



STATE OF NEW YORK
SUPREME COURT
ALBANY COUNTY COURTHOUSE
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ROGER D. McDONOUGH
JUDGE

STEVEN M. CONNOLLY
LAW CLERK
ERIN M. GOLEN
SECRETARY

October 16, 2018

James E. Long, Esq.
668 Central Avenue
Albany, NY 12206
VIA E-MAIL AND FIRST CLASS MAIL

Re: Limpert v. Brandt, et al.
Index No.: 6108-18

Dear Mr. Long:

Enclosed for filing please find an executed Decision and Order in the above-captioned action.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Erin M. Golen".

Erin M. Golen

Enclosure

cc (w/enc): James E. Walsh, Esq.
Via E-Mail Only

Brian Quail, Esq.
Via E-Mail Only

Jeffrey T. Buley, Esq.
Via E-Mail Only

Thomas Russell Schepp, II, Esq.
Via E-Mail Only

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

In the Matter of Gregory J. Limpert,

Objector/Petitioner,

-against-

DECISION AND ORDER

Index No.: 6108-18

RJI No.: 01-18-129656

Karen M. Brandt, as candidate for the Office of Justice of the Supreme Court in the 5th Judicial District, Gerry Neri, as candidate for the Office of Justice of the Supreme Court in the 5th Judicial District, James P. Murphy, as candidate for the Office of Justice of the Supreme Court in the 5th Judicial District, Donald A. Greenwood, as candidate for the Office of Justice of the Supreme Court in the 5th Judicial District, the New York State Board of Elections, the New York State Republican Party, Gregory A. Scicchitano and Neil Germain, Permanent Chairperson and Permanent Secretary of the 5th Judicial District Republican Party Convention,

Respondents,

For a Judgment pursuant to Election Law §§ 6-124 and 6-126 invalidating the nomination of the Respondents Karen M. Brandt, Gerry Neri, James P. Murphy and Donald A. Greenwood as the candidates of the Republican Party for the public office of Justice of the Supreme Court for the 5th Judicial District in the General Election to be held on November 6, 2018.

(Supreme Court, Albany County All Purpose Term)

Appearances:

JAMES E. LONG, ESQ.
Attorney for Petitioner
668 Central Avenue
Albany, New York 12206

JAMES E. WALSH, ESQ.
Attorney for Respondent Candidates
20 Church Avenue
Ballston Spa, New York 12020

NEW YORK STATE BOARD OF
ELECTIONS
(Brian Quail, Esq., Special Counsel)
40 North Pearl Street, 5th Fl.
Albany, New York 12207

JEFFREY T. BULEY, ESQ.
Attorney for New York Republican State
Committee
50 State Street
Albany, New York 12207

THOMAS RUSSELL SCHEPP, II, ESQ.
Attorneys for Respondents Scicchitano
and Germain
104 Pleasant Street
Manlius, New York 13104

Roger D. McDonough, J.:

Petitioner seeks an Order declaring invalid and null and void the Certificate of Nomination and the nomination purportedly made by the Judicial Nominating Convention of the Republican Party for the Fifth Judicial District which names the Respondent candidates Karen M. Brandt, Gerry Neri, James P. Murphy and Donald. A. Greenwood, as the candidates for the Republican Party for the office of Justice of the Supreme Court for the Fifth Judicial District in the general election to be held on November 6, 2018. The respondent candidates, as well as Scicchitano and Germain (hereinafter collectively referred to as respondents) oppose the requested relief. The State Board of Elections does not take a position on the merits of the case.

This matter was made returnable on October 5, 2018. The Court held a hearing on that date, at which time the principal parties stipulated that there were no questions of fact¹, only questions of law. Petitioner's post-hearing submission was received on October 9, 2018. On that date, the Court also received correspondence from the New York Republican State Committee

¹ The Court cannot reconcile the parties' stipulation as to factual matters at the hearing with Scicchitano and Germain's submission of affidavits in opposition to the petition, which clearly controvert documentary evidence in the record (*see infra* p. 7-8).

