

SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

In the Matter of

CLAUDIA TENNEY, candidate for Member of Congress,
22nd District of New York State,

Petitioner,

MEMORANDUM OF LAW

-against-

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,

Index No. EFC-2020-1376

KEITH D. PRICE, JR., candidate for Member of Congress,
22nd District of New York State,

and

ANTHONY BRINDISI, candidate for Member of Congress,
22nd District of New York State.

Respondents.

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Dated: December 2, 2020

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STATEMENT OF FACTS

During the hearing conducted on November 23 and 24, 2020, Your Honor questioned whether this Court had jurisdiction to rule on the validity of ballots where the County Board failed to properly follow Election Law § 9-114. See Tr. 193-94 (“[t]he evidence before this court has clearly raised issues as to what our jurisdiction is as to ballots that are, not marked in ink, ballots that are marked with only sticky notes”); Tr. 210 (“We keep running into this, and whether or not this court has jurisdiction to continue to look at these ballots that are not marked on their face as to the objection and the Board's determination.”). Your Honor further directed the County Boards to provide the parties with the “tallies of the scanned and hand-counted vote. . . . immediately,” enjoined the County Boards from certifying their results, held any further hearings in abeyance and afforded the parties until 5:00 PM, Monday, November 30, 2020, to submit any motions. Tr. 352-53, 450-51; Dkt. Nos. 64, 65. Additional amendments to the County Boards’ tallies rendered necessary an Order of this Court on November 30, 2020, that, among other things, required the County Boards to “submit a **final** report of their original canvass” by December 1, 2020, and adjourned the motion deadline to 4:00 PM, Wednesday, December 2, 2020. Dkt. No. 70 (emphasis in original). Those court-ordered final tallies are set forth in the Affirmation of Paul DerOhannesian, ¶3.

For the following reasons, Petitioner Tenney respectfully submits that this Court should direct the Respondent County Boards to certify the results submitted to this Court by the Respondents County Boards in response to this Court’s Order of November 30, 2020 (Dkt. No. 70) and transmit those results to the Respondent New York State Board of Elections and directing the New York State Board of Elections to certify the results for Member of Congress, 22nd District of New York State held on the 3rd day of November, 2020, forthwith upon receipt of certified

results from the Respondents County Boards of Elections as submitted to this Court in response to the Court Order of November 30, 2020 (Dkt. No. 70). Petitioner Tenney further submits that this Court should dismiss the cross-claim submitted by Respondent Brindisi, or alternatively, deny relief under Respondent Brindisi's cross-claim.

ARGUMENT

I. This Court Should Certify The Respondent County Boards' Results

Petitioner Tenney argued in her Memorandum of Law, filed November 24, 2020, that this Court should not review any ballots that fail to contain the critical markings identified in Election Law § 9-114. Dkt. No. 61, pp. 3-6.; see also Election Law § 8-506;¹ Dkt. No. 40, p. 4 (this Court's Order concerning the proper procedure for documenting objections). Petitioner now incorporates the arguments contained in that filing (Dkt. No. 61) and maintains that unless the ballot is "marked or identifiable as to permit [this Court] to immediately" determine whether it was canvassed and the basis for the party's objection, this Court is unable to rule on any purely speculative objections. Id. at 6 (quoting People ex rel. Brown v. Freisch, 215 N.Y. 356, 362 (1915)). The 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. There is no provision for the Court to rely on extrinsic evidence, which is subject to partisan recollection and recall, to establish the requirements for objected to ballots

Furthermore, this Court only has jurisdiction to review the validity of a ballot where there has been a demonstrable objection by a party. See Dorman v. Scaringe, 222 A.D.2d 887, 888 (3d Dep't 1995) ("As the record reveals that no challenges were made and, accordingly, all objections

¹ Election Law Sections 8-506 and 9-114 mandate the Board of Elections write on the objected ballot or ballot envelope: 1) who objected; 2) the reason for the objection; 3) the Board's ruling; 4) whether the ballot was canvassed and 5) the Commissioner's signature.

to these ballots were waived, Supreme Court lacked jurisdiction to hear the challenges in the first instance.”) (citations omitted); Matter of Stewart v. Chautauqua County Bd. of Elections, 69 A.D.3d 1298, 1302 (4th Dep’t 2010) (finding the court lacked jurisdiction where the parties “failed to demonstrate that there was a challenge to the affidavit ballot”) (citations omitted). Respondent Brindisi’s witness for Oneida County candidly admitted she did not make specific objections to many of the ballots, nor did she request that the Oneida County Board provide a ruling or document the ruling. Tr. 317-28; see also Tr. 295. The Court’s role is to review the Board’s determination. However, Petitioner Tenney respectfully submits that many of the absentee, affidavit and military ballots fail to contain any writings on the ballot upon which this Court could conclude that an objection has been raised against the ballot. See Tr. 193-94 (“[t]he evidence before this court has clearly raised issues as to what our jurisdiction is as to ballots that are, not marked in ink, ballots that are marked with only sticky notes”); Tr. 210 (“We keep running into this, and whether or not this court has jurisdiction to continue to look at these ballots that are not marked on their face as to the objection and the Board’s determination.”). The record in this regard is correctly described by the Court as “almost non-existent” and not permitting “meaningful review.” Tr. 228, 252-53. Respondent Brindisi failed to ensure that any objections were properly documented. Accordingly, this Court does not have jurisdiction to rule on the validity of those ballots as they are not properly before this Court.²

Moreover, the facts of this apparently unique situation preclude the Court from providing effective relief since critical Board of Elections’ records are missing from several ballots admitted

