

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Index No. 6056/90

Petitioners-Appellants,

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

AFFIDAVIT IN
OPPOSITION TO
MOTION TO REARGUE
AND CROSS-MOTION
IN SUPPORT OF
COUNSEL FEES AND
SANCTIONS

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT, HELENA
DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD OF
ELECTIONS, ANTONIA R. D'APICE, MARION B. OLDI,
Commissioners constituting the WESTCHESTER
COUNTY BOARD of ELECTIONS,

Respondent-Respondents,

for an Order declaring invalid the Certificates
purporting to designate Respondents Hon. FRANCIS
A. NICOLAI and HOWARD MILLER, Esq. as candidates
for the office of Justice of the Supreme Court
of the State of New York, Ninth Judicial
District, and the petitioners purporting to
designate ALBERT J. EMANUELLI, Esq., a candidate
for the office of Surrogate of Westchester
County to be held in the general election of
November 6, 1990.

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STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

MARK K. MALONE, ESQ., being duly sworn, deposes and says:

1. I am an associate with the law firm of Hall,

Dickler, Lawler, Kent & Friedman, attorneys for respondent, ALBERT J. EMANUELLI, ESQ. I am fully familiar with the facts and circumstances of this matter. I submit this affidavit in opposition to Petitioners-Appellants' motion to reargue and renew the decision of the Appellate Division, Third Department, dated May 2nd, 1991, and the order of the Appellate Division, Third Department, dated and entered on May 15th, 1991.

CONSPIRACY AND RETALIATION ALLEGATIONS

2. Unequivocally, Petitioners-Appellants have failed at every stage to properly contest the nomination of Judge EMANUELLI. Although they have lost at the trial and appellate levels, Petitioners-Appellants persist in making this case a financial war of attrition. They cannot win on the merits. Instead, they hope to force Respondents to capitulate by making these proceedings as costly as possible. Their tactics go beyond the frivolous and are malicious.

3. Initially, Petitioners-Appellants never objected to the 1989 resolution until just prior to the 1990 elections. Moreover, Petitioners-Appellants never properly challenged, pursuant to the election law, Judge EMANUELLI's designating petitions. Furthermore, Petitioners-Appellants never attempted to compete, by way of primary, for the nomination which Judge EMANUELLI received.

4. Instead, Petitioners-Appellants seek, through the affidavit of their former attorney, Doris L. Sassower, to savage the reputations and impugn the integrity of the appellate judges in

both the Second and Third Departments. Ms. Sassower allegedly submits this affidavit not as an attorney, but as an individual with personal knowledge of material facts.

5. In an unparalleled display of audacity, Ms. Sassower makes bald, unsupported accusations that the Justices of the Appellate Division, Second Department, suspended her in retaliation for her representation of Petitioners-Appellants. She alleges that their motives were to "thwart any further appellate review of this matter..." In just one paragraph, she maligns the character and impugns the integrity of every Justice sitting on the bench of the Appellate Division, Second Department.

6. In essence, she accuses these Justices of intentionally interfering with Petitioners-Appellants' right to counsel of their own choosing and deliberately violating Petitioners-Appellants' right and ability to appeal. She accuses these Judges of attempting to silence her to prevent her from representing Petitioners-Appellants.

**ALLEGATIONS THAT THE JUSTICES OF THE
APPELLATE DIVISION, THIRD DEPARTMENT,
DID NOT ACT IMPARTIALLY IN THESE PROCEEDINGS**

7. Ms. Sassower, on behalf of the Petitioners-Appellants, argues that all of the Justices of the Appellate Division, Third Department, who were cross-endorsed, should have recused themselves. She claims that, just prior to the oral argument on the appeal, she telephoned the Clerk of the Court and asked him whether any of the justices assigned to hear the appeal had been cross-endorsed. She claims that the clerk never got back

to her prior to oral argument and that she did not raise the issue before argument because of her "desire to avoid public embarrassment [sic] to members of the panel ..."

8. This is typical of Petitioners-Appellants' practice throughout these proceedings. They have failed to proceed properly at every phase of this litigation and they continually seek to lay the blame for their mistakes on other people.

