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To Be Argued By:

GREGORY C. SOUMAS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

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INDEX NOS.
2020-02297
2020-02298

IN THE MATTER OF THE APPLICATION OF

LOUIS PULIAFITO,

Petitioner - Appellant,

-against-

REBECCA A. SEAWRIGHT,

Respondent-Respondent,

-and-

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent-Appellant.

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RESPONDENT-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COUNTER STATEMENT OF FACTS

The Respondent-Candidate, Rebecca A. Seawright (hereinafter referred to as "Seawright") filed designating petitions seeking to be designated as candidate for Member of the New York State Assembly in the 76th Assembly District in the New York County Democratic Party Primary and the Working Families Party Primary to be held on June 23, 2020. These two separate petitions each contained the requisite number of valid required signatures and were both timely filed with the NYC Board of Elections pursuant to the Revised Petition Filing Calendar for the June 23, 2020 Primary Elections adopted by the Board on March 18, 2020 and pursuant to Chapter 24 of the Laws of 2020 and Executive Order 202.2.

The revised Petition Filing Calendar and Governor's Executive Order were created in connection with and in response to the unprecedented Coronavirus (COVID-19) public health crisis in New York State occurring in or about March of 2020, which public health crisis resulted in essentially a "shutdown" of all normal social activities, business and commerce within the state. The revised calendar cut short the original filing dates by approximately 3 weeks. Seawright filed a Cover Sheet in connection with her Democratic Party designating petition on or about April 2, 2020. Seawright also filed a Certificate of Acceptance in connection with

her Working Families Party designating petition on or about April 2, 2020.

Said "late" filings were in the context of the New York State COVID-19 pandemic response, which has altered all manners of social, economic, business, and governmental functions during March and early April of 2020. If ever there was a circumstance calling for court intervention and imposition of judicial discretion to alleviate an excusable delay in a filing, this is it. Due to the "shelter in place" directives of Governor Cuomo, the issuance of Executive Orders 202.2 and 202.8 and the legislature's passage of Chapter 24 of the Laws of 2020 (S.8058) (which the Governor signed into law On March 18, 2020), a state of emergency was declared in New York State, most legal filing deadlines were truncated and statutes, local laws, ordinances, rules and regulations were all temporarily suspended in order to deal with the COVID-19 health disaster.

In recognition of these unique facts and circumstances, it is conceded that Seawright did not *timely* file a "cover sheet" with the NYC Board under the revised filing calendar in connection with her Democratic Party designating petition pursuant to 9 NYCRR 6215.1 and relevant NYC Board Designating Petition Rule C1. However, a proper and valid cover sheet was, in fact, filed with said Board within the original, pre-revised, pre – Executive Order 202.2 calendar

statutory time period deadline of April 2, 2020. Pursuant to NYC Board Rule C1, the failure to timely file a cover sheet when required by the Election Law is deemed a "fatal defect" , citing **Matter of Armwood v. McCloy** , 109 A.D.3d 558 [2d Dept. 2013], leave to appeal denied 21 NY3d 861 (2013).

It is also conceded that Seawright did not *timely* file a "certificate of acceptance" with the NYC Board under the revised calendar in connection with her Working Families Party designating petition pursuant Election Law §§ 6-146(1) and 1-106(2), see generally **Matter of Gentner v. Albany County Board of Elections** , 309 A.D.2d 962 [3d Dept. 2003]. However, a proper and valid certificate of acceptance was, in fact, filed with said Board within the original pre-revised, pre-Executive Order 202.2 statutory filing deadline for certificates of acceptance. Pursuant to Election Law §1-106(2), the failure to file a certificate of acceptance is "deemed" a fatal defect.

Candidate Seawright brought two Validating proceedings under Article 16 of the Election Law in New York Supreme Court on or about April 3, 2020, anticipating that the NYC Board of Elections would disqualify Seawright's petitions on the aforementioned technical grounds. Additionally, Republican 76th Assembly District Candidate Louis Puliafito brought two Invalidating proceedings

under Article 16 of the Election Law in New York Supreme Court.

Thereafter, the NYC Board ruled Seawright "off the ballot" on April 21, 2020, finding that the late filed cover sheet and late filed certificate of acceptance each required *prima facie* Board rejection of Petitioner's Democratic Party petition and Working Families Party petition.