(hereinafter “State Committee”), in which it argued that the petition improperly named the New York State Republican Party as a respondent and that the petition should, therefore, be dismissed for failure to obtain jurisdiction over the proper party.²

Legality of the 5th Judicial District Convention

Petitioner argues that the Republican Party Convention was not legally and properly convened in violation of Election Law §§ 6-124 and 6-126 based on the following: (1) that the time and place of the meeting of the convention was not fixed by a committee appointed pursuant to the rules of the State Committee and the Republican Party rules; (2) that the convention was not called to order by the Chairman of the Committee, Thomas Dadey, Jr.; and (3) that the convention was instead called to order by Gregory A. Scicchitano, an individual without authorization or delegation to call the meeting to order.

Petitioner further contends that the 5th Judicial District Convention of the Republican Party did not properly elect a temporary Chairman in violation of Election Law § 6-126(2). Additionally, petitioner claims that the convener, Scicchitano, exercised additional duties enumerated in the minutes including acting as temporary and permanent Chair of the Convention in violation of Election Law § 6-126(1). Petitioner, moreover, argues that the four respondent candidates were improperly nominated by one motion, after which a voice vote was taken on all candidates. Finally, petitioner urges the Court to find that the convention was improperly convened because the date was changed from September 21, 2018 to September 24, 2018 without authorization from the State Committee.

² Based upon the record before the Court, it does not appear that the State Committee formally appeared in this matter. Nevertheless, in its discretion, the Court will also consider the argument raised by the State Committee.

Threshold Issues

As an initial matter, the respondent candidates aver that petitioner lacks standing to bring the instant proceeding because he was not a delegate to the convention. Pursuant to Election Law § 16-102, a proceeding regarding the designation of a candidate for public office must be instituted in the Supreme Court by an aggrieved candidate or by a person who has filed general and specific objections in accordance with Election Law § 16-154(2). Written objections may be filed “by any voter enrolled to vote for such party position” (Election Law § 16-154[2]). An objector must be a qualified voter and timely file objections and specification as a citizen-objector (*Matter of Doran v Scranton*, 49 AD2d 976 [3d Dept 1975]). In this case, the petition states that petitioner Gregory J. Limbert, a resident of Camillus (Onondaga County), is enrolled in the Republican Party, and is duly registered and eligible to vote in the general election on November 6, 2018 for the office of Supreme Court Justice for the Fifth Judicial District. The respondent candidates do not dispute the timeliness of petitioner’s objection or that he is a “qualified voter.” Accordingly, inasmuch as petitioner has alleged irregularities in the procedures undertaken at the convention, the Court concludes he has standing as an “objector.”

Nor is the Court persuaded that dismissal is warranted due to petitioner’s failure to name the State Committee as a respondent. Under CPLR 1001(a), necessary parties are those “who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.” Here, the petition does not challenge the authority and/or jurisdiction of the State Committee to enact rules or procedures. Rather, petitioner relies, in part, upon the State Committee sanctioned rules and procedures as the basis for his request to invalidate. Stated differently, petitioner’s challenge is

to the conduct of the convention, such that the State Committee's direct participation in this litigation is not essential (*see Matter of Max v Ward*, 107 AD3d 1597, 1599-1600 [4th Dept 2013]; *Matter of Michaels v New York State Bd. of Elections*, 154 AD2d 873, 874 [3d Dept 1989]). In other words, the requested relief can be granted completely without joining the State Committee and/or any subdivision, and without the State Committee being inequitably affected by any resulting judgment (*see Matter of Michaels v New York State Bd. of Elections*, 154 AD2d at 874; *cf. Matter of Dixon v Reynolds*, 65 AD3d 819, 820 [4th Dept 2009], *lv denied* 13 NY3d 701 [2009]).

Respondents' argument concerning petitioner's failure to name Thomas Dadey, Jr. as a party is equally without merit. While the Chairman of the State Committee evidently designated Dadey to serve as the convener of the Republican Fifth Judicial District Nominating Convention, the meeting minutes reflect that the convention was instead called to order by delegate Scicchitano.³ In light of the foregoing, the Court finds that it was unnecessary to join Dadey as a party to this proceeding (*see Matter of Castracan v Colavita*, 173 AD2d 924, 926 [3d Dept 1991] [holding that "officers elected in the conventions that are requested to be voided and reconvened . . . had to be joined"], *appeal dismissed* 78 NY2d 1041 [1991]).

