of Appeal dated June 20, 1991 (the last day for filing), a day after service upon Ms. Sassower of the suspension Order was clearly unintentional, minor, and inconsequential. His setting forth such ridiculous accusation shows plainly the straw-grasping nature of his position.

17. It is further disgraceful that Mr. Ciampoli should contend, without supporting legal authority, that Doris Sassower, former counsel to Appellants herein, is, by reason of her suspension, testimonially disqualified from submitting an Affidavit attesting to her personal knowledge of material facts, directly involved in this application, which are legal in nature, and to urge that she as well as I should be sanctioned for having done so. There is no basis or justification shown by him for the frivolous argument, which is obviously made for ulterior motives.

18. As further evidence of Mr. Ciampoli's maliciousness and use of irrelevant information for its prejudicial value is his gratuitous inclusion as an exhibit of the New York Law Journal's June 21, 1991 publication of the Order of the Appellate Division, Second Department suspending Ms. Sassower from the practice of law--when such fact was not only not disputed but set forth openly by her in the second paragraph of her Supporting Affidavit.

Moreover, the aforesaid published Order annexed by Mr. Ciampoli, is confirmatory of Ms. Sassower's statement that no reasons or findings of fact are set forth for such draconian relief of immediate, indefinite and unconditional suspension, and that no hearing was held in the matter prior to such suspension Order.

19. Mr. Ciampoli makes the knowingly false and misleading statement at paragraph 10 that I "had previously filed

a criminal complaint with Respondent New York State Board of Elections alleging essentially the same cause of action as criminal violations of the Election Law". Mr. Ciampoli does not document that statement. The reason he does not is that, as documented in Appellants' October 28, 1990 Reply Affirmation in support of their Preference Application[1], I did not previously file any criminal complaint. As Mr. Ciampoli well knows by now, my "prior" complaint he alludes to consisted of a detailed and documented letter addressed to Governor Cuomo, dated November 1, 1989[2], sent by the Governor's office thereafter, sua sponte and without my prior knowledge, to the New York State Board of Elections. As shown by the October 17, 1990 letter[3] of Peter Kosinski, Esq., Special Deputy Counsel to the New York State Board of Election, that agency's dismissal was not based on any investigation or any hearing. Nor is any mention made of the fact that in late November 1989, in a telephone conversation with

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[1] Those pertinent pages (pp. 22-28), as well as the exhibits referred to therein, were subsequently annexed as #A-3 to Petitioner-Appellants' Reply Brief, dated January 24, 1991, on file with this Court. Not included therein--but annexed as part of Appellants' October 28, 1990 submission in support of the preference application--is a confirmatory Affirmation by me stating:

> "I...adopt, approve and confirm the truth and accuracy of the facts set forth therein, and especially attest that the facts...as they relate to me are true and correct in all respects..."

[2] Exhibit "B" to Appellants' October 28, 1990 Reply Affirmation in further support of their Preference Application.

[3] Exhibit "C" to Appellants' October 28, 1990 Reply Affirmation in further support of their Preference Application.

Patricia Martinelli, the Enforcement Counsel of the New York State Board of Elections, I offered to send her affidavits and a tape recording to prove the violations of the Election Law which had occured at the Democratic Judicial Nominating Convention that had been held in September 1989.

20. These pertinent facts, meticulously set forth by Appellants' in their aforesaid October 28, 1990 Reply Affirmation, expressly called for the Court's intervention:

> "The...shocking behavior by a governmental enforcement body, which not only attempts to foreclose judicial investigation of Election Law abuses it failed to investigate--but seeks sanctions against Appellants' pro bono counsel for bringing the case on for judicial review, merits not only censure and sanctions by this Court under Part 130 of the Rules, but a call to the Governor for appropriate attention." (at para. 47) (emphasis in the original)

21. This Court's October 30, 1991 denial of Appellants' preference application entirely ignored and overlooked the documented improper conduct of Respondent New York State Board of Elections in this litigation.

22. Indeed, Appellants' January 24, 1991 Reply Brief included a separate section as to the imperative need for Court intervention resulting from Respondent New York State Board of Election's articulated policy not to investigate Election Law violations that "go behind" the face of Certificates of Nomination; and the documentary proof that even facially invalid Certificates were not invalidated by the Respondent State Board

of Elections (see pp. 12-13). In pertinent part, such section[4] stated:

> "Administrative redress through the New York State Board of Elections is, thus, an illusory remedy and serves to underscore the compelling need for judicial intervention.
>
> Unquestionably, the suspect conduct of Respondent New York State Board of Elections explains its hostile position in these judicial proceedings. Clearly, it is inappropriate for such public agency to actively seek to foreclose review judicially of the Election Law abuses pleaded in the Petition herein--which it failed and refused to provide administratively. This abdication of the Board's statutory responsibility to the public is part of an on-going pattern of inaction, neglect, and misfeasance, demonstrated by its failure to address complained-of 1989 convention violations." (emphasis added)

23. This Court's May 2, 1991 Decision completely disregarded the misconduct by the public agency charged with safeguarding the franchise, and allowed to pass--without comment--that agency's efforts to quash judicial review and to intimidate Appellant and their pro bono counsel by a thoroughly unwarranted call for sanctions, not heard then, but now again requested.