9. Interestingly, Petitioners-Appellants waited until after the Appellate Division ruled in favor of Respondents before raising this issue. Moreover, at this juncture, Petitioners-Appellants have explicitly questioned the impartiality, and implicitly the integrity and judgment, of Presiding Justice Mahoney, Justices Casey, Kane, Weiss, Mikoll and Mercure.

10. Through Ms. Sassower's affidavit, Petitioners-Appellants allege that three of the five members of the panel who heard oral arguments about the 1989 resolution by the Westchester County Republican and Democratic Executive Committees, and about the 1990 nominating conventions in Westchester County should have recused themselves because they were cross-endorsed. Ms. Sassower claims that the impartiality of these Justices is questionable. Such an argument is an affront to those Judges.

11. Ms. Sassower goes on to state that five of the Justices who denied her preference application were also cross-endorsed. She implies that these Justices decided her application, not on the merits, but based upon personal and political prejudices.

12. It is incredulous that Ms. Sassower, would be so disingenuous not to have, in fact, verified the cross-endorsement of the panel judgments prior to argument and, in fact, had so made that earlier request and received her exhibits prior thereto.

NONJOINER OF NECESSARY AND INDISPENSABLE PARTIES

13. Petitioners-Appellants claim that the Appellate Division misapprehended the law in determining that they failed to join necessary parties in this proceedings. In a complete retreat from that position, Petitioners-Appellants also agree that even if they failed to join necessary parties, those parties had notice of these proceedings and could have intervened if they so desired. Both arguments must fail.

14. In their prayer for relief, Petitioners-Appellants ask the Court to declare that certain resolutions passed in 1989 by the Executive Committees of the Democratic and Republican Parties were illegal and that judicial nominations which may have been affected or influenced by these resolutions were invalid.

15. Certainly the beneficiaries of the resolutions are necessary parties because their interests would most assuredly be affected by any court determination. The 1989, 1990 and 1991 candidates who were cross-endorsed certainly come within this category.

16. Moreover, Petitioners-Appellants seek to void the 1990 Republican and Democratic judicial conventions. They ask that the Westchester Republican County Committee and the Westchester Democratic County Committee reconvene their judicial conventions.

17. However, Petitioners-Appellants have failed to join all of the candidates who were nominated at those conventions. Clearly, all those parties on the challenged certificates of nomination who were nominated at the 1990 conventions are necessary and indispensable parties to this action. This includes those candidates who were not cross-endorsed because, if the Court were to grant the relief Petitioners-Appellants seek, the interests of all the nominated candidates could be adversely affected.

18. Petitioners-Appellants try to excuse their failure to join these indispensable parties by claiming that the two candidates who were nominated in 1990 but not cross-endorsed were served with copies of the Petitioners-Appellants' Specification of Objections to the nominating certificates. This does not give the Court jurisdiction over them and, because their rights are inextricably entwined with those of the cross-endorsed candidates, a judgment of this Court granting Petitioners-Appellants the relief which they seek would adversely affect these two candidates without giving them the opportunity to be heard.

19. Petitioners-Appellants assert that, because this proceeding received publicity, there is no question that the two candidates who were not cross-endorsed in 1990 had actual knowledge and were aware of these proceedings. It is amazing that Ms. Sassower can make sworn statements about the state of mind of other people.

20. Moreover, she states that she would not have objected to anyone intervening in the proceedings. However,

Petitioners-Appellants cannot shift their burden to others. They had an obligation to join all necessary parties in this suit. It is not the duty of potential defendants to intervene in an action.

FAILURE TO SERVE THE ATTORNEY-GENERAL

21. Because Petitioners-Appellants sued a State body (the State Board of Elections), they were obligated to serve their petition and all pleadings on the Attorney General. Petitioners-Appellants admit that they failed to do this. Ms. Sassower attempts to explain this failure by stating that she had an oral conversation with someone from the State Board of Elections who told her that the Attorney General need not be served. She claims to have a letter (attached as Exhibit "C" to the notice of motion) which confirms this oral advice.

22. Manifestly, this advice contravenes the law (C.P.L.R. 2214 [d]). Petitioners-Appellants had no right to rely on this supposed legal advice.

