FILED: APPELLATE DIVISION - 3RD DEPT 05/13/2020 09:59 AM
NYSCEF DOC. NO. 11

531344
RECEIVED NYSCEF: 05/13/2020

To be Argued by:
JOSEPH T. BURNS, ESQ.
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

In the Matter of Application of
OLA HAWATMEH,

Petitioner-Appellant,

Docket No.: 531344

– against –

THE NEW YORK STATE BOARD OF ELECTIONS,
Peter Kosinski, Andrew Spano, and Douglas Kellner,
Commissioners Constituting the Board,

Respondents-Respondents,

– and –

James Goblet, Benjamin Cooper, and Michaela Marmorato,

Objectors-Respondents.

BRIEF FOR OBJECTORS-RESPONDENTS

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Albany County Clerk's Index No. 903484-20

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PRELIMINARY STATEMENT

Petitioner – Appellant has appealed the Order of the Supreme Court, Albany County (Platkin, J.) dated May 6, 2020 and entered in the office of the Albany County Clerk on May 7, 2020. The Supreme Court, in a Decision, Order, and Judgement denied Petitioner – Appellant's Petition to validate her Conservative Party designating petition, adjudged and declared Chapter 24 of the Laws of 2020 to be facially constitutional as well as applied to the Petitioner – Appellant, and dismissed the Verified Petition of the Petitioner – Appellant.

QUESTIONS PRESENTED

1. Did the Court below correctly find that the late filing of a candidate's acceptance is fatal and requires the invalidation of a candidate's designating petition?

   Yes, and the lower Court's decision should be affirmed.

2. Did the Court below correctly find that Chapter 24 of the Laws of 2020 is facially constitutional as well as constitutional as applied to the facts of this case?

   Yes, and the lower Court's decision should be affirmed.

3. Can the Court grant equitable relief to a candidate whose designating petitions have been invalidated in an Election Law proceeding?

   No, and the lower Court correctly refused to validate the candidate's designating petition.

STATEMENT OF FACTS

Respondents respectfully submit that the issues raised by candidate Ola Hawatmeh have been long settled by the Courts of the State of New York.

Appellant timely filed her Conservative Party designating petition to be a candidate for Member of Congress, 19th District of New York State on March 20, 2020. An authorization of her Conservative Party candidacy was timely filed on March 24, 2020. Her acceptance of this designation was postmarked on March 25, 2020 and arrived at the New York State Board of Elections on March 26, 2020. However, the last day to file or postmark an acceptance was March 24, 2020. After receiving objections from the Respondents-Objectors, the Commissioners of the New York State Board of Elections, on April 27, 2020, voted unanimously to invalidate the Conservative Party designating petition of Petitioner-Appellant.

The dates for filing designating petitions, authorizations and acceptances was set when Governor Andrew M. Cuomo signed into law Chapter 24 of the Laws of 2020. This was enacted on March 18, 2020 in response to the COVID-19 global pandemic. After Chapter 24 was enacted, the bipartisan New York State Board of Elections promptly produced and placed on the homepage of its web site a political calendar outlining the dates for filing designating petitions, authorizations and acceptances for candidates for public office.

Appellant timely commenced an Election Law Section 16-102 validating proceeding and attempted to provide excuses and justifications for the late filing of her acceptance. Appellant also challenges the facial constitutionality of Chapter 24 of the Laws of 2020 as well as how it is applied to the facts of this case. On May 6, the Court below held that a late filing of an acceptance is fatal and requires the invalidation of a candidate's designating petition. Furthermore, the Court below held that Chapter 24 of the Laws of 2020 was facially constitutional and as applied to the facts of this case. On May 6, 2020, Petitioner's attorney filed a notice of appeal. This appeal ensues.

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY HELD THAT THE LATE FILING OF AN ACCEPTANCE IS FATAL AND REQUIRES THE INVALIDATION OF A CANDIDATE'S DESIGNATING PETITION

The decision of the Court below correctly held that the late filing of the candidate's acceptance under Election Law Section 6-158 is fatal, requires the invalidation of the candidate's designating petition, and no excuse offered by the candidate is sufficient to make the acceptance and designating petition valid.

It is undisputed that candidate Ola Hawatmeh is not an enrolled member of the Conservative Party, and as a non-member of the Conservative Party, requires a valid authorization and acceptance for her Conservative Party designating petition

for the public office of Member of Congress, 19th District of New York State to be valid. These documents, under Election Law Section 1-106, must be timely filed or postmarked to be valid, and if postmarked, must arrive at the New York State Board of Elections no more than two business days after the last day to file the document.

On March 18, 2020, as the COVID-19 pandemic was causing chaos throughout New York State and the country, Governor Andrew M. Cuomo signed into law a bill altering New York State's political calendar to move up the time for filing designating petitions and all other Election Law documents associated with designating petitions. This legislation became Chapter 24 of the Laws of 2020 and required that designating petitions be filed from March 17, 2020 to March 20, 2020 and also adjusted the time for filing authorizations and acceptances accordingly.

It is undisputed that the Conservative Party designating petition for candidate Ola Hawatmeh was timely filed in accordance with the political calendar enacted by Chapter 24 of the Laws of 2020 (Record p. 40). Additionally, the Conservative Party authorization for candidate Ola Hawatmeh was also filed timely at the New York State Board of Elections (Record p. 132). Her acceptance of this designation/nomination, however, was postmarked late, and this required the bipartisan commissioners of the New York State Board of Elections to invalidate her designating petition (Record p. 136).