² At this time, Petitioner Tenney will not go so far as to argue that Election Law § 9-114 is a jurisdictional requirement – meaning that this Court does not have jurisdiction over ballots unless the County Board of Elections strictly complied with Section 9-114. Rather, Petitioner Tenney maintains that this Court lacks jurisdiction where the ballot is unclear or silent as to whether it was included in the count or whether the ballot itself indicates the basis for the party’s objection without introduction of extrinsic evidence.

as exhibits. See ON-12 (Tr. 70); ON-13 (Tr. 71); ON-39 (Tr. 125). In another case confusing notations made the court “unsure” if a ballot was counted. ON-14 (Tr.78). These ballots lacked any record or notation of whether they were included in the canvass results. As this court noted: “Indeed, one Commissioner testified that [sic] under oath it was simply not possible to know whether some of the ballots before this court were canvassed or not. Because of that, it’s just not possible to direct the Board of Election on how to adjust the tally. I’m not clairvoyant.” Tr. 218-19.

The failure to adhere to the requirements of Election Law 9-114 make it impossible to recreate what occurred at the time of canvass and decide or order whether to include or exclude multiple votes is a razor-thin electoral contest. It is simply impossible to fashion relief even if the validity or invalidity of these ballots is uncontroverted.

The Court of Appeals in People ex rel. Brown v. Freisch, 215 N.Y. 356, 362 (1915), warned of the perils of trying to recreate a Board’s findings in the absence of appropriate Board notations. See, Dkt. No. 61, pp.5-6. Under the unique circumstances and record of this case, Petitioner Tenney therefore respectfully submits that this Court should certify the results of the County Boards submitted in response to this Court’s Order of November 30, 2020 (Dkt. No. 70).

II. Respondent Brindisi’s Cross-Claim Should Be Dismissed or Denied Relief Under the Purported Cross-claim

Petitioner Tenney initiated this matter via Order to Show Cause and a Verified Petition on November 4, 2020. Dkt. Nos. 1, 2. On November 8, 2020, Respondent Brindisi submitted a Verified Answer with Counterclaim and Cross-Claim. Dkt. No. 23. (Although Respondent Brindisi identifies the filing as including both a “counterclaim” and a “cross-claim,” it is clear that Respondent is only seeking relief from the County Boards of Elections – in other words, a “cross-

claim.” Dkt. No. 23, ¶¶10-14.) The basis for any relief requires the assertion of a valid cross-claim or petition. Without a valid cross-claim or petition, the Respondent is not entitled any relief.

A. Respondent Brindisi Never Obtained a Court Order Permitting a Cross-Claim

CPLR 402 governs the appropriate pleadings in a special proceeding. CPLR § 402. The statute limits pleadings to a petition and answer. Id. CPLR 402 further states that “the court may permit such other pleadings as are authorized in an action upon such terms as *it* may specify.” Id. (emphasis added). The court has not “permitted” or “specified” the terms of any cross-claim in this special proceeding. It is settled law that a party is precluded from filing a cross-claim in an election matter without leave of the court. See Williams v. Rensselaer County Bd. of Elections, 98 A.D.2d 938, 939 (3d Dep’t 1983) (“a cross claim is not permitted in a special proceeding without court order”) (citations omitted); Koplen v. Austin, 5 A.D.3d 515, 516 (2d Dep’t 2004) (“[A] cross claim is not permitted in a special proceeding without leave of court.”) (citations and internal quotations omitted); Zenosky v. Graziani, 288 A.D.2d 843, 844 (4th Dep’t 2001) (same). Respondent Brindisi did not obtain an order of this Court prior to filing his so-called “counterclaim and cross-claim.” Nor has Respondent Brindisi obtained an order following the submission.³

Petitioner Tenney therefore respectfully submits that Respondent Brindisi’s cross-claim must be dismissed. See O’Connor v. D’Apice, 156 A.D.2d 610, 612 (2d Dep’t 1989) (“We further find that the Supreme Court properly dismissed Francis X. Lynett’s cross claim in proceeding No. 1 inasmuch as a cross claim is not permitted in a special proceeding without leave of court.”) (citations omitted). Accordingly, Respondent Brindisi lacks standing to request any relief under Article 16 of the Election Law from this Court.

³ Respondent Brindisi has also not filed a cross-petition.

B. Respondent Brindisi's Cross-Claim, Even if it were a Valid Pleading, Permits Only Limited Relief in this Proceeding

Even if Respondent Brindisi's Cross-Claim were valid its terms specifically limit the relief the court may provide. The Respondent specifically denied that the Court had any jurisdiction under Article 16 other than "to preserve ballots and to rule on the validity or invalidity of ballots for which the candidates have protested the Boards' of Election decision to either canvass or refuse to canvass the ballots." Dkt.23, ¶3. As the court has noted the record is devoid of candidates' protests and rulings of the Boards of Election as to any ballot, which is the premise of Respondent Brindisi's alleged cross-claim.

CONCLUSION

Based on the foregoing, Petitioner Tenney respectfully submits this Court should 1) direct the Respondents County Boards to certify the results submitted to this Court in response to this Court's Order of November 30, 2020 (Dkt. No. 70) and transmit those results to the Respondent New York State Board of Elections; 2) direct the New York State Board of Elections to certify the results for Member of Congress, 22nd District of New York State held on the 3rd day of November, 2020, forthwith upon receipt of certified results from the Respondents County Boards of Elections as submitted to this Court in response to the Court Order of November 30, 2020 (Dkt. No. 70); and, 3) dismiss the cross-claim of Respondent Brindisi, or in the alternative, deny relief under Respondent Brindisi's cross-claim.⁴

⁴ Petition reserves the right to ensure equal application and rights to any Article 16 requested relief.

Dated: December 2, 2020
Albany, New York

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