

At a Special Term of the Supreme Court of the State of New York held in and for the County of Oswego on February 2, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

CLAUDIA TENNEY,
Petitioner,

v.

**OSWEGO COUNTY BOARD OF ELECTIONS,
ONEIDA COUNTY BOARD OF ELECTIONS,
CORTLAND COUNTY BOARD OF ELECTIONS,
MADISON COUNTY BOARD OF ELECTIONS,
BROOME COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
HERKIMER COUNTY BOARD OF ELECTIONS,
CHENANGO COUNTY BOARD OF ELECTIONS,
NEW YORK STATE BOARD OF ELECTIONS,
KEITH D. PRICE, JR., and ANTHONY BRINDISI,**
Respondents.

ORDER TO SHOW CAUSE

Index No. EFC-2020-1376

On February 1, 2021, Respondent Anthony Brindisi filed a proposed Order to Show Cause seeking: (1) an injunction staying certification of the final results in this matter until all appeals have been decided; and (2) an order directing a manual audit of the voter verified records pursuant to Election Law § 16-113. In support of his application, Brindisi submits the Affirmation of Henry J. Brewster, Esq., sworn to February 1, 2021 (NYSCEF Doc. 197), the Affidavit of Lucy MacIntosh (NYSCEF Doc. 198), and Exhibits 1 through 19 attached to his Memorandum of Law (NYSCEF Doc. 200). All parties were provided with notice of, and an opportunity to respond to, the request for a temporary restraining order in the proposed Order to Show Cause, pursuant to 22 NYCRR 202.7(f) (NYSCEF Doc. 201).

I.

With respect to Brindisi's request for a manual audit of the voter verified records pursuant to Election Law § 16-113, this relief was neither pled, nor demanded, in his Counterclaim (NYSCEF Doc. 23). Petitioner Tenney, however, did demand such relief in her Petition, invoking this Court's jurisdiction under Election Law §§ 16-100, 16-106, 16-112, 16-113 and 16-116 in Paragraph 8, and specifically requesting the verification of the machine vote tallies in her wherefore clause (NYSCEF Doc. 1). In response to Tenney's allegation that this Court has jurisdiction to grant relief under those provisions of the Election Law, including Section 16-113, Brindisi "denie[d] that the Court has any of the asserted jurisdiction in the instant proceeding except that provided for in Article 16 of the Election Law to make orders to preserve ballots and to rule on the validity or invalidity of ballots for which the candidates have protested the Board of Elections' decision to either canvass or refuse to canvass the ballots" (NYSCEF Doc. 23). In other words, not only did Brindisi not ask for a manual audit under Election Law § 16-113 until yesterday, he previously argued that this Court has no authority to order that relief. While Brindisi is free to make a motion to amend his pleadings or conform them to the proof in this action (CPLR 3025[b], [c]), this Court cannot grant him substantive relief that he has not demanded in a pleading (*We're Associates, Co. v Scaduto*, 206 AD2d 245, 248 [2d Dept 1994]).

Additionally, the motion papers submitted in support of Respondent Brindisi's proposed order to show cause mark the first time in this long-running proceeding that either party has raised a potential problem involving the scanning of paper ballots and counting of votes. Those allegations, however, are limited, and only raise concerns about the machine counts for affidavit, absentee and other special ballots – not the scanning of the early-and-same-day machine ballots that Brindisi now wants to manually audit. A manual audit of the early-and-same-day

machine ballot counts should have already been conducted within 15 days of the election by each of the Respondent Boards of Elections pursuant to Election Law § 9-211 and 9 NYCRR 6210.18. Accordingly, in order for this Court to properly exercise discretion to order a full manual audit of all of the early-and-same-day machine ballots, the discrepancies revealed by the prior manual audits would have to “create[] a substantial possibility that the winner of the election as reflected in the voting machine or system tally could change” (Election Law § 16-113[2]). That burden is high, and it has not been met.

For these reasons, the Court declines, at this juncture, to issue an order to show cause with respect to Brindisi’s request for a manual audit of the voter verified records.

II.

With respect to Brindisi’s request for an injunction staying certification pending completion of all appeals in this proceeding, the Court hereby grants the order to show cause, as modified herein, issuing a Temporary Restraining Order staying certification of the final election results in New York’s 22nd Congressional District by Respondent Oneida County Board of Elections (not because of any errors on behalf of the Oneida County Board of Elections; but, rather, merely because it was the last County to conduct its final canvass), pursuant to the Court’s authority under CPLR 6313[1] because of the possibility of irreparable harm that could occur if an individual was certified and then irrevocably seated under Article 1, Section 5 of the United States Constitution in the House of Representatives prior to this Court’s determination on Respondent Brindisi’s request for an injunction and stay.

III.

Accordingly, it is hereby

ORDERED that all parties herein show cause before the Hon. Scott J. DelConte, J.S.C., in the Oswego County Virtual Courtroom, *via* Microsoft Teams **at 1:00 p.m. on Friday, February 5, 2021**, or as soon thereafter as counsel may be heard, why an order of this Court should not be made and entered:

1. Ordering that the portions of this Court's Order of January 29, 2021 vacating the Court's Order of November 25, 2020 enjoining the New York State Board of Election from certifying the General Election results for New York State's 22nd Congressional District shall be stayed pending the resolution of any appeals taken from orders of this Court; and it is further

ORDERED that, because of the possibility of irreparable harm, this Court hereby issues a Temporary Restraining Order pursuant to CPLR 6313 enjoining Respondent Oneida County Board of Elections from certifying its final election results for New York State's 22nd Congressional District; and it is further

ORDERED that all papers in support of, or in opposition to, Respondent Brindisi's request in this proceeding for a stay of the certification of results for New York State's 22nd Congressional District pending completion of all appeals shall be filed by **4:00 p.m. on Thursday, February 4, 2021** to the NYSCEF system and, further, that any party may argue at the return date on Friday, February 5, 2021, whether or not it submitted papers.

Dated: February 2, 2021



HON. SCOTT J. DELCONTE, J.S.C.

ENTER.