C-11

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,

Petitioner-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,

Respondent-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.

Albany County Clerk's Index No. 6056/90

RJI No. 0190 ST 2747

Affirmation in Reply and in Opposition to Respondents' Cross-Motions

DORIS L. SASSOWER, 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. I am the attorney for Petitioner-Appellants in the

above-entitled special proceeding instituted under Article 16 of the New York State Election Law, and submit this Affirmation in reply to six separate sets of opposition papers served by counsel for Respondents WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, MEHIEL, WEINGARTEN, NICOLAI, MILLER, EMANUELLI, NEW YORK STATE BOARD OF ELECTIONS, and WESTCHESTER COUNTY BOARD OF ELECTIONS.

2. Two baseless cross-motions to dismiss the appeal and for sanctions against Petitioners and their counsel have also been served, one on behalf of Respondent NEW YORK STATE BOARD OF ELECTIONS, and one on behalf of Respondent MILLER. Both said cross-motions failed to comply with the applicable time requirements for cross-motions under CPLR Sec. 2103(b)(2), 2215. Respondent MILLER's papers also were not served in accordance with the terms of the instant Order to Show Cause in that only a fax copy (with no exhibits) was served on me by Mr. Dranoff on MILLER's behalf. I will, however, address the substance hereinafter and submit this Reply Affirmation also in opposition to said cross-motions.

3. The instant preference application is unopposed by GUY PARISI, Esq., whose motion to dismiss the Petition was granted by the Lower Court, which dismissal is the subject of this appeal. No opposing papers have been received from Mr. PARISI, on behalf of Defendant COLAVITA, for whom, as counsel to Aldo Vitagliano, Esq., he interposed a belated Verified Answer. Nor have any opposing papers been received from the WESTCHESTER REPUBLICAN COUNTY COMMITTEE, or from Respondent BREVETTI, the

former Law Chairman of the Westchester Democratic County Committee. I am informed that the Attorney General's office has declined to appear and has deferred to the New York State Board of Elections, which has its own counsel.

4. At the outset, it is shocking that the Respondents who have submitted papers in opposition include the three judicial candidates (one a sitting judge, the other two, former judges), as well as the two public agencies charged by the Legislature with the duty of enforcing voting rights safeguarded under the Election Law, all of whom, because of the gravity and nature of the case, with compelling public interests involved, might reasonably have been expected to consent to, rather than oppose, the preference application made herein by Petitioners, as a matter of right under this Court's own Rules. As shown by Exhibit "A" hereto, the New York State League of Women Voters deems this case sufficiently important to have put out a state alert to all voters, via the media, calling attention to the significant issues this case raises and the need for an appellate disposition before Election Day.

5. The public may well infer that if the Respondent public officials and judicial candidates truly believed the Petition lacked merit, as they contend, and were confident of the legality of the cross-endorsements contract in question, as well as of the conventions resulting in the judicial nominations, they themselves would be urging that the preference be granted so that the extremely narrow issues presented by this appeal could

be squarely addressed and decided by this Courts on the merits as soon as possible. Moreover, the time spent by these Respondents in preparing opposition papers and cross-motions to oppose Petitioners' mandated preference, could have been better spent had they used it to prepare, serve and file their Respondent's Briefs.

6. Simply stated, however, Respondents have no answer to the inescapable conclusion that Justice Kahn erred in disregarding the overwhelming factual evidence (see Record on Appeal, pages 13-76), showing that a re-assembling of the conventions was required by the Election Law, Section 16-102(3). The Petition unquestionably stated a cause of action entitling Petitioners to such relief (see Appellants' Brief, pages 1-23), and, Petitioners' having scrupulously observed the precedent requirements specified in the Election Law to gain standing as citizen objectors, they were entitled to invoke judicial intervention. The Petition alleged that the particular cross-endorsements agreement in issue (the "Three Year Plan") constituted an illegal agreement contrary to public policy. Such policy is reflected by the penal provisions of Election Law 17-158, the Code of Judicial Conduct, and the Rules of the Chief Administrator of the Courts (see above mentioned pages of Appellants' Brief).

The Lower Court erroneously concluded that the patently illegal Three Year Plan (outlined in the Statement of Facts appearing at pages 4-9 of Appellants' Brief) became

untainted because it was implemented at the parties' judicial nominating conventions--concealing the fact that the Petition, Petitioners' Objections and Specifications, attached as exhibits thereto, as well as the Supporting Affidavits of three witnesses at the conventions, were "proof" that Election Law mandates were violated--inter alia, that the Democratic convention proceeded without a quorum, that there was no Roll Call of Delegates taken to ascertain the existence thereof, that adequate seating was not provided to accommodate the required number of delegates and alternate delegates; and that at the Republican convention, the party Chairman, Respondent COLAVITA, who was the Convenor, continued to preside as Permanent Chairman after the Convention was organized, contrary to Election Law mandates designed to prevent coercion on the assembled delegates.

7. This Court's obligation to grant a preference is clear. With election time almost at hand, the Court has an even greater responsibility to safeguard the constitutionally-protected public interest at stake. To avoid the vesting of rights by the judicial nominees and claims of mootness once the election has taken place, the election on November 6th to fill two of the three vacancies in the Supreme Court must now be stayed, pending final appellate determination with respect to voiding the nominations of Respondents NICOLAI and MILLER, the election for the third Supreme Court vacancy being unaffected. The election to fill the uncontested vacancy in the Surrogate's Court should also be stayed, since the final determination, we

submit, should hold that Respondent EMAMUELLI's participation in the illegal agreement and his performance of the conditions, attached to his obtaining the nomination for that position, thereby disqualifies him from serving in any judicial office.

