

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

Index No.

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

-against-

ANTHONY M. 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, Commis-
sioners constituting the NEW YORK STATE
BOARD OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

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.

AFFIRMATION
IN SUPPORT OF
MOTION TO
DISMISS PETITION
AS TO RESPONDENT
HOWARD MILLER,
ESQ.

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STATE OF NEW YORK

COUNTY OF ROCKLAND

SANFORD S. DRANOFF, ESQ., an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am the attorney for Respondent HOWARD MILLER, ESQ. and make this affirmation in support of the within motion to dismiss this proceeding as against Respondent HOWARD MILLER, ESQ.

2. This motion is made based upon the following grounds:

1) The court lacks jurisdiction over the matter and personal jurisdiction over the Respondent, HOWARD MILLER, ESQ.;

2) The petition fails to state a cause of action against Respondent HOWARD MILLER, ESQ.;

3) The proceeding is barred by laches and the statute of limitations.

3. Jurisdictional Defects. The proceeding suffers from the following jurisdictional defects:

a) The court lacks subject matter jurisdiction;

b) The court does not have jurisdiction over the person of Respondent MILLER, because of defective service;

c) Failure to join indispensable parties;

d) The order to show cause is defective and fails to comply with CPLR 2214(d);

e) Petitioners have failed to comply with Section 6204.1 of the Rules and Regulations of the State Board of Elections.

4. Subject Matter Jurisdiction. Petitioners purport to seek relief under Sections 16-100, 16-102, 16-104, 16-106 and 16-116 of the Election Law (as set forth in the caption of this proceeding). Article 16 of the Election Law governs Judicial Proceedings under the Election Law and vests the Supreme Court with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in Article 16, including proceedings as to designations and nominations. Petitioners, however, allege no violation of any specific provision of Article 16, but, rather, rely upon an amorphous claim of deprivation of a right of election. The Supreme Court has no inherent power to expand judicial review of election matters beyond that provided by statute. Nor may it expand or change the provisions of the statute. The Court may not consider arguments based solely upon alleged "ethical" grounds or upon supposed considerations of public policy. Petitioners' claims may only be determined by legislative action and the Legislature has made it clear that multi-party endorsement, particularly for a judicial candidate, is neither prohibited nor deemed an infringement on electoral rights.

Absent a violation of Article 16 of the Election Law, this court is without jurisdiction to entertain this proceeding.

Even assuming, arguendo, that the court has jurisdiction to hear this proceeding, it is without power to order the reconvening of the judicial conventions, unless the petitioners can demonstrate such fraud or irregularity in the convention as to make it impossible to determine who was nominated (Election Law Section

16-102). The petition is utterly devoid of factual allegations demonstrating fraud or irregularity which makes it impossible to determine who was nominated.

5. Lack of Personal Jurisdiction Over Respondent Howard Miller, Esq. This special proceeding was commenced by order to show cause pursuant to CPLR 403. Service on the Respondent HOWARD MILLER, ESQ. (hereinafter "MILLER") was directed to be made by:

"... personal service of the said Order to Show Cause and Petition upon the remaining Respondents by delivery of the aforesaid papers to their respective offices, be deemed good and sufficient service thereof."

CPLR 403 requires that a Notice of Petition (the alternative method of commencing a special proceeding) must be served in the same manner as a summons in an action. The order to show cause, however, may be served "at a time and in a manner specified therein" consistent with concepts of due process. The order to show cause in this matter specifically directs "personal" service. Personal service, as defined in CPLR 308, requires either delivery to the person (Sub. 1); delivery to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and mailing to such person's residence or business (Sub. 2); by delivery to an authorized agent (Sub. 3); by affixing to the door of the person's business or residence and mailing (Sub. 4); or in such manner as the court may direct, but only if service is impracticable under the earlier subdivisions (Sub. 5).

The direction for "personal service" upon Respondent

MILLER in the order to show cause mandated that CPLR 308, which statutorily defines personal service, be followed. Thus, it was imperative that the Order to Show Cause not only be delivered to the office, but also mailed. No mailing was received by Respondent MILLER, and, upon information and belief, none was made. The Court cannot, in effect, amend CPLR 308 by adding a new definition of personal service, such as one which permits delivery to a person's place of business without the concomitant mailing.

Further, while CPLR 403 permits service at a time and manner specified, due process requires that the mandates of CPLR 308(5) be observed: to wit, that petitioners must make a showing that personal service by the several methods authorized is impracticable prior to applying for an alternative method of service (i.e., delivery solely to the office without the accompanying mailing). No such showing was or could be made.

The Court of Appeals has consistently held that service means delivery. In the instant case, as the accompanying affirmation of Respondent MILLER indicates, delivery was not made within the statutory time.

6. Failure to Join Indispensable Parties. Petitioners seek a judgment vacating, annulling, and setting aside the Certificates of Nomination of the Republican and Democrat parties and an order directing the reconvening of the judicial conventions. The

Certificates of Nomination designate the following candidates:

Republican Certificate of Nomination

George H. Roberts
Francis A. Nicolai
Howard Miller

Democrat Certificate of Nomination

Joan Lefkowitz
Francis A. Nicolai
Howard Miller

If the Certificates of Nomination are vacated and annulled, the nominations of both George H. Roberts (by the Republican Party) and Joan Lefkowitz (by the Democrat Party), as well as those of the named Respondents NICOLAI and MILLER, would be vacated and annulled. Petitioners have, however, failed to name and serve candidates ROBERTS and LEFKOWITZ and such failure constitutes a jurisdictional defect requiring dismissal of the petition.