Supreme Court, New York County, Part 35 EFM (Justice Carol R. Edmead) entertained all four (4) proceedings on submission, and issued Decisions and Orders on May 8, 2020, granting the (2) applications of Petitioner-Candidate Rebecca A. Seawright in the Validating proceedings and declared both her Democratic Party petition and her Working Families Party petition to be "valid, proper , sufficient and legally effective." The Court also granted Puliafito's motion to intervene in said proceedings and designated Puliafito as a Respondent in each proceeding.

The Court denied the (2) applications of Petitioner-Candidate Louis Puliafito Invalidating the Seawright Designating Petitions. Puliafito then appealed all four orders to this Court. The NYC Board of Elections also appeals the four orders of Supreme Court.

FACTUAL ISSUES BEFORE THIS COURT

As recounted in detail in the Affidavit of Rebecca A. Seawright, part of the record herein, Member of the Assembly Seawright was in Albany in mid-March, 2020, fully participating in the legislative budget negotiating process at a time when the COVID-19 pandemic was raging through New York State. At the same time, via Executive Orders 202.2, 202.8 and Chapter 24 of the Laws of 2020, Governor Cuomo shortened the 2020 primary designating petitioning period, ending said petitioning period as of 5PM on March 17, 2020, which also changed the petition filing deadline to Friday, March 20, 2020. The NYC Board thereafter issued its revised petition filing calendar on or about March 18, 2020, which calendar contained a deadline of Friday, March 20, 2020 for filing petitions and Tuesday, March 24, 2020 for the filing of a certificate of acceptance.

It is within this daunting timeline that the two Seawright designating petitions were filed with the NYC Board of Elections. As noted previously, a cover sheet for the Seawright Democratic Party petition was filed, albeit late, as was a Certificate of Acceptance for the Seawright Working Families Party petition.

Supreme Court noted that while Seawright's certificate of acceptance and cover sheet were not timely filed under the revised primary election calendar, "in

the absence of allegations of fraud substantial compliance with the Election Law is sufficient," citing **Rosen v McNab,** 25 N.Y.2d 789 , 799 [1969]. Supreme Court also specifically noted that the Board had failed to properly notify the candidate of any defects in her petition pursuant to Election Law §6-134(2) and 9 NYCRR 6215.7 and that the late cover sheet occurred during a public health emergency amid truncated filing deadlines.

Supreme Court further noted "neither the Board of Elections nor Puliafito [have] demonstrated that Seawright's error of a late submission is so egregious that it demonstrates a lack of substantial compliance," and, citing **Powell v. Marchi**, 153 A.D.3d 540 [1st Dept 1989], referred to caselaw regarding cover sheets with errors advising that said petitions are deemed to still be in substantial compliance "unless the errors in cover sheets are so grievous as to constitute failure to comply with the requirements of the *Election Law* as to content and substantial compliance to form."

LEGAL ARGUMENT

Section 16-102(2) of the Election Law governs proceedings with respect to petitions. The Supreme Court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which

shall be construed liberally **Matter of Smith v. Marchi**, , 143 A.D. 2d 325 [2nd Dept. 1988]; **Murawski v. Pataki**, 514 F.Supp2d 577, 586 S.D.N.Y. 2007).

POINT I

NOTHING IN ELECTION LAW §6-134(2) AND/OR 9 NYCRR §6215.7 PREVENTS OR PRECLUDES THE FILING OR ACCEPTANCE OF A LATE OR AMENDED COVER SHEET

The NYC Board relies on **Matter of Armwood, supra**, in asserting a prima facie cover sheet defect in Seawright's failure to timely file a cover sheet. However, **Armwood** did not factually occur during a once in a century pandemic nor do the facts in that case comport with the facts and circumstances herein. Armwood was a Nassau County Supreme Court case where the Nassau County Board of Elections fully complied with the requirements of 9 NYCRR 6215.7 and the Election Law by notifying the candidate in writing that a petition had been filed without a cover sheet and without the petition sheets being securely fastened together, as required. The candidate thereafter attempted to "cure" said petition defects by filing an amended cover sheet (and also filing copies of the sheets of the designating petition) within the 3 day period afforded by 9 NYCRR 6215.7 and Election Law §6-134(2), and the Nassau Board then duly ***accepted*** the designating petition. Supreme Court , Nassau County, ***denied*** a subsequent petition to

invalidate. On appeal, the Appellate Division, Second Department then reversed Supreme Court and granted the petition to invalidate the designating petition. However, that Court did not allege or state anywhere state that the Nassau Board was precluded from giving the "cure" notice or from accepting the late filed cover sheet.

