SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

CLAUDIA TENNEY,	:	
Petitioner,	:	INDEX NO. EFC-2020-1376 (Justice DelConte)
-against-	:	
OSWEGO COUNTY BOARD OF ELECTIONS, et al.,	:	MEMORANDUM OF RESPONDENT ANTHONY BRINDISI IN OPPOSITION TO PETITIONER TENNEY'S MOTION
Respondents.	:	
For an Order, etc.	:	

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MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER CLAUDIA TENNEY'S MOTION

Respondent Anthony Brindisi ("Brindisi") submits this opposition to Claudia Tenney's ("Tenney") Motion under CPLR 2214(d), which Brindisi files pursuant to this Court's Notice directing the Parties to file "proposed orders to show cause and supporting papers, returnable Monday, December 7, 2020 at 1:00 p.m. . . . on or before 4:00 p.m. on Wednesday, December 2, 2020 . . . with opposition papers . . . [due] on or before 4:00 p.m. on Thursday, December 3, 2020." Docket No. 70 at 2.

I. Introduction

The remedy that Tenney requests is inappropriate and unjustifiable, particularly under the circumstances of this case. Tenney asks this Court ignore valid evidence and leave hundreds of valid ballots uncounted based on the Boards' failure to follow procedures set out in the Election Code and this Court's order. But this Court has the power and indeed the obligation to review the record and determine which disputed ballots are properly before it, and determine whether those disputed ballots include any cast by valid voters that were wrongfully rejected in violation of New York law. While the record stored at the Courthouse is not currently organized in a way that is conducive to efficient judicial review, each problem in the record is eminently solvable. *See* Docket No. 90 at 6-11 (explaining each discrete problem and proposing a corresponding and workable solution). As a result, this Court can exercise its authority to order such corrections and then resume its review of disputed ballots so this election can be promptly finalized and the winner—as selected by the people of New York's 22nd Congressional District—can be determined and certified.

Tellingly, Tenney fails to cite any authority that would permit this Court to take the approach she urges. Undaunted, she asks the Court to simply decline to review all ballots preserved for judicial review, and instead proposes this Court rubberstamp a record Tenney herself admits is flawed. *See generally* Docket No. 88; *see also* Docket No. 87 at 7. The law does not allow Tenney to circumvent this Court's review so that she can declare herself the winner before each properly contested vote has been reviewed and resolved. Hundreds of ballots that were improperly rejected by the Boards of Elections (the "Boards") remain before this Court for its review and resolution, and no results can or should be certified until that occurs. *See* Docket No. 58 at 2-8 (setting forth various categories of wrongly rejected ballots); Docket No. 62 at 5-15 (clarifying a misrepresentation by counsel for Tenney with regard to the receipt and postmark deadline under

New York law and setting forth various categories of wrongly rejected affidavit ballots before this Court for its review).

Tenney argues for rubberstamping the incomplete results now for three reasons: (1) she asserts, in direct contravention arguments she previously made in this case, that this Court lacks jurisdiction because the Boards did not make a written record of all objections made to ballots and the resolution of those objections on the ballots or ballot envelopes; (2) she wrongly claims this Court did not grant leave permitting Brindisi's cross-claim and therefore, his claims must be dismissed; and (3) she incorrectly asserts that Brindisi does not request the relief he now seeks in his cross-claim. Tenney is wrong on the facts as well as the law. While the Boards may not have made records of all the objections and the resolution of those objections in the form required by state law and the Court's November 10 Order, the Boards did keep such records in other formats—be they "sticky notes," spreadsheets, or stacks. Further, Brindisi has also produced sufficient evidence to demonstrate that he made such objections, which is sufficient to preserve the Court's jurisdiction. Finally, this Court granted leave to Brindisi's counsel to file his cross-claim, and Brindisi's cross-claim requests the precise relief he seeks: a ruling on the "validity of the ballots that are the subject of the Board['s] rulings of invalidity which he has protested at the canvass." Docket No. 23 ¶ 13. The Board' failure to make an ideal record of these rulings does not change the nature of the relief Brindisi seeks.

This Court should deny the relief requested in Tenney's order to show cause, and should instead order the Boards to implement the discrete and commonsense solutions proposed by Brindisi to organize and clarify the record, resume its review of each contested ballots, and ensure that the results that are ultimately certified are correct, accurate, and that every valid and lawful vote before the Court is properly counted.