23. Moreover, the letter from a Mr. John Ciampoli, dated long after the Petition was served on Respondents, merely states, "it is no longer necessary to serve the Attorney General with papers during the remaining proceedings." This did not absolve Petitioners-Appellants of their duty to serve the Attorney General with a copy of the petition and all papers attached in accordance with the law of the State of New York. There is no language in the letter which indicates that the Attorney General waived service of the Petition (See Petitioners-Appellants Exhibit "C".)

24. To the extent Petitioners-Appellants seek renewal

based on this letter, they have not demonstrated any new or additional proof which is material or relevant on the issues before the Court. Accordingly, to the extent that Petitioners-Appellants argue that the Court should grant renewal, the motion must be denied.

CROSS-MOTION FOR COUNSEL FEES

25. Pursuant to 22 NYCRR 130-1.1, the Court is permitted to impose costs, sanctions and attorney's fees for frivolous conduct. It is respectfully submitted that Petitioners-Appellants conduct in making the instant application is patently frivolous.

26. Petitioners-Appellants, through the affidavit of their former attorney, allege that the Appellate Division, Second Department has retaliated against them by suspending Ms. Sassower. In addition, they claim that the Justices of that court sought to prevent them from appealing the decision of the Appellate Division, Third Department.

27. Not content with maligning the Justices of the Second Department, Petitioners-Appellants accused the Justices of the Appellate Division, Third Department of being biased and partial in determining Petitioners-Appellants' preference application in the appeal of Justice Kahn's order of October 17th, 1990. Petitioners-Appellants have impugned the reputation of every judicial officer involved in these proceedings.

28. Moreover, Petitioners-Appellants' motion to renew and reargue is utterly without merit in law or fact. They accused the Court of misapplying the law of joinder.

29. Unequivocally, however, Petitioners-Appellants failed to join several necessary parties. They admit this failure, but offer the lame excuse that this case was publicized and that they would have allowed anyone to intervene.

30. Petitioners-Appellants failed to file objections to Judge Emanuelli designating petitions and did not challenge, via a primary, his bid for nomination by both parties. Having failed to mount a proper challenge under the provisions of the Election Law, Petitioners-Appellants brought this meritless suit.

31. Unquestionably, the Court had and reviewed all of the pleadings and papers. The law was correctly applied to the facts in this case.

32. After losing at both the trial and appellate levels, Petitioners-Appellants have submitted a frivolous motion to this Court. Judge Emanuelli has been forced to answer this meritless application. Unfortunately, it is evident that Petitioners-Appellants, together with Doris Sassower and Eli Vigliano, Esq., will not cease this malicious use of the judicial system. The only way to prevent them from further abusing the legal process is to impose costs, sanctions and attorney's fees for their conduct.

33. Legal costs were incurred to prepare this answer. Time was spent conferring with our client, gathering pertinent, factual information and documents necessary, reviewing the pleadings and decision of the trial court as well as the Appellate Division, researching the legal issues, and the actual preparation of the answering papers. I have spent approximately 16 hours at an

hourly rate of \$150.00 per hour for a cost of \$2,400.00, which is in addition to having billed and received \$6,000.00 already for the earlier litigation.

34. Defendant is seeking an award of counsel fees in the amount of \$8,400.00 for the unnecessary and substantial legal fees caused by the frivolous abuse of the process of this Court by Petitioners-Appellants, Doris Sassower and Eli Vigliano, Esq. In determining whether the fees requested are appropriate, qualifications and credentials of the attorneys whose time has been devoted to answering the motion are relevant.

35. I am an experienced attorney, having been admitted to practice before the courts of the State of New York since 1983. I was an Assistant County Attorney in the County of Westchester in the Family Court Bureau and the Litigation Bureau. Subsequently, I became a Law Assistant to the Hon. Thomas A. Facelle and the Hon. Orazio R. Bellantoni in the Westchester County Family Court. Thereafter, I was the Principal Law Clerk to the Hon. Thomas A. Facelle in the New York State Supreme Court, Westchester County.

36. In addition to attorney's fees, Judge Emanuelli is also requesting costs and sanctions. As set forth herein, there is no basis for this application in law or in fact. Petitioners-Appellants, Doris Sassower and Eli Vigliano, Esq., have needlessly caused expense to Judge Emanuelli. We look to the Court to send a clear message to these people that they may not abuse the judicial process by making frivolous motions. Only severe economic sanctions will deter this conduct in the future.