24. It is thus not surprising--though no less shocking--that Respondent New York State Board of Elections continues its dereliction in asking this Court to deny Appellants any relief and to sanction Appellants, me, and their pro bono

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[4] Such section is entitled:

"The Partisan Position Taken By Respondent New York State Board of Elections Makes the Need for Judicial Review Imperative as a Matter of Public Policy"

counsel for having sought reconsideration by this Court of its May 2, 1991 Decision, or alternatively, leave to go to the Court of Appeals. Clearly, Mr. Ciampoli seeks not only to prevent judicial review of the public interest issues, but review of the misconduct of his agency as well.

25. As hereinabove set forth, the abdication of the public interest is astonishingly reflected in Mr. Ciampoli's instant papers on behalf of Respondent New York State Board of Elections, which fail to make the slightest mention of those transcendent public issues which are the primary focus of Appellants' motion. As set forth in Appellants' Memorandum:

> "This case...is an imperative to decisive adjudication on the merits since the issues affect the lives, liberty, and property interests of one million and a half residents in the Ninth Judicial District. In view of the continuing long-term injury to all such persons individually, as well as the public interest in preserving the sanctity of the franchise--and the integrity and independence of the judiciary--this Court should promptly correct the injustice represented by the unwarranted and drastic dismissal of this proceeding. (at pp. 2-3) (emphasis added)

26. Mr. Ciampoli's claim that he is "unable to discern any 'new evidence which is required pursuant to a motion to renew"[5] is a further blatant example of his attempt to mislead the Court. There was never any evidence previously before the Court concerning the matters set forth in paragraphs 6 and 7 of

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[5] It should be noted that paragraph 3 of Mr. Ciampoli's Affidavit makes the opposite complaint, i.e. that Appellants' submission "attempts to place this Appellate Divsiion in the position of receiving testimony not introduced at trial term..."

the July 25, 1991 Supporting Affidavit of Doris L. Sassower, nor was Mr. Ciampoli's own confirmatory letter of October 31, 1990 ever previously in evidence. Hence, such materials are indisputably new evidence presented to support this motion to renew.

27. Mr. Ciampoli does not dispute the truth or accuracy of the aforesaid new evidence, which no other Respondent has the personal knowledge to do, i.e. that the advice given Appellants' then counsel by that agency that the Attorney-General need not be served and that October 31, 1990 letter constituted formal confirmation of that fact. Hence, paragraphs 6 and 7 must be accepted as true.

28. It is peculiar that Mr. Ciampoli should unequivocally state that "This court's decision in no way was based upon a failure to serve the Attorney-General..." (para. 4(b)), in view of this Court's explicit statement in its decision that "Another basis for dismissal of this proceeding is petitioners' failure to serve the Attorney-General...".

29. Obviously, Mr. Ciampoli does not view the alleged failure to serve the Attorney General as a ground for this Court's dismissal. Indeed, Mr. Ciampoli does not even urge that such omission should have been a ground for dismissal. It is axiomatic that the Attorney-General defers to the general counsel of state agencies which are favored with such legal services. Nor does Mr. Ciampoli disagree with Appellants' contention that such omission cannot be raised as a ground for dismissal by any

other Respondent. Mr. Ciampoli nowhere claims that he ever made a motion raising said objection, and the Record shows he did not.

30. As acknowledged by Mr. Ciampoli, I was co-counsel with Ms. Sassower in the proceedings before Justice Kahn, and appeared with her at the counsel table at the time of the oral argument before him on October 15, 1990. I might add further that Justice Kahn was induced to take the expedited approach he did and deliberately did not rule on the procedural objections on both sides, because of the loud insistence by counsel for all Respondents that they wanted a decision on the merits reviewable by the Court of Appeals before Election Day. Respondents sought and gained the benefits of such approach--which secured for them the advantage of not being found in default by reason of their untimely papers and, therefore, without standing to assert their procedural objections. Under the circumstances, it was unjust for this Court, without warning, to have ruled on Respondents' procedural objections without giving Appellants the opportunity to supplement the Record accordingly.

31. As set forth in Appellants' Point I and undisputed by Mr. Ciampoli:

> "At minimum, Appellants representing the <u>public interest</u> should have been given adequate notice to supplement the Record so as to establish the facts as to Respondents' default and consequent lack of standing to raise their procedural objections." (at p. 10) (emphasis added)

32. Nor, significantly, does Mr. Ciampoli dispute any of the legal arguments or challenge any of the legal authority

cited in Points II and III of Appellants' Memorandum of Law relative to the non-joinder objection, a further concession that justice and the overriding public interest militates against any dismissal at this juncture.

33. Concerning the recusal issue, Mr. Ciampoli does not contradict any of the facts set forth in Ms. Sassower's Affidavit nor does he dispute the explicit mandate of the Code of Judicial Conduct or any of the cases cited in Point V of Appellants' Memorandum on the subject.

34. By any standard to be applied under Rule 130-1.1, Mr. Ciampoli's instant papers must be deemed frivolous as a matter of law since they are factually and legally unfounded, false and distorted. Moreover, considering that Mr. Ciampoli is a public servant on the public payroll, his call for sanctions against pro bono counsel and those associated with this public interest case must be seen as "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" and sanctionable under Rule 130-1.1(ii). Howling for sanctions, without any reasonable basis therefore, is itself, by the express language of the Rule, sanctionable, and in this instance most appropriate.

WHEREFORE, it is respectfully prayed that this Court grant Appellants instant motion for reargument/renewal, recusal, and, alternatively, for leave to appeal to the Court of Appeals in that "questions of law have arisen...which ought to be reviewed", as provided under CPLR Sec. 5713, together with such other and further relief as to this Court may seem just and proper, including the imposition of sanctions against Respondent New York State Board of Elections and Mr. Ciampoli.

Dated: Yonkers, New York
August 15, 1991

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