II. Argument

A. The Court has jurisdiction to conduct judicial review of the objections made during the canvass, including making factual findings regarding whether the parties made objections.

Tenney's contention that the Boards' "records and documentation of the canvass" are not adequate to conduct "any" judicial review of "any objections made[,]" Docket No. 87, at 2—and that she must therefore be certified as the winner of the election—is wrong on both the facts and on the law.

As an initial matter, Tenney has wisely backed off her prior unsupported position that the Court completely lacks jurisdiction if Boards did not handwrite objections and their resolution in ink on ballots or ballot envelopes as directed by Election Law § 9-114. Docket No. 87 at 3 n.2 (conceding Election Law § 9-114 is not a jurisdictional requirement). This is because compliance with Election Law § 9-114 is not a jurisdictional requirement. As discussed in Brindisi's prior briefing, under New York Election Law section 16-106, a court has subject matter jurisdiction to review "[t]he casting or canvassing or refusal to cast challenged ballots . . . absentee . . . and ballots voted in affidavit envelopes[.]" N.Y. Elec. Law § 16-106(1); *Alessio v. Carey*, 10 N.Y.3d 751, 753 (N.Y. 2008). While a ballot may "be the subject of a judicial challenge" only if an "objection is lodged to the [board of election's] decision to canvass or refuse to canvass a particular ballot during the canvass[,]" *Stewart v. Chautauqua Cnty. Bd. of Elections*, 894 N.Y.S.2d 249, 253 (N.Y. App. Div. 2010), Section 16-106 does not require proof of an objection in any specific form. *Cf. In re Baker*, 213 N.Y.S. 524, 526 (Sup. Ct. Oneida Cty. 1925) (stating court has jurisdiction over challenged votes, even though statement of canvass listed no void or challenged ballots and no challenge sheets were produced, because evidence from witnesses established that votes were challenged). It is the *objection* that prevents waiver of the ability to seek review, not the form in

which it was recorded.

Given this concession, Tenney's contention that the Court cannot conduct "any" judicial review of "any objections made" during the canvass is a factual argument, not a legal argument. *See* Tr. 66:19-20 (Tenney's counsel arguing that whether an objection is preserved is "a question of fact" and that the Court is empowered to determine "whether there is adequate evidence of an objection"). Fairly understood, Tenney's argument is about the sufficiency of evidence, and thus asks the Court to make a sweeping ruling that there is insufficient evidence to establish a challenge as to every ballot without engaging in further judicial review of the actual evidence offered by the Boards and Brindisi.

But with the exception of two specific issues discussed *infra* in Part II. B., Tenney fails to identify any evidence that plausibly supports her claim that "[t]he records and documentation of the canvass are not adequate for the Court to conduct *any* reliable, accurate, and legal review of *any* objections made at the canvass of ballots." Docket No. 87 at 2 (emphases added).

Indeed, her argument directly contradicts the clear record before this Court. During the November 23 evidentiary hearing, the parties presented—and (in some cases) the Court ruled upon on the validity of—dozens of ballots and absentee ballot envelopes that were the subject of an objection by one of the candidates. Tenney's memorandum—with two exceptions, discussed below—does not argue that there was inadequate evidence of an objection as to any particular ballot or ballot envelope already entered into evidence, such that judicial review was impossible. Nor could she. While some Boards did not make a record of objections on each ballot or ballot envelope itself, as directed by statute and the Court's November 10 order, the Boards did use other recordkeeping practices—such as "sticky notes," spreadsheets, or labeled stacks—to record objections and the Boards' resolution of those objections. While these practices made the Court's

task of adjudicating disputes over Boards' decisions to count or to refuse to count certain ballots more difficult and less efficient, they do not make any judicial review impossible, as Tenney suggests. Indeed, the failure of some Boards' to create a statutorily compliant record of objections is not the same as a failure to create any record of objections at all. Rather than throwing in the towel, as Tenney suggests, the appropriate way to deal with these recordkeeping practices is set forth in Brindisi's proposed order to show cause: ordering the Boards to translate their current record of objections—be they "sticky notes," spreadsheets, or stacks—into a written record of the objection and disposition written on the back of the ballot or on the ballot envelope itself.