The stated basis for said reversal was that "a candidate may not "amend" a cover sheet which was never filed in the first place, as was the case here." **Armwood**, supra at 559. While at first blush that logic may seem simple and compelling, closer examination shows that such logic dissolves absent any clear statutory imperative anywhere in the law or regulations that failure to initially file a cover sheet is an incurable fatal defect.

" Since the Legislature has not chosen to specifically render the failure to file convention minutes a fatal defect, it has been observed that such a failure is not necessarily fatal," **Fuentes v. Catalano** , 165 A.D.3d 1010 [2d Dept 2018]; **See Matter of Acca v. Kosinski,** 176 A.D.3d 1305 [3d Dept 2019]. Here, the Legislature has never specifically made failure to file a cover sheet an incurable fatal defect. Only the NYC Board of Elections has made such an erroneous determination.

Further complicating the **Armwood** decision is the fact that the underlying cases cited in support of its premise are all inapposite, do not stand for the propositions asserted and do not form a proper basis for the relief imposed.

In **Matter of Magelaner v. Park**, 32 A.D. 3d 487 [2d Dept. 2006], the Appellate Division reversed and dismissed a Queens Supreme Court proceeding and order which had granted an invalidating petition, and reversed the same Court and granted a corresponding validating proceeding, putting the candidate onto the ballot. The Court simply noted that the amended cover sheet was in substantial compliance with the Election Law and NYC Board Rules, and presented no danger of fraud or confusion, and put the candidate back on the ballot.

Matter of Day v. Daly, 254 A.D.2d 688 [4th Dept 1998], merely states that the three day cure provisions apply to technical violations of regulations, including omission of page numbers from a designating petition pursuant to 9 NYCRR 6215.1(a). That Court affirmed the lower court's denial of an invalidating petition, keeping the candidate on the ballot.

Matter of McDonough v. Scannapieco, 65 A.D.3d 647 [2d Dept. 2009], is referred to in **Armwood** in roundabout manner – it is stated without any particular context that "We note that any language to the contrary in **McDonough** is dicta,

yet nowhere is it mentioned that McDonough was a cover sheet case decided solely and quite specifically on **only** jurisdictional grounds.

Thus, **Armwood** stands alone as an anomaly, without any sound supporting caselaw and without any precedential value beyond the peculiar facts and circumstances of that particular case.

In fact, upon information and belief, the **Armwood** case has never been cited by any New York court for any Election Law proposition at any time since 2013, anywhere in the State of New York other than a 2013 Second Department case, **Balberg v. NYC Board of Elections**, 109 A.D.3d 910 [2d Dept. 2013], which addressed a completely unrelated cover sheet issue having nothing to do with any of the issues presently at hand. Its purported precedential value is therefore limited if not nonexistent.

POINT II

THE NYC BOARD OF ELECTIONS FAILED TO COMPLY WITH 9 NYCRR 6215.7 AND NEVER PROPERLY SERVED A CURE NOTICE ON SEAWRIGHT

Here, the NYC Board of Elections *failed* to properly *notify* the candidate of any potential petition defect **in writing** pursuant to Election Law §6-134(2) and 9 NYCRR 6215.7 (a, b, c), and further is procedurally without the power or legal

authority to *declare* in its Rule C1 that the failure to file a cover sheet is a "fatal defect." Only the legislature (or a Court of competent jurisdiction) has the legal authority to unilaterally impose "fatal defect" status to petition requirements under the Election Law. Nowhere in Election Law §6-134(2) or 9 NYCRR 6215 is it ever stated that the failure to timely file a cover sheet is a fatal defect in a petition, or that the failure to file a cover sheet does not trigger a "cure" notification under 9 NYCRR 6215.7 from the Board.