8. Tellingly, in their papers in opposition to the preference, Respondents carefully avoid any expression or commitment that they will not argue "mootness" as a defense, were the case to be heard after Election Day--as would occur in the absence of a preference and an interim restraint. Respondent judicial nominees do not offer to waive any claim that their rights have vested to the judicial offices upon their election, or that, once inducted, they would resign such positions, voluntarily, in the event this Court were to find they had gained their offices illegally by virtue of (a) an illegal contract; and (b) unlawfully-held nominating conventions.

9. The position of these Respondents' counsel relative to the instant preference application is in sharp contrast with their diametrically opposite position at the oral argument before Justice Kahn on October 15, 1990. At that time, these same counsel vigorously urged that a decision, and appellate review thereof, <u>had</u> to be completed within the period remaining before the November 6th Elections. They then emphasized the need for a speedy decision by Justice Kahn to ensure that the review process would even permit a decision by the Court of Appeals. Indeed, the need for swift action was so vital that all of Respondents' counsel joined in the hysterical reaction of outrage and protest

by Samuel Yasgur, Esq., counsel for Respondent EMANUELLI, when, at the conclusion of the oral argument, His Honor gave me until Friday, October 19, 1990 (four days after argument) to address Respondents' grossly untimely submissions (Mr. PARISI, having attempted to serve me in Court that very morning with his Answer containing his cross-motion to dismiss, although he was served with the Order to Show Cause and Petition 17 days earlier). Due to the intensity of Respondents' opposition, Justice Kahn reduced my time to one day--which I thereafter dispensed with entirely, as soon as I learned that the Appellate Division could calendar the case for Friday, October 19, 1990, if an appealable Order and the requisite Briefs and Record on Appeal were filed by Wednesday, October 17, 1990.

10. Within 24-hours of Justice Kahn's So-Ordered Decision, I did, in fact, prepare and file with the Court in Albany the required eight copies of my Brief and Record on Appeal--and personal service was effectuated upon the twelve Respondents, represented by eight separate counsel scattered throughout Westchester, Rockland, New York City, before I reached Albany where I also had to personally serve the NEW YORK STATE BOARD OF ELECTIONS.

11. Following receipt by counsel for the various Respondents of Appellants' Brief and Record on Appeal, on information and belief, some or all of them called the Clerk's Office at this Court, and complained bitterly when they learned that they would have only 24 hours to serve and file their

Respondents' Briefs, prior to the scheduling of argument for Friday morning.

Needless to say, however, they did not have the burden of assembling the Record on Appeal under such intense pressure, nor did they have to effectuate service on any more than one attorney--myself.

12. Can there be any doubt that had "the shoe been on the other foot", and had Respondents been the Appellants, rather than Petitioners, I would have been required to comply with the time constraints attendant on election cases?

13. The paramount issue in this case, involving the constitutionally-protected voting rights of nearly a million voters in the Ninth Judicial District, requires the most expeditious attention. Surely, an expedited appeal should not be denied because, as Mr. Hashmall argues, of the "undue burden on Respondents' counsel to interrupt their busy practices to prepare, serve and file briefs on this issue in only a few days".

14. It should be noted that out of six sets of opposing papers, only Mr. Ciampoli, on behalf of the NEW YORK STATE BOARD OF ELECTIONS, and Mr. Hashmall, on behalf of the WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, MEHIEL, and WEINGARTEN, attempt to find some legal basis to avoid the entitlement of Petitioners to a preference.

RESPONDENT NEW YORK STATE BOARD OF ELECTIONS' OBJECTIONS

15. Mr. Ciampoli makes two arguments germane to the issue of the instant preference application, both of which are

clearly frivolous.

(a) Quoting the language of Rule 800.16 of this Court that "such appeal [in proceedings brought pursuant to the Election Law] shall be given preference", (which Mr. Ciampoli does not underline), he, instead, underlines the wording of the remainder of the sentence relative to the hearing of the appeal: "it shall be brought on for argument on such terms and conditions as the presiding judge may direct". Notwithstanding the above explicit wording, Mr. Ciampoli apparently believes that it is the preference of the appeal, rather than the argument thereof, that is subject to "terms and conditions".

16. The intent of the rule is that the terms and conditions relative to bringing the appeal on for argument shall not destroy the mandated preference, but will implement and effectuate the purpose of the preference--which is to have the appeal heard and decided before Election Day so that the relief given can be meaningful.

(a) When I was told by the Deputy Clerk of this Court on Monday, October 15, 1990 that in order for an appeal of this Election Law case to be heard in the October term (which was expiring that Friday), it would be necessary for the Appellants (be they Petitioners or Respondents) to have their Briefs and Record on Appeal served and filed with the Court by Wednesday, October 17, 1990, so that argument could be had on Friday, October 19, 1990--that was a term and condition, albeit onerous, that had to be complied with. Working through the night after

the adverse decision of October 16th was rendered, I did, in fact, meet that term and condition.