In fact, during the hearing, Tenney and Brindisi *agreed* that, if evidence of an objection is ascertainable from a Board's idiosyncratic recordkeeping or from outside evidence produced by campaign observers and non-contemporaneous records produced by counsel for the Boards—even if such objection was not properly preserved on a ballot or ballot envelope itself—that objection is properly before this Court and subject to its review and jurisdiction. *See e.g.*, Tr. 149:23-150:6 (Tenney's counsel arguing that a spreadsheet indicating objections, rather than an objection written on a ballot or ballot envelope itself, is plainly sufficient to establish that an objection has been preserved); Tr. 154:13-14 (Tenney's counsel advocating for the Court's reliance on testimony from Madison Commissioners with regard to whether objections were preserved); Tr. 155:10-15 (Tenney's counsel advocating for reliance on an affidavit from a Tenney Campaign observer with regard to the preservation of objections made before the Madison Board); Tr. 163:8-12 (Tenney's counsel suggesting that the Court should rely on a spreadsheet made by counsel for the Madison Board in determining what objections had been preserved); Tr. 170:9-176:11 (Tenney's counsel eliciting testimony evidence with regard to the Tenney Campaign's objections in Madison County).

While Tenney may now seek to abandon this argument, precedent demonstrates that the Court's responsibility is to evaluate the evidentiary record—which may include county board records other than notations on the ballot itself, as well as other forms of admissible evidence offered by the parties, including testimony—and make a factual determination regarding whether an objection was preserved. Perhaps realizing the clear import of these cases, Tenney attempts to manufacture a jurisdictional rule out of whole cloth: claiming now that the Court only has jurisdiction if "the ballot itself indicates the basis for the party's objection without introduction of extrinsic evidence." Docket No. 87 at 3, n.2. Even setting aside the fact that Tenney has already argued the *opposite* position in this very case with respect to her objections to Madison County absentee ballots, Tenney cites no authority in support of her purported "parol evidence rule" for ballot objections. Nor does it find any support in the law. For example, in *In re Baker*, the Supreme Court had jurisdiction to review election officials' decisions to count challenged ballots even though the statement of the canvass did not list any challenged ballots and challenge sheets were not provided, because other evidence of the challenges existed. 213 N.Y.S. at 526. Specifically, an election official wrote down the names of voters and the challenge to their ballots. *Id.* Because this evidence of the challenges existed and because the court could order the Board of Elections to file that evidence if necessary, the Court had the authority to rule on the challenged ballots. *Id.*

Nor do the cases cited in Tenney's memorandum provide support for her position. For example, Tenney relies on *Dorman v. Scaringe*, 635 N.Y.S.2d 725 (1995), as support for her claim that this "Court only has jurisdiction to review the validity of a ballot where there has been a demonstrable objection by a party." Docket No. 87 at 2. But that case simply shows that it *is* necessary for the Court to review the evidence in the record before it and make a determination as to whether objections had been made: in that cate, the court was clear that the record "*reveal[ed]*

that the disputed ballots were not challenged" and that "Petitioner, who bears the burden of proof . . . while challenging the residency of the absentee voters, *has failed to identify* what, if any, challenges were made to the ballots. *Dorman*, 635 N.Y.S.2d at 725 (emphasis added). At the same time, his opponent "*affirmatively established* that no challenges were made before the Board of Elections." *See id.*; *see also Stewart v. Chautauqua Cty. Bd. of Elections*, 894 N.Y.S.2d 249, *aff'd*, 14 N.Y.3d 139 (2010) (holding ballots could not be subject to judicial review because the parties "*failed to demonstrate* that there was a challenge to the affidavit ballot of John Doe") (emphasis added). In other words, the courts in *Dorman* and *Stewart* did not simply reject the challenge because the Board did not mark the ballots correctly; those courts instead relied on the record established *by the parties*. Those cases show that a party can offer evidence of a challenge and this Court should make a ruling on whether ballots were challenged based on the record before it. In this case Brindisi has established that challenges were made to the ballots, and Tenney has failed to affirmatively establish that that was not the case. Thus, those cases support Brindisi's position, and require the rejection of Tenney's position.