Finally, respondents maintain that the petition fails to state a cause of action upon which relief can be granted. It is well established that "[c]ourts considering a motion to dismiss a complaint for failure to state a cause of action must liberally construe the pleadings, accept the

³ Indeed, the only references to Dadey in the minutes concern his attendance at the meeting as part of a delegation representing the 128th Assembly District; his nomination of the Honorable James P. Murphy of Onondaga County for Justice of the Supreme Court of the Fifth Judicial District; and a resolution naming him to serve as a member of the Committee to Fill Vacancies.

facts alleged in the complaint as true, give [petitioner] the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory” (*ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 930 [3d Dept 2012]). Upon review, the Court finds that the petition alleges facts that fit within a cognizable legal theory, stemming from the alleged violations of Election Law §§ 6-124 and 6-126 at the Judicial Nominating Convention (*see e.g. Matter of Brouillette v Cerio*, 55 AD3d 1039 [3d Dept 2008]). Accordingly, the Court concludes that the petition states a cause of action.

Standard of Review

The Court is mindful of the Court of Appeals’ admonition that:

[W]here, as here, the Legislature erects a rigid framework of regulation, detailing...specific particulars, there is no invitation for the courts to exercise flexibility in statutory interpretation. Rather, when elective processes are at issue, the role of the legislative branch must be recognized as paramount. Broad policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process. Strict compliance also reduces the likelihood of unequal enforcement. The sanctity of the election process can best be guaranteed through uniform application of the law.

(*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004] [internal quotation marks and citations omitted]).

Election Law § 6-126(1)

Election Law § 6-126(1) provides, in relevant part, that: “[t]he person who calls the convention to order shall exercise **no other function** than that of calling the official roll of the delegates upon the vote for temporary chairman and declaring the result thereof” (emphasis

supplied). Here, the meeting minutes establish that Scicchitano acted as the convener by calling the meeting to order. He subsequently exercised additional duties enumerated in the minutes including acting as temporary and permanent Chairman of the Convention. Scicchitano's role as convener, however, statutorily precluded him from performing any other function at the Convention (*see* Election Law § 6-126[1]). In other words, he could neither serve as temporary, nor permanent Chairman of the Convention.

To overcome this noncompliance, respondent candidates proffer the affidavit of Thomas Dadey, Jr., who states that he, in fact, called the Convention to order and “then requested the assistance of Gregory Scicchitano . . . to call the roll of Delegates to determine who was present or not present” (Dadey Aff, ¶¶ 7 & 8). For his part, Germain, who served as Permanent Secretary at the Convention, also submitted an affidavit, in which he unequivocally agreed with Dadey's testimony. More significantly, Germain averred that he “in artfully” drafted the meeting minutes and wished to “make a brief correction” to reflect that “[t]he Convention was actually called to order by . . . Dadey” (Germain Aff, ¶¶ 2 & 3).

Although the statute provides that “the permanent officer shall keep the records of the convention” (Election Law § 6-126[2]), the Court recognizes that the Election Law also provides for the submission of proof in affidavit form. Nevertheless, it would defeat the purpose of the statute if such proof could supplant certified meeting minutes submitted to the Board of Elections (*see Matter of Meader v Barasch*, 133 AD2d 925, 927-928 [3d Dept 1987], *lv denied* 70 NY2d 611 [1987]). This is particularly true under these circumstances, where the *same* affiants who previously swore to the truth of the meeting minutes, later submitted affidavits which contradict

crucial contents of said minutes.⁴

As such, the Court must rely upon the meeting minutes, which indisputably demonstrate that the convener exercised functions in addition to “that of calling the official roll of the delegates upon the vote for temporary chairman and declaring the result thereof” in direct contravention of Election Law § 6-126(1) (*cf. Matter of Marallo v New York State Bd. of Elections*, 164 Misc2d 33, 37 [Sup Ct, Westchester Co. 1994] [voice vote was incorrectly recorded in meeting minutes, but the papers filed *with* the minutes including certificate of nomination, certificate of authorization and acceptance certificates accurately reflected what occurred], *affd* 208 AD2d 843 [2d Dept 1994], *lv denied* 84 NY2d 807 [1994]; *Nemoyer v New York State Bd. of Elections*, 125 Misc2d 1054, 1059-1060 [Sup Ct, Albany Co. 1984] [ambiguous meeting minutes], *affd* 105 AD2d 488 [3d Dept 1984], *lv denied* 63 NY2d 608 [1984]).⁵ As a consequence, the nomination resulting from said convention is rendered null and void.