(b) When, contrary to the above representation, I learned from the Clerk of the Court on Thursday, October 18th, that this Court had declined to hear argument on Friday, and, in response to my request for a judge to sign an Order to Show Cause, that no formal application was required for a preference, and that a letter would suffice, I met this further term and condition by submitting a written request (Exhibit "A" to my moving papers).

(c) Moreover, as shown by my letter request, I also followed the course suggested by Judge Mikoll of waiving argument entirely--thereby wholly eliminating the need for any additional terms and conditions of "bringing the matter on for argument".

(d) At approximately 4:00 p.m. on Friday, October 19, 1990, however, I was informed that a new term and condition was required, to wit, a formal application by Order to Show Cause (Exhibit "B" to my moving papers). By then, two work days had been lost from the time I had complied with the original terms and conditions specified by the Clerk's Office, namely having the Brief and Record on Appeal served and filed by Wednesday, October 17, 1990 and orally requesting that the case be heard on Friday, October 19, 1990.

17. Despite the clear and unambiguous language of Mr. Novack's faxed letter to me, stating that I should make my

preference application by formal motion, Mr. Ciampoli makes his second argument against the instant preference application.

(a) Mr. Ciampoli contends that Appellants are "barred from receiving the relief requested for a second time" under the theory of res judicata and pursuant to Rules of this Court (which he does not bother to specify).

18. Mr. Ciampoli, a seasoned lawyer, surely knows that this is not a res judicata situation. Moreover, in light of the Court's own letter, dated October 19, 1990, on the direction of Presiding Justice Mahoney, that the preference application be made by formal motion, Mr. Ciampoli's objection must be viewed as the ultimate in bad faith.

RESPONDENT WESTCHESTER DEMOCRATIC COUNTY COMMITTEE'S OBJECTIONS

19. Mr. Hashmall, who technically has no standing in this case by reason of the rejection of his untimely and improperly verified Answer (see Appellants' Notice of Rejection on pp. 92-94 of Record on Appeal), demonstrates similarly bad faith in his argument against Petitioners' entitlement to a preference. Mr. Hashmall concedes that special proceedings under Article 16 are "entitled to the normal preference". However, he attempts to get around that fact by contending that this is not such a proceeding--but rather a declaratory judgment action. The contention is plainly specious. Inter alia, Petitioners' prayer for relief shows that the ultimate relief sought therein is the removal of the judicial nominees from the ballot, for which the Election Law is the exclusive remedy. Ferguson v. Cheeseman, 138

AD2d 852 (App. Div., 3rd Dept.) 1988, as Mr. Ciampoli, representing the NEW YORK STATE BOARD OF ELECTIONS has conceded to me.

20. Mr. Hashmall (who, as noted, himself has no standing in this action) makes the frivolous argument that Petitioners have no standing to bring this proceeding because they identify themselves in the caption thereof as "acting pro bono publico". Mr. Hashmall cites no legal authority precluding citizen objectors otherwise entitled to bring proceedings for summary judicial relief under Section 16-102 of the Election Law from identifying themselves in a judicial proceeding as acting in the public interest, rather than for their own personal gain. The legislative intent, clearly expressed in 16-100 of the Election Law, is that it be "liberally construed". To hold that the addition of the words "acting pro bono publico" to the caption of this proceeding deprives Petitioners of their standing would also be contrary to the legislative intent, as expressed in CPLR 103(b)--that a defect in form shall not be the basis of dismissal of an otherwise proper proceeding, as well as in CPLR 104--that "the civil practice law and rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding". The NEW YORK STATE BOARD OF ELECTIONS itself raised no objection to Petitioners' standing at any time up to the present, or to the aforesaid designation, or any other defense, in its Answer (Record on Appeal, pp. 127-8). Once the NEW YORK STATE BOARD OF

ELECTIONS found that all procedural prerequisites of such agency had been met by Petitioners, this Court's jurisdiction was properly invoked, and these Respondents cannot object to Petitioners' standing.

RESPONDENT MILLER'S OBJECTIONS

21. Mr. Dranoff, representing Respondent MILLER, has served defective opposing papers on me, including a cross-motion, which, inter alia, failed to comply with the service requirements of the instant Order to Show Cause, in that he served me a faxed copy only (with no exhibits), and did not serve the required original thereof. As hereinabove stated, the cross-motion is also jurisdictionally defective, in that leave was not given for the foreshortened time within which such cross-motion was served. Nonetheless, I will address the substantive points raised by Mr. Dranoff to demonstrate their completely groundless nature.

22. Mr. Dranoff does not set forth facts or law, as opposed to his opinions and conclusions, warranting denial of this preference application. Such conclusory allegations are inadequate to defeat it. In addition, Mr. Dranoff misrepresents the basis of this application in stating that Petitioners are relying on CPLR 5521, relating to discretionary preferences. My papers clearly show that the only preference sought is pursuant to this Court's own rules requiring such preference in Election Law cases.