Noting that the NYC Board had failed to comply with relevant New York law regarding ***notice*** of the cover sheet defect to candidate Seawright, Supreme Court correctly declared valid, proper , sufficient and legally effective the two Seawright designating petitions based on the unique factual circumstances in March of 2020 and the absence of any real prejudice under said circumstances. **See generally**, **Matter of Gardner v. Board of Elections**, 2013 NY Slip Op 31831 [Sup. Ct 2013], citing **Matter of Pearse v. NYC Board of Elections**, 10 A.D.3d 461 [2d Dept 2004].

It is noteworthy that this very same NYC Board of Elections has argued in court papers before Supreme Court ***this year*** that the Court should excuse the Board's inability to perform its functions due to the COVID-19 emergency where

the Board failed to *timely* notify a candidate of an alleged non-compliance. **See Terranova v. Board of Elections,** 2020 NY Slip Op 50509 [NY Sup Ct 2020].

POINT III

SUPREME COURT HAS THE DISCRETIONARY POWERS TO PERMIT LATE FILINGS TO RELIEVE A MISTAKE, TO CORRECT AN ERROR OR WHERE AN EXCUSABLE INADVERTENCE LEADS TO A DELAY IN THE FILING OF AN ACCEPTANCE OR DESIGNATING CERTIFICATE

Seawright filed her Certificate of Acceptance for her Working Families Party designating petition on a date after March 24, 2020, the revised Petition Filing Calendar date adopted by the NYC Board of Elections for filing such a certificate. As noted before, however, her certificate of acceptance was, in fact, filed on or before the original calendar filing date for such certificates which was changed and moved up by Executive Order 202.2 and the Board's revised calendar schedule. Seawright's cover sheet was also filed after the revised filing date deadline, but within the original calendar filing date for such cover sheet.

Said "late" filings were in the context of the New York State COVID-19 pandemic response, which has altered all manners of social, economic, business, and governmental functions during March and early April of 2020. If ever there was a circumstance calling for court intervention and imposition of judicial discretion to alleviate an excusable delay in a filing, this is it.

As noted **In re Kress,** 67 Misc.2d 121 [N.Y.Sup. Ct. 1971], citing **Mellen v. Board of Elections**, 262 N.Y 422 [N.Y. 1933], "Special Term can exercise discretion upon proper showing to correct errors and mistakes in the filing of certificates of nomination where no harm can come to any party and the election machinery in other respects will be in no way affected." The courts have the power to direct a Board of Elections to receive a certificate of acceptance as sufficient in form and timely. **See Battista v. Power, 10 N.Y.2d 867** [N.Y. 1961]; **Carson v. Lomenzo**, 18 N.Y.2d 263 [N.Y. 1966]; **MacKenzie v. Buckley,**75 Misc.2d 379 [N.Y. Sup. Ct. 1973].

Here, there is absolutely no prejudice associated with the Court directing the NYC Board of Elections to accept the late filed Certificate of Acceptance under the unusual circumstances presented. There is no schedule of objections associated with such a certificate's filing. The failure to timely file such certificate under a newly imposed, truncated petition filing schedule in the context of a statewide health crisis points to judicial discretion in allowing such late filing. Similarly, the late filing of a cover sheet where there was never a cure notice properly served on the candidate should be excused.

Absent such judicial discretion, the Working Families Party will be deprived

of its candidate of choice on the general election ballot in November due solely to a filing mistake in the midst of the COVID-19 pandemic. Absent such judicial discretion, the Democratic Party will be deprived of its candidate of choice on the general election ballot in November due solely to a filing mistake in the midst of the COVID-19 pandemic.

CONCLUSION

The Court should affirm Justice Edmead's Decisions and Orders below granting both Validating petitions, denying the Invalidating petitions and placing Rebecca A. Seawright on the ballot in the New York Democratic Party and Working Families Party primaries on June 23, 2020.

Dated: New York, NY
May 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO 22 NYCRR § 1250.8 (5)

I hereby certify that the following brief was prepared on a computer using Microsoft Word.

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is

2,911 Words

I hereby certify pursuant to 22 NYCRR 130-1.1-a that to the best of my knowledge, information and belief, formed after inquiry reasonable under the circumstances, the presentation of contentions in Respondent's Briefs are not frivolous as defined in 22 NYCRR 130-1.1(c)

Dated: New York, NY
May 12, 2020

Gregory C. Soumas, Esq.