Therefore, based upon the clear and unequivocal language of the statute, and the subsequent violation of the Election Law, the Court is constrained to declare invalid the Certificate of Nomination made by the Judicial Nominating Convention of the Republican Party for the Fifth Judicial District in the general election to be held on November 6, 2018. The

⁴ Under the less stringent standard adopted by the Appellate Division, Second Department in *Matter of Reda v Mehile* (197 AD2d 723 [1993]), respondents would have to produce “substantial evidence” to overcome the presumption of regularity afforded to the official act of preparing the Convention meeting minutes (Jerome Prince, Richardson on Evidence 3-120 [Farrell 2008 ed]). Based upon the record, even applying the Second Department’s standard, respondents have failed to set forth substantial evidence to overcome the presumption of regularity attached to the minutes.

⁵ Assuming for the sake of argument that respondents raised a question of fact as to the accuracy of the meeting minutes, it would engender the same uncertainty concerning the irregularities in the procedures undertaken at the convention. In that case, the Court would have reached the same determination, albeit on different grounds, and similarly directed the reassembling of the convention.

parties' remaining contentions have been considered by the Court and were found to be without merit, or rendered academic in light of the foregoing determination.

New Convention

Pursuant to Election Law § 16-102(3), “[t]he court may direct reassembling of any convention or the holding of a new primary election, or caucus where it finds there has been such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected.” Bearing in mind that the general election will be held in exactly three weeks, the Court finds that this remedy is appropriate provided that the reassembling of the Judicial Nominating Convention of the Republican Party for the Fifth Judicial District occur on or before **Tuesday, October 23, 2018** (*cf. Matter of Gerke v Taddeo*, 5 Misc3d 1012(A), *4 [Sup Ct, Albany Co. 2004]).

Accordingly, it is hereby

ORDERED, that the petition is hereby granted and the Certificate of Nomination made by the Judicial Nominating Convention of the Republican Party for the Fifth Judicial District in the general election to be held on November 6, 2018, is hereby declared invalid and null and void; and it is further

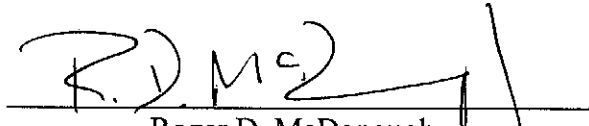
ORDERED, that on or before Tuesday, October 23, 2018, the Judicial Nominating Convention of the Republican Party for the Fifth Judicial District shall reassemble for the purpose of nominating candidates for the Republican Party for the office of Justice of the Supreme Court for the Fifth Judicial District.

This shall constitute the Decision and Order of the Court. All papers are returned to the counsel for petitioner who is directed to enter this Decision and Order without notice and to serve

all other counsel of record with a copy of this Decision and Order with notice of entry.

ENTER.

Dated: Albany, New York
October 16, 2018



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause, signed by the Hon. Roger D. McDonough on September 1, 2018; Verified Petition, dated September 30, 2018, with annexed exhibits; Memorandum of Law, dated October 5, 2018;
2. Respondent Candidates Verified Answer, dated October 4, 2018, with annexed exhibits; Memorandum of Law, undated;
3. Respondents Scicchitano and Germain's Verified Answer, dated October 4, 2018, with annexed exhibits; Memorandum of Law on Behalf of Respondents Scicchitano and Germain, undated;
4. Court Exhibit 1 (comprised of materials submitted by the State Board of Elections on October 5, 2018);
5. Petitioner's Post Hearing Memorandum of Law, dated October 9, 2018; and
6. Correspondence Addressed to the Honorable Roger D. McDonough from Jeffrey T. Buley, Esq., dated October 9, 2018.