23. Mr. Dranoff concedes that cases brought under the Election Law are entitled to a preference. However, again

without any basis, he advances his opinion that such preference is to be conditioned on the Respondents' view of the merits of the Petition. Mr. Dranoff asserts that Respondents have denied the alleged violations at the judicial nominating conventions, but fails to disclose that Respondents have only made general denials in their Answers. There is not a single Affidavit by any of the 10 Respondents personally (the Boards of Election are excluded), although clearly they have personal knowledge of what took place at the conventions. None of the Respondents, or even their counsel, who themselves have personally knowledge, specifically deny the alleged violations, or in any way contradict the Affidavits in support of the Petition by three witnesses present at the conventions, attesting to same. (see Record on Appeal, pp. 55-76). It is well settled that conclusory denials in an Answer and conclusory allegations in an affidavit, unaccompanied by supporting facts, have little or no weight.

24. Contrary to Mr. Dranoff's unsubstantiated factual and legal arguments, the aforesaid overwhelming evidence in the Record is unrefuted and supports Petitioners' contention that the judicial nominations were, as in the case cited by Mr. Dranoff, "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. 291 NY 645. Until a final appellate decision, it is impossible to determine whether or not these candidates were rightfully nominated.

25. The difference between the Aurelio situation and the present case is that in the Aurelio case, there was no claim of any fraud or irregularity at the judicial nominating conventions, which the Court found to be a prerequisite to an order requiring the conventions to reassemble. As aforementioned, that prerequisite was not only alleged by the instant Petition, but was supported by unrefuted, documentary proof. Moreover, at the oral argument before Justice Kahn, I stated that I had witnesses to the pleaded violations (whose Affidavits are part of the Record on Appeal, pp. 55-76), whose testimony would establish that Mr. Hashmall, who acted as Permanent Chairman of the Democratic judicial nominating convention and Marc Oxman, who acted as its Permanent Secretary, both lawyers, had signed perjurious documents, including convention Minutes, filed with the Board of Elections. Notwithstanding such serious accusation, neither Mr. Hashmall nor any of the other attorneys for Respondents herein, have included within their affidavits any reference thereto or, as noted, a specific denial of the alleged violations in the conduct of the conventions. An adverse inference can certainly be drawn when Respondent party leaders, party officials, judicial nominees, as well as their counsel, all of whom are lawyers, and all of whom have personal knowledge of material facts, are unwilling to swear to any specific denials of the pleaded violations. The inference, plainly, is that to do so would put them at risk of a perjury charge, and automatic disbarment upon conviction.

26. It should also be noted that the alleged disqualification of the candidates herein, unlike the case in Aurelio, arises out of the pleaded violation by these candidates of the penal provisions of the Election Law itself, Sec. 17-158. Violations of those provisions are criminal acts, constituting a felony. Under the law of the State of New York, felony conviction results in automatic disbarment and disqualification from holding public office. It is thus imperative that the legality of the cross-endorsements contract in issue be speedily and dispositively resolved by this Court and/or the Court of Appeals. Until that issue is adjudicated, it is just and proper that the names of these judicial nominees be stricken from the ballot on Election Day. Unquestionably, the potential harm to the public interest by reason of their otherwise assured election is far outweighed by the injury to the public weal represented by the violation of voting rights, protected by the Federal and State Constitution, as well as by the Election Law of the State of New York.

PETITIONERS' APPEAL IS MERITORIOUS AND SHOULD SUCCEED

27. Petitioners have invoked their statutory right to judicial intervention in a timely and proper proceeding under the Election Law. By reason of the facts alleged by Petitioners and the supporting documentation, Petitioners have more than a reasonable probability of success on their appeal of Justice Kahn's Decision/Order dismissing their petition for failure to state a cause of action.

28. None of the Respondents have cited a single case to dispute the fundamental legal proposition that "a complaint should not be dismissed on pleading motions, so long as when plaintiff's allegations are given benefit of every possible inference, a cause of action exists." R.H. Sanbar Projects, Inc. v. Gruzen, 148 AD2d 316, 1989, citing Rovello v. Orofino, 40 NY2d 633. By that standard, Justice Kahn's Decision is patently erroneous and must be reversed as a matter of law.

29. To avoid meeting the preference issue head-on, Respondents' counsel attempt to divert the Court's attention by raising issues wholly irrelevant thereto. Thus, they raise the same technical, procedural issues, i.e., standing, necessary parties, laches, estoppel--which are not only irrelevant to the preference application, but which the Lower Court's Decision and Order specifically rendered irrelevant and immaterial to the appeal, by stating as follows:

> "Various defendants have moved to dismiss upon considerations of jurisdiction, failure to state cause of action, laches, statute of limitations, etc. Petitioners have also sought a directive from the Court that certain respondents are in default for having timely served pleadings or defectively verified pleadings. However, in the interests of judicial economy and with an acknowledgement that this decision must be rendered in an exceedingly expeditious manner, the court shall directly address the merits of the petition itself, in order that the inevitable appeal process may be commenced in a timely fashion."
>
> (Record on Appeal, pp. 5-6, 7, emphasis added)

30. Since Justice Kahn's Decision and Order only

addressed the single question as to whether the Petition states a cause of action, the issues of jurisdiction, standing, necessary parties, laches, estoppel, questions of service, timely submission of pleadings, etc., were put aside for purposes of appellate review so that the merits of the Petition could be directly addressed. The technical issues, then, should have no bearing on whether a preference should be granted in order that the single question of the legal sufficiency of the Petition can be addressed.

31. For the legal authorities demonstrating the lack of merit of the aforesaid affirmative defenses of Respondents, I refer the Court to Petitioners' Brief and specifically pp. 23-29.