WHEREFORE, it is respectfully requested that the Court deny Petitioners-Appellants' motion in its entirety and grant Judge Emanuelli's request for attorney's fees and costs and sanctions and for such other and further relief as to this Court seems just and proper.

Dated: White Plains, New York
August 9, 1991

Mark K. Malone
MARK K. MALONE, ESQ.

Sworn to before me this
9th day of August, 1991

Gordon A. Burrows
NOTARY PUBLIC

Gordon A. Burrows
Notary Public, State of New York
No. 6 007
Qualified in Westchester County
Term Expires 7/6/93

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Index No. 6056/90
Appeal No. 62134

Petitioners-Appellants,

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

NOTICE OF
CROSS-MOTION

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT, HELENA
DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD OF
ELECTIONS, ANTONIA R. D'APICE, MARION B. OLDI,
Commissioners constituting the WESTCHESTER
COUNTY BOARD of ELECTIONS,

Respondent-Respondents,

for an Order declaring invalid the Certificates
purporting to designate Respondents Hon. FRANCIS
A. NICOLAI and HOWARD MILLER, Esq. as candidates
for the office of Justice of the Supreme Court
of the State of New York, Ninth Judicial
District, and the petitioners purporting to
designate ALBERT J. EMANUELLI, Esq., a candidate
for the office of Surrogate of Westchester
County to be held in the general election of
November 6, 1990.

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S I R (S) :

PLEASE TAKE NOTICE that upon the affidavit of MARK K. MALONE,
ESQ., sworn to on the 9th day of August, 1991 and upon the motion
papers of Petitioner-Appellants herein that respondent, ALBERT J.
EMANUELLI, ESQ., will move this court on the return date of

petitioner/appellant's motion (August 19, 1991) for an order of this court pursuant to §2221, 5520, 5522 and 5601 et. seq. of the CPLR and parts 37.1 and 130-1.1 et. seq. of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York:

1. Dismissing the motion of Petitioner-Appellants;
2. Denying Petitioner-Appellants leave to renew and/or reargue the appeal;
3. Denying Petitioner-Appellants leave to appeal to the Court of Appeals of the State of New York;
4. Imposing sanctions, costs and attorney's fees for frivolous conduct upon Petitioner-Appellants;
5. Imposing sanctions, costs and attorney's fees for frivolous conduct against Eli Vigliano, Esq., counsel for Petitioner-Appellants;
6. Imposing sanctions, costs and attorney's fees for frivolous conduct against Doris Sassower, Esq., former counsel for Petitioner-Appellants;
7. For such other and further relief as this Court may deem just and proper.

Dated: White Plains, New York
August 12, 1991

Yours, etc.

HALL, DICKLER, LAWLER,
KENT & FRIEDMAN
Attorneys for Respondent-
Emanuelli
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TO: JOHN CIAMPOLI, ESQ.
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230 Park Avenue
New York, New York 10169

THOMAS J. ABINANTI, ESQ.
Six Chester Avenue
White Plains, New York 10601

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated, Yours, etc., HALL, DICKLER, LAWLER, KENT & FRIEDMAN Attorneys for

Office and Post Office Address 11 Martine Avenue WHITE PLAINS, N.Y. 10606 (914) 428-3232

To Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on at M. 19

Dated, Yours, etc., HALL, DICKLER, LAWLER, KENT & FRIEDMAN Attorneys for

Office and Post Office Address 11 Martine Avenue WHITE PLAINS, N.Y. 10606 (914) 428-3232

To Attorney(s) for

Index No.

Year 19

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

In the Matter of the Application of MARIO M. CASTRACAN and VINCENT F. BONELLI, acting Pro Bono Publico,

Petitioners-Appellants for an Order, pursuant to Sections 16-100, 16-102, 16-104, 16-106 and 16-116 of the Election Law,

-vs-

ANTHONY J. COLAVITTA, ESQ., Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE, GUY T. PARISI, ESQ., DENNIS MEHEL, ESQ., Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, et al.,

Respondents-Respondents

AFFIDAVIT IN OPPOSITION AND CROSS MOTION

HALL, DICKLER, LAWLER, KENT & FRIEDMAN Attorneys for

Office and Post Office Address, Telephone

11 Martine Avenue WHITE PLAINS, N.Y. 10606 (914) 428-3232

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for