While it may be a harsh result, Courts have regularly and consistently held that the late filing of Election Law documents like acceptances is fatal, and no excuse can allow these documents to be made valid. In addition, while the candidate could not timely file her acceptance, she and, presumably, her campaign team, had no problem with the timely filing of her designating petition and authorization. If the new political calendar caused such disruption and confusion to the Petitioner-Appellant's campaign that she was unable to timely file an acceptance, it's hard to imagine that that wouldn't have also prevented her from timely filing her designating petitions and authorization.

Appellant-Petitioner argues that she only became aware of the new political calendar on March 22, 2020 (Record p. 156). Yet her Conservative Party designating petition was filed on March 20, 2020, while she was, apparently, in St. Louis, Missouri. It is very hard to imagine that a candidate for a major public office – a federal office – could have her designating petition filed timely on March 20, 2020 but never be made aware of the change in the political calendar until March 22, 2020 – two days after her designating petitions were filed and four days after the political calendar was altered when the Governor signed into law Chapter 24. Even if candidate Ola Hawatmeh only learned of the change to the political calendar on March 22, 2020, that still gave her all of March 23 and March 24 to sign an acceptance – a single page document that only requires the signature

of a candidate and the signature of a notary public – and overnight the acceptance to the New York State Board of Elections.

The Courts have allowed the late filing of certain Election Law documents with a proper excuse under certain conditions. For instance, the late filing of minutes of a judicial convention is not necessarily fatal provided that a proper and valid excuse exists. This was permitted just last year in Matter of Vacca v. Kosinski, 176 A.D. 3d 1305 (3rd Dept. 2019). The Courts, however, view the late filing of acceptances very differently. The late filing of an acceptance is a fatal defect and, regardless of the excuses offered by the candidate, calls for the invalidation of a designating petition. Irvin v. Sachs, 129 A.D. 2d 872 (1987) and Gallo v. Turco, 131 A.D.3d 785 (2015).

The late filing of an acceptance is more than a technical defect. The filing of an acceptance is a substantive matter mandated by the Election Law. Strict adherence to the time constraints must be followed.

Regardless of the excuses offered by the Petitioner-Appellant, no excuse is available to allow her designating petition to be validated for the fatal defect of an acceptance that has been filed late.

POINT II

THE COURT BELOW CORRECTLY HELD THAT CHAPTER 24 OF THE LAWS OF 2020 IS FACIALLY CONSITUTIONAL AS WELL AS CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

Chapter 24 of the Laws of 2020 was enacted into law due to the horrific and ongoing COVID-19 pandemic (Record p.4). The sponsor's memo of the bill specifically states that it was proposed because, "… the coronavirus pandemic necessitates a truncated political calendar for petitions related to the June 2020 primary election." It passed each house of the State Legislature with strong, bipartisan support (only four votes against its passage in the Senate and only twelve votes against its passage in the Assembly).

Since the outbreak, governments at the local, state and federal level have taken a number of significant and often unpopular measures in order to slow the spread of COVID-19 and prevent our healthcare system from being overwhelmed. While these measures may inconvenience thousands if not millions of New Yorkers and Americans, they are done with the best of intentions and have very likely saved thousands of lives. Chapter 24 is one of these measures.

As stated by the Court below, Chapter 24 was not enacted to disenfranchise the Petitioner-Appellant, any particular political party, or any other class of voters or citizens. Chapter 24 was enacted with the noblest of objectives – to ensure that the COVID-19 pandemic not spread among Boards of Elections employees,

campaign workers and campaign volunteers. By anyone's account, it passes any and all tests of constitutionality.

Most importantly, under Executive Law section 71, notice must be given to the New York State Attorney General when making a constitutional challenge. When this step has not been taken, Courts may not consider the constitutional challenge. Lanz v. Feola, 181 A.D.2d 1053 (1992). Petitioner-Appellant never provided notice to the Attorney General of this challenge and never provided notice to Respondents that the Attorney General had been provided notice of this challenge. Therefore, Petitioner-Appellant's challenge to the constitutionality of Chapter 24 of the Laws of 2020 may not even be considered by the Courts.

POINT III

EQUITABLE RELIEF FOR THE CANDIDATE IS UNAVAILABLE IN AN ELECTION LAW PROCEEDING

Candidate Ola Hawatmeh argues, in essence, that, as a matter of equity, her designating petitions should be validated and she should be able to run as the Conservative Party candidate for U.S. Congress, 19th Congressional District of New York. She relies on the unreported Supreme Court decision in Jasikoff v. Commissioners, Westchester County Board of Elections, Westchester Index No. 1376/20 (2020).

It is, however, well established that equitable relief is unavailable in Election Law proceedings. The Courts are constrained by what is made available by the New York State Election Law, and the Petitioner-Appellant is asking that the Courts grant her relief outside of the Election Law.

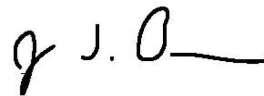
The Court of Appeals has held that, "The Supreme Court is not vested with any inherent power in election cases. It only has such power as is given it by statute." Hogan v. Supreme Ct., 281 N.Y. 572 (1939). In more recent decisions, the Courts have continued to hold that its powers in Election Law proceedings are strictly limited by the statute. Corrigan v. Board of Elections of Suffolk County, 38 A.D.2d 825 (1972) and Delgado v. Sunderland, 97 N.Y.2d 420 (2002).

Petitioner-Appellant's request that the Courts use its equitable powers to restore Ola Hawatmeh to the ballot is simply unable to be granted in this Election Law proceeding.

CONCLUSION

The Court below correctly found that the late filing of the candidate's acceptance required the invalidation of the candidate's designating petition, and this Court should affirm the lower Court's decision.

Dated: May 12, 2020



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PRINTING SPECIFICATIONS STATEMENT

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Point size: 14 pt.
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this statement is 1,971.

Dated: May 12, 2020