LACK OF MERIT OF CROSS-MOTIONS

32. In view of the emergency interim relief sought, and solely to avoid any negative influence resulting from Respondents' counsel's introduction of these irrelevant and legally baseless affirmative defenses, I will set forth a rebuttal showing that the defenses are factually spurious as well.

33. Before doing so, however, I will first address Respondents' equally spurious cross-motions, albeit as noted, they are technically dismissable.

(a) Mr. Ciampoli and Mr. Dranoff cross-move to dismiss this appeal because of alleged omissions in Appellants' Record on Appeal. As will hereinafter be shown, Appellants' Record on Appeal is not deficient in any material respect, and certainly

not deliberately so.

(b) Mr. Ciampoli and Mr. Dranoff complain that Respondent PARISI's Answer and his cross-motion to dismiss for failure to state a cause of action set forth therein, was omitted from Appellants' Record on Appeal. Such omission is not the subject of any complaint by Respondent PARISI, who does not oppose the preference application. Hence, neither Mr. Ciampoli nor Mr. Dranoff has standing to raise it.

(c) The non-inclusion of that document is certainly not relevant to this preference application. It is likewise immaterial to the appeal, where its omission from Appellants' Record is perfectly explainable:

(1) As Respondent PARISI himself knows, I rejected his Answer and the within motion when he attempted to serve me with it in Court on October 15, 1990, the very date of oral argument before Justice Kahn. Moreover, I advised His Honor that I would not accept same, unless so directed by the Court. I was never so directed. Accordingly, I did not have the document in my possession at the time the Record on Appeal was being prepared, served and filed.

(2) In light of my aforesaid rejection of Respondent PARISI's Answer and motion contained therein, I had assumed, perhaps erroneously, that His Honor was granting Mr. PARISI's motion to dismiss in his capacity "of counsel" to Mr. Vitagliano on behalf of Respondent COLAVITA. I indicated that good faith belief in my Table of Contents to the Record on

Appeal, the fourth entry of which shows:

"Order and Decision:
granting the 'motion of Respondent Anthony J. Colavita for a judgment dismissing the proceeding' (Par. 14 of said Respondent's Answer).....3"

It should be noted that the omitted Answer of Respondent PARISI, (which identified Aldo T. Vitagliano, Esq. as his attorney) is identical to the one for Respondent COLAVITA (on which GUY T. PARISI is identified as attorney), and which does appear in the Record on Appeal (pp. 86-91). Hence, there is no prejudice.

(3) At the time of the argument before Justice Kahn, Mr. PARISI appeared, stating he was acting "of counsel" to Aldo T. Vitagliano, Esq., who was not present. It appeared that Mr. PARISI was presenting his motion to dismiss in his capacity as attorney for Respondent COLAVITA. It did not occur to me, since I had already rejected his untimely Answer, that he was also attempting to act "of counsel" to his own lawyer, Mr. Vitagliano. Indeed, the status of Mr. PARISI and his representation was sufficiently confusing that Justice Kahn's listing of the Appearances of counsel (pp. 3-4 of the Record on Appeal) totally avoids the subject by omitting any identification for Mr. PARISI and Mr. Vitagliano--and does not note the fact that Mr. Vitagliano did not appear in Court.

(d) Mr. Ciampoli and Mr. Dranoff, if they felt aggrieved by the omission, could certainly have moved to supplement the Record. Indeed, I would have stipulated to include the document, without necessity of a motion, had they notified me of their desire for its inclusion.

(e) Likewise, as to the omission of Mr. Hashmall's Opposing Affidavit, since Mr. Hashmall has made no complaint concerning same, Mr. Ciampoli and Mr. Dranoff have no standing to raise such objection.

(f) As to the omission of the motion to dismiss the Petition on behalf of Respondent MILLER, inadvertently omitted, it was not decided by Justice Kahn. Mr. Dranoff cannot show any prejudice, since it was Mr. PARISI's motion to dismiss that was granted--not his. Petitioner-Appellants' Record on Appeal complies with CPLR Rule 5526:

> "...The record on appeal from...any order shall consist of the notice of appeal, the judgment or order appealed from...the papers and other exhibits upon which the judgment or order was founded and any opinions in the case."

(g) Therefore, the separate cross-motions by Mr. Ciampoli and Mr. Dranoff to dismiss the appeal, predicated on the foregoing immaterial omissions, are wholly baseless. Moreover, these two attorneys well knew the incredible time pressure that Petitioners' counsel was under in having to prepare, assemble, reproduce and separately serve on eight different lawyers a 140-page Record on Appeal, and a 31-page Appellants' Brief within a 24 hour time period. After running off 6,000 pages, the printer had barely enough time to bind the copies for the Court before I had to leave on the 300 mile round-trip to Albany. For Mr. Dranoff, nonetheless, move to dismiss Petitioners' appeal by reason of minor and immaterial omissions, and the shortness of time which made it physically impossible to have all copies

properly bound, is truly deplorable. But for him to analogize said inconsequential, good faith omissions with "the selective inclusion deplored in 2001 Real Estate v. Campeau Corp., 148 AD2d 315," where the Respondent "was compelled to submit its own extensive supplemental record on appeal, which is nearly three times the length of the original record on appeal", supra at p. 316,. and to seek $1,500 monetary sanctions against Petitioners, is a malicious and unconscionable defamation, worthy of rebuke by this Court and the sanctions called for under Part 130 of the Rules designed to deal with such intimidation tactics.