Furthermore, Tenney's argument that the Court cannot review the Boards' decisions regarding rejected ballots because it is "impossible to recreate what occurred at the time of canvass" is incorrect. *See* Docket No. 87 at 4. As set out in Brindisi's Motion, the Court can act as the finder of fact to determine what occurred in each county and exercise its jurisdiction to correct errors and order Boards to comply with the duties imposed on them by law. Tenney cites *People ex rel. Brown v. Freisch*, 109 N.E. 517, 518 (1915) for the proposition that a court should not "[try] to recreate a Board's findings in the absence of appropriate Board notations." Tenney Mem. of Law at 4. But the *Freisch* Court was concerned with the absence of *any* evidence to assist the Court in determining what occurred during the canvass. *See Freisch*, 109 N.E. at 521 (noting that the

election contest statute in effect at the time did not support a construction justifying a court order directing election officers to examine ballots "without any marks of identification . . . , aided *only by a recollection of the situation as it existed on the night of election*, endeavor to select the identical ballots declared void at the time of the canvass") (emphasis added). Here, the Court need not rely only on the unsupported memories of election workers. Instead, it has contemporaneous documentation of which ballots were objected to and, in Brindisi's Motion, a methodology for determining the reasons for ballot rejections.

Adopting the Tenney Campaign's argument would set a concerning precedent. If a court has jurisdiction to review ballots only if elections officials mark the objection on the ballot or ballot envelope during the canvass, then the ability of candidates, campaigns, and voters to ensure that qualified ballots are counted or held invalid ballots depends entirely on the unilateral conduct of election officials—something over which candidates, campaigns, and voters have no control. Candidates, campaigns, and voters should not be punished for the failure of election officials to follow statutory instructions. This is especially so in proceedings under Election Law Section 16-106(1), in which candidates, campaigns, or voters sue the very same election officials required to comply with statutory procedures. Permitting election officials to circumvent judicial review by simply failing to follow the process outlined in state law would make their actions unreviewable at their own will—a result inconsistent with basic principles of due process. It would be similarly inequitable to disenfranchise qualified voters whose ballots should have been counted just because the Boards failed to make a proper record of the objection when a process exists by which the Court can determine, as necessary, which ballots were rejected and why the Board rejected them. This Court should adopt the procedures requested in Brindisi's motion to ensure that as many qualified ballots as possible are counted.

B. The two issues with recordkeeping specifically cited by Tenney can be resolved through the Court's well-established factfinding abilities, and the Court has tools available at its disposal to correct errors and clarify the record to facilitate its review.

Tenney's sweeping contention that the Boards' "records and documentation of the canvass" are not adequate to conduct "any" judicial review of "any objections made[,]" Docket No. 87, at 2, is not well founded. Indeed, Tenney cites only two specific examples of purportedly inadequate records, neither of which render this Court's execution of its duty impossible. Specifically, Tenney focuses on: 1) the handful of ballots from Oneida County that were objected to, but whose record of objection was contained on a sticky note that became separated from the ballot, and 2) the more than 400 rejected affidavit ballots from Oneida County to which the Brindisi campaign objected, but which the Oneida Board may not have preserved a record of objections. *See id.* at 3-4. As Brindisi set out in his Motion and supporting memorandum, each issue with the record is eminently solvable, and ordering such issues corrected falls squarely within this Court's jurisdiction pursuant to Election Law Section 16-106(4). *See* Docket No. 90 at 6-11.

With respect to the Oneida affidavit ballots in particular, Tenney misstates the evidentiary record before the Court. There is no dispute that the Brindisi campaign objected to specific affidavit ballots that the Board rejected according to the procedures established by the Board for lodging such objections; the testimony of the Brindisi campaign's watchers and the bipartisan members of the Oneida Board were entirely consistent. *See* Tr. 302-30 (testimony of watcher Pearlman); *id.* at 335-50 (testimony of watcher Stankiewicz); *id.* at 354-64 (testimony of Commissioner Cardone); *id.* at 365-73 (testimony of Commissioner Grimaldi). Nor is there any dispute that the Oneida Board attempted to preserve a record of the Brindisi campaign's objections by maintaining the objected-to affidavit ballots in stacks bundled together with a sticky note on top and stored in a specific box in the Board's secure storage area. *See e.g.*, Tr. 355:9-11