7. Failure to Comply with CPLR 2214(d). CPLR 2214(d) requires that the Attorney General be served in any case against a state body or officer instituted by Order to Show Cause. This proceeding is brought against the New York State Board of Elections and the Commissioners thereof. However, the order to show cause fails to direct service upon the Attorney General. Failure to serve the Attorney General is a jurisdictional defect, requiring dismissal of the proceeding.

While the New York State Board of Elections is vested with authority to provide its own counsel, there is no exclusion under CPLR 2214(d) for any state body, regardless of whether the Attorney General is required to defend or not.

8. Failure to Comply with Section 6204.1(b) of the Rules and Regulations of the State Board of Elections. Petitioners were required to serve upon Respondent MILLER a duplicate copy of the specifications of objections, either by personal delivery or certified or registered mail, on or before the date of filing of any such specifications with the Board of Elections. Petitioners failed to do so. Such service is a jurisdictional condition precedent to the commencement of a proceeding pursuant to Election Law 16-102.

II. THE PETITION FAILS TO STATE A CAUSE OF ACTION AGAINST RESPONDENT MILLER.

9. The petition, other than correctly stating that Respondent MILLER is the candidate nominated by the Republican and Democrat parties as their candidate for Justice of the Ninth Judicial District in the 1990 election, fails to allege any fact imputing an actionable wrong to Respondent MILLER. Petitioners' prayer for relief contains a conclusory statement that Respondent MILLER was a "party" and "accessory" to a "Contract" which petitioners denote as a "Three Year Plan" (hereinafter the "Plan"). The Plan was purportedly entered into by other respondents and, according to petitioners, allegedly disenfranchised voters of the Ninth Judicial District. Petitioners do not, however, allege that Respondent MILLER was in any manner connected to either the formation or implementation of the Plan or committed any other actionable wrong. Thus, the bare conclusory statement in the relief clause is insufficient as a matter to law to sustain this

proceeding against Respondent MILLER.

The Plan, by petitioners' own description, related to certain existing judicial seats. Respondent MILLER's candidacy emerged as a result of the retirement of the HON. THEODORE A. KELLY, an event which was not considered or mentioned in the "Plan." It is only petitioners' bare conclusion that Respondent MILLER's cross-endorsement resulted from the Plan, in which MILLER did not participate, was not even named, and did not relate to the seat being vacated by JUDGE KELLY.

The thrust of petitioners' claim is that bi-partisan support allegedly "disenfranchises" the electorate. Petitioners ask this court to reverse the Court of Appeals (which has consistently upheld the propriety of bi-partisan endorsement of judicial candidates) and to do what the Court of Appeals has specifically prohibited the Legislature and the political parties from doing: denying a judicial candidate bi-partisan support.

The relief sought not only requests that Respondent MILLER's nomination be vacated, but that he be disqualified and barred from nomination as a candidate, all of which is in clear violation of Respondent MILLER's constitutional right to run for public office.

10. The "Plan". There is nothing illegal about the so-called "Plan" (really a Resolution enacted by two major political parties). The Resolution, drafted by the parties' Executive Committees, was drawn with the aim of creating a bi-partisan judiciary. The attorneys on the Executive Committees of each party

are aware that they have a special duty to ensure that political considerations do not influence the selection of judges. The Lawyer's Code of Professional Responsibility, Canon 8, Section EC 8-6, reads in part:

"Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. ***" (Emphasis added)

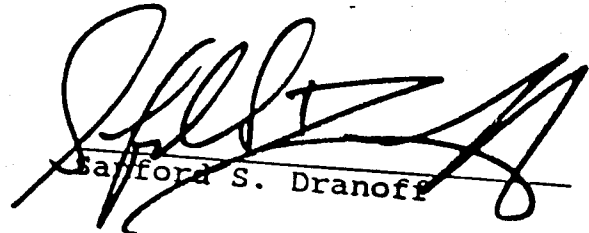
From this duty imposed by the lawyers' canon of ethics, efforts were made by the respective Executive Committees of the Republic and Democrat Parties to ensure that political considerations would in fact not outweigh judicial fitness in the selection of judges.

11. Laches and the Statute of Limitations. Petitioners allege that the basis for their claim is a "Plan" allegedly adopted in August and September of 1989. The Plan (actually a Resolution) was widely publicized in August and September of 1989, and petitioners had every opportunity to challenge the Plan prior to the 1989 elections and long before the holding of the subject Judicial Nominating Conventions. Petitioners' claims, under Article 16 of the Election Law, matured ten days after the 1989 conventions. This proceeding, about a year later, is barred by

laches and the Article 16 statute of limitations.

12. Conclusion. In view of the foregoing, it is respectfully requested that the proceeding be dismissed in all respects as to Respondent MILLER and that the nomination of Respondent MILLER as candidate for judicial office by the Democrat and Republican parties be determined valid.

Dated: October 11, 1990
Pearl River, New York


~~Sanford S. Dranoff~~