THE ALLEGED ESTOPPEL/LACHES DEFENSES ARE FRIVOLOUS

34. The true facts readily establish the utter spuriousness and bad faith of the so-called estoppel and laches defenses. The collateral estoppel defense is alleged in the Eighth Affirmative Defense of Respondent COLAVITA's Verified Answer (Record on Appeal, p. 89) and the identical Answer of Respondent PARISI and reads as follows:

> "By virtue of the fact that Petitioners' agents have previously filed a complaint alleging the same cause of action with the New York State Board of Election (sic) which has been dismissed, Petitioners are collaterally estopped from instituting this proceeding".

35. Such alleged defense, although not stated to be on information and belief, is clearly not based on personal knowledge, and, therefore, without probative value for purposes of this application. Nor is it pleaded in the Answer of any other Respondent. Nevertheless, such baseless defense is now adopted by counsel for a number of other Respondents, none of

whom include any assertion of the facts alleged therein or supporting affidavit by anyone with the requisite personal knowledge, as a basis for the denial of a preference.

36. None of the factual allegations set forth in the aforementioned paragraph "EIGHTH" are true. The shortness of time does not permit a separate Affidavit by Eli Vigliano, Esq., my associate counsel on this matter, a lawyer with forty years standing at the bar, and Chairman of the Ninth Judicial Committee, a public interest group which grew out of Mr. Vigliano's observations of the illegal and fraudulent manner in which the 1989 Democratic judicial nominating convention was conducted. (see Affidavit of Eli Vigliano, Esq. contained in the Record on Appeal, pp. 63-73).

According to Mr. Vigliano, on November 1, 1989, he hand-delivered a letter (Exhibit "B") to Governor Cuomo's office in New York City, in which he called for an investigation based on his extensively detailed and documented allegations concerning the subject cross-endorsements contract (the Three Year Plan), as well as the serious violations at the Democratic judicial nominating convention, which he had attended in a non-official capacity. The violations constituted fatal jurisdictional defects, which rendered the 1989 Certificates of Nomination of the three judges, therein named, a legal nullity.

37. After the November 1989 election, the Governor's Office referred Mr. Vigliano's citizen's complaint to the NEW YORK STATE BOARD OF ELECTIONS. In his initial and only telephone

conversation with their Law Enforcement Counsel, Patricia Martinelli, Esq, he informed her that he had three witnesses who could corroborate his allegations, he would procure affidavits from them, if she desired, and that if she wished, he would make available to her a tape recording, which he had made of the 1989 Democratic judicial nominating proceedings. Mr. Vigliano never heard from her or anyone else connected with the agency thereafter.

38. On May 25, 1990, almost seven months later, the NEW YORK STATE BOARD OF ELECTIONS, without prior notification to Mr. Vigliano, and, by their own admission (Exhibit "C") without any investigation whatsoever, the agency closed its file, and sent a letter (Exhibit "A" to Mr. Yasgur's Affidavit in Opposition) to an address, which by that time was no longer current. The original letter was returned to the sender Board, unopened, in its original envelope, with a notation that the addressee was no longer at that address (Exhibit "D").

39. In fact, Mr. Vigliano, was never informed as to the disposition of his November 1, 1989 complaint until October 15, 1990 [1], when a copy of the May 25, 1990 letter of the NEW YORK STATE BOARD OF ELECTIONS was in the hands of GUY T. PARISI,

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[1] Mr. Ciampoli admitted to me on October 15, 1990 (although not in open court) that he was aware that Mr. Vigliano had never received the May 25, 1990 disposition letter. Mr. Ciampoli and others I thereafter spoke to at the NEW YORK STATE BOARD OF ELECTIONS had no explanation as to why no attempt was made to ascertain the new address of Mr. Vigliano, a lawyer registered under the laws of the State of New York, with an office and home address and telephone number, listed with the New York Telephone Company.

Esq., who referred to it during argument in support of the claim that Petitioners were "collaterally estopped" "from instituting this proceeding".[2]

40. That any lawyer, let alone lawyers for persons and agencies occupying positions of public trust, could seriously argue that the aforesaid citizen's complaint in 1989 could estop Petitioners from initiating an Election Law proceeding based on acts in 1990 in furtherance of the 1989 illegal agreement is demonstrative of how lacking these Respondents are of any real defense to the misconduct and Election Law abuses alleged by Petitioners.

41. The very letter and determination of May 25, 1990 from Peter S. Kosinski, Esq., Special Deputy Counsel to the NEW YORK STATE BOARD OF ELECTIONS, outlined the procedure to be followed in order to initiate a judicial proceeding under the Election Law to review the conduct of judicial conventions, making it apparent that it was too late to challenge the legality

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[2] Mr. Ciampoli, as well as Peter Kosinski, Esq., Special Deputy Counsel, both stated that they had no explanation as to how Mr. PARISI, attorney for Respondent COLAVITA, had acquired possession of the aforesaid May 25, 1990 disposition letter of his agency, responding to what they confirmed was a "Confidential" complaint under established policy of the New York State Board of Elections. Mr. Kosinski claimed not to know the political affiliation of Patricia Martinelli, Enforcement Counsel of his agency, or whether she was related to Ralph Martinelli, former Chief of Police of the Town of Eastchester, where Respondent COLAVITA maintains his private law offices. He promised to get back to me if he could learn that information. To date, he has yet to do so.

of the 1989 judicial conventions and the judicial nominations resulting therefrom.[3]

Nothing in the aforesaid communication in any way suggests that such previous complaint letter would constitute a collateral estoppel to any future proceeding initiated in accord with the instructions set forth--whether such proceedings were to be brought by Mr. Vigliano or anyone else.