(Commissioner Cardone confirming that this was the case); *id.* at 357:2-8 (same). The only issue is whether this box of objected-to ballots was preserved when it was transported to the Court. If upon further review, the Court and the Board are unable to confirm that the box was preserved, the Court may properly rely upon testimony and documentary evidence showing that Brindisi watchers identified certain rejected affidavit ballots, objected to those affidavit ballots, and recorded the names of those affidavit voters in contemporaneous notes, already entered into evidence after a full opportunity for cross examination. *See* Tr. 203:22-305:5 (Brindisi campaign representative objected to rejected affidavit ballots in Oneida County); *id.* 306:17-307:12 (Brindisi campaign representative took contemporaneous notes on each ballot she objected to in Oneida County); *id.* 315:10-12 (admitting Oneida County rejected ballot notes into evidence); Ex. ON-40; Ex. ON-41. This evidence is more than sufficient to establish that these objections were not waived, and the failure of the Board to record those objections does not deprive this Court of jurisdiction. *Cf. In re Baker*, 213 N.Y.S. at 526.

Tenney does not credibly call into question any of these facts. Tenney incorrectly avers that the Brindisi watchers did not make specific objections to the ballots. Docket No. 87, at 3. To the contrary, the Brindisi watchers specifically identified exactly the rejected affidavit ballots to which they wanted to interpose an objection by separating them out from the larger pile of rejected affidavit ballots, putting them into a separate pile, rubber-banding them together, placing a sticky note on top stating "Brindisi Objections", handing them to members of the Board and stating "can you just set these aside for the court [to] review." *See e.g.*, Tr. 369:18-21. Tenney also contends that Brindisi somehow erred because his watchers did not "request the Oneida County Board provide a ruling or document the ruling." Docket No. 87, at 3. But even if there were a legal requirement that a watcher must request (or somehow compel) a Board to make a ruling and

document a ruling in order to preserve an objection—a proposition for which Tenney offers no authority in support—there is no actual factual dispute about the Board's ruling on any of the objections: all of the rejected affidavit ballots remain sealed and uncounted, with the reasons for their rejections written on the envelopes themselves. Finally, while Tenney disparages "extrinsic evidence" as "subject to partisan recollection and recall", Docket No. 87, at 2, Tenney ignores that courts regularly decide disputes of fact based on testimony and documentary evidence. Tenney had a full opportunity for cross examination, and the Court is empowered to make credibility determinations and consider corroborating evidence in the course of its factfinding activities.

C. Brindisi obtained leave of court permitting a cross-claim.

Tenney incorrectly asserts that Brindisi's cross-claim must be dismissed because Brindisi never obtained the requisite permission from the Court to file a cross-claim. Docket No. 87 at 5. This argument is a head-scratcher. On November 6, the Court held a conference with all attorneys in this proceeding, including Joseph Burns, counsel to Petitioner Tenney. During that hearing, counsel to Brindisi orally requested leave of court to file a counterclaim and cross-claim with his answer. The Court asked Mr. Burns whether he objected to this request. Mr. Burns stated that he had no objection. No other attorney for the parties raised any objection. The Court then stated that Brindisi had leave to file such a responsive pleading. Affirmation of Martin Connor at ¶¶ 3-4. Because Brindisi obtained this Court's permission to file a cross-claim, the cross claim is properly before the Court.

D. Brindisi's cross-claim pleads the relief he seeks.

Finally, Tenney asserts that Brindisi's cross-claim does not seek the relief he requests because, according to Tenney, "the record is devoid of candidates' protests and the rulings of the Boards of Election as to any ballot, which is the premise of" Brindisi's cross-claim. Docket No.

87 at 6. But, as discussed in detail above, there is ample record evidence of candidates protests and Boards' rulings. With respect to the two specific evidentiary issues raised by Tenney, Brindisi has produced ample evidence of his campaign's objections to ballots and provided a method by which to build a factual record regarding why ballots were rejected. Moreover, the cross-claim requests "such other and further relief as the court deems just and proper." Accordingly, the Court should deny Tenney's request that it dismiss Brindisi's cross-claim.

III. Conclusion

For the foregoing reasons, Brindisi respectfully asks that the Court deny Tenney's Proposed Order to Show Cause.

Dated: Brooklyn, New York
December 3, 2020

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