42. Respondents' bad faith is further demonstrated by their failure to cite any legal authority to sustain a defense of collateral estoppel or laches against citizen objectors, acting in the public interest, who initiate a Petition under the Election Law. Petitioners were under no compulsion or obligation to have brought such proceedings at any time. Hence, they cannot be barred because they did not bring such proceedings, or any other legal action, last year. Until Respondent **EMANUELLI** actually resigned from the Supreme Court position to which he was elected in November 1989, which did not occur until August 1990, there was no proof that he did, in fact, consider himself bound by the terms and conditions of the

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[3] Indeed, although Mr. Kosinksi took the trouble to point out that "the time to file objections to a nomination or designation of any candidate for public office expires 10 days after the holding of such convention", in fact, his advice was erroneous, since the Election Law is even more stringent--requiring such objections within 3 days (Election Law, Sec. 6-154). It is indefensible that Mr. Kosinski, as Special Deputy Counsel to the New York State Board of Elections, should have misstated such a vital jurisdictional prerequisite which, if relied upon, would destroy a Petitioner's cause of action.

contract which had secured him the nomination.

43. Mr. Ciampoli himself conceded to me in a telephone conversation last week that the relief sought herein, namely, striking the names of the judicial candidates from the ballots, would not have been obtainable in any administrative remedy or in any other type of judicial proceeding than one brought under the Election Law, as was done in the instant case--and that required that Petitioners wait until the September 1990 judicial nominating conventions had taken place.

44. It should be noted that after those conventions and the filing of Petitioners' Objections and Specifications with the NEW YORK STATE BOARD OF ELECTIONS, that agency denied my request for a hearing on the Petitioners' complaints relative to the nomination certificates of the Republican and Democratic Judicial Nominating Conventions. Mr. Ciampoli, as well as Thomas Zolessi, Esq., general counsel to the NEW YORK STATE BOARD OF ELECTIONS, informed me that the agency's practice is not to consider any extrinsic evidence going beyond the face of the Certificates of Nomination. The validity of allegations of fraud or other abuses at the conventions are left to the Court to decide when the judicial review process is commenced.

45. The Court should further note that, in addition to the enforcement and other powers and duties specified by law, the Election Law gives the State Board of Elections broad enforcement powers, including, inter alia, the power to hold hearings, conduct investigations, initiate judicial proceedings, including

criminal prosecutions (see Sections 3-102, 3-104)--all designed "to encourage the broadest possible voter participation in elections" (Sec. 3-102, para. 13).

46. Despite the enforcement powers vested in Respondent NEW YORK STATE BOARD OF ELECTIONS, it abysmally failed to exercise them after receiving Mr. Vigliano's aforesaid November 1, 1989 complaint from the Governor's Office. And, inexplicably, it opposes the instant preference application, by urging that citizen objectors, acting pro bono, who do the job the agency fails and refuses to do, should have their Election Law proceeding summarily dismissed--simply because the Governor saw fit to direct that complaint of Mr. Vigliano concerning voting rights violations in the prior year to the agency entrusted with the obligation of enforcement of the Election Law.

47. The aforesaid bizarre and shocking behavior by a governmental enforcement body, which not only attempts to foreclose a 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.

ALL NECESSARY PARTIES HAVE BEEN JOINED

48. As to the objections based on non-joinder of various parties, Petitioners joined all parties as to whom relief was requested. I further advised counsel for Respondents that I

would not object to intervention by any party who they believed to be necessary or proper.

49. Due to the delay that has occurred in achieving an Order of this Court that the conventions be reassembled prior to the election for the purpose of nominating new judicial candidates, it would appear that a stay of the election of two judicial candidates for the Supreme Court vacancies is essential interim relief pending the decision on final appellate review.

50. Since the election to fill the third Supreme Court vacancy can proceed unaffected, the omission of the other judicial nominees as parties herein in no way prejudices them (see article in The New York Times, Westchester edition, 10/28/90, Exhibit E, demonstrating that, in actuality, there is but <u>one</u> Supreme Court vacancy available. However, if the intervention of such additional judicial candidates is deemed appropriate, I have no objection thereto.

51. Mr. Hashmall cites no authority for requiring the addition as parties hereto of the Chairman of the Convention or the Secretary thereof or the Committee on Vacancies, none of whom are necessary to achieve the relief requested. Moreover the Committees on Vacancies, nominated at the 1990 judicial conventions, has no independent standing. It is an appendage of the nominees and its legitimacy depends wholly on whether the judicial nominating conventions, which brought them into being, were legally constituted and conducted.

THE PREJUDICE TO THE BOARDS OF ELECTIONS IS MINOR

52. THE NEW YORK STATE BOARD OF ELECTIONS and the WESTCHESTER COUNTY BOARD OF ELECTIONS both seem to have "lost touch" with the statutory purpose of their very existence, i.e. to protect the sanctity of the ballot. They are charged with the responsibility to enforce the law to prevent election fraud and other abuses in the nomination and election process. For such agencies to actively oppose an application for preference of an appeal seeking to have a judicial review on the merits of significant complaints of illegal, corrupt and abusive election practices, and urge dismissal of such appeal on frivolous grounds, should make this Court, as well as the public, question the integrity and political independence of this agency of government.

53. The concern of the WESTCHESTER COUNTY BOARD OF ELECTIONS might have been better expressed to the Appellate Division, Third Department, on Friday, October 19, 1990, when it learned that the customary preference was not being accorded this case. It should have expended its efforts to persuade other Respondents' counsel herein that the election clock was ticking away and that all Respondents should join in the application. Indeed, one wonders why the WESTCHESTER COUNTY BOARD OF ELECTIONS did not itself move for a preference for the very reasons that it now urges warrant denial of the application.

54. Moreover, the bad faith of this government agency is glaring in the context of telephone conversations during the

week of October 1st between myself and Susan Owens, Esq., attorney for the Westchester County Attorney's Office, following her receipt of the underlying Order to Show Cause and Petition. Ms. Owens told me that she was handling the matter for the WESTCHESTER COUNTY BOARD OF ELECTIONS. We discussed the procedure to be followed by the Boards of Election of the various counties of the Ninth Judicial District in the event that the elections of the judicial nominees was stayed by the Court. She told me--as did Mr. Ciampoli himself--that stickers would be placed over the names of the judicial candidates on the ballots in the voting booths--and that this was relatively easy and inexpensive--and preferable to my applying for a stay, which would prevent them from printing the ballots at the outset. An example of the ballot and of how easily it can be modified is annexed hereto as Exhibit "F-1" and "F-2".

55. It is respectfully submitted that the cost and inconvenience to the Boards of Election is insignificant where constitutional rights of the public are concerned and where it is clear that irreparable harm would be done to the democratic process by the inevitable election of Respondent judicial nominees.

THE CROSS-ENDORSEMENTS CONTRACT IN ISSUE IS ILLEGAL

56. Mr. Dranoff misrepresents the state of the law relative to the matter of cross-endorsements. He asserts that the Court of Appeals has repeatedly validated multi-party candidacies particularly in judicial races, citing Rosenthal v.

Harwood, 35 NY2d 469. In that case, the Court of Appeals held that a party by-law prohibiting a judicial candidate from accepting a cross-endorsement was invalid. However, the rationale of that decision, i.e., that such restriction would improperly compromise the independence of the judicial nominee, applies with equal, if not more, force to invalidate the party resolution involved in the instant case. Rosenthal does not say, conversely, that a party can require a judicial candidate to accept a cross-endorsement and other conditions similarly impinging on the judicial nominee's independent judgment, such as exist in the illegal contract underlying this proceeding. Indeed, all of the reasoning expressed in Rosenthal to make such restriction void, exists, a fortiori, in the case at bar--where, not only were there a series of cross-endorsements over a three-year period, but contracted-for resignations by the judicial nominees, once elected, as well as a pledge to divide up patronage appointments equally between the two parties.

57. Thus, Mr. Dranoff is seen to be reckless with the truth when he states, flatly and unequivocally, that this is "an issue which has already been decided by the Court of Appeals".

58. The instant proceeding is not a case where one major political party cross-endorses, without pre-conditions, a single judicial candidate of the other major political party in a single election. Contrary to Mr. Dranoff's broad statements, the far-reaching, ultimate, and unresolved question presented by the Petition is the legality of a particular cross-endorsements

contract, running over a period of years, put in written resolution form, which required judicial nominees, as a condition to obtaining their nomination, to accept such cross-endorsements, to agree to contracted-for resignations so as to create new judaical vacancies, and to a provision that, once elected, they would divide patronage appointments equally, in accordance with the recommendations of their party leaders.

59. On a balancing of equities, based on the Petition and the state of the record, the reasonable probability of success on the merits, the immediate need to avoid irreparable injury to the democratic and judicial process by Election Law violations and an insidious cross-endorsements arrangement, far outweighs any possible inconvenience or hardship to the Respondents and, therefore, merits the relief requested in its totality. This Court must not shirk its responsibility, difficult as it is.

WHEREFORE, it is respectfully prayed that the instant appeal be accorded an immediate preference so that the appeal herein may be heard and decided on the merits without further delay, and that an interim stay be granted to preserve the status quo pending the decision of this Court by directing the NEW YORK STATE BOARD OF ELECTIONS to order the County Boards of Elections of the Ninth Judicial District to modify the ballots and voting machines to provide that the names of Respondents NICOLAI and MILLER shall not appear as candidates for Justice of State Supreme Court and that the voters shall vote for one of the

remaining three candidates, and by directing the WESTCHESTER COUNTY BOARD OF ELECTIONS to provide that the name of Respondent EMANUELLI shall not appear as a candidate for Surrogate Judge, together with such further election proceedings as may be called for under the Election Law and such other, further and different relief as the Court may deem just and proper.

Dated: White Plains, New York
October 28, 1990

S/
DORIS L. SASSOWER