

**Matter of Rosenberg v Lindsay**

2013 NY Slip Op 31973(U)

August 10, 2013

Supreme Court, Suffolk County

Docket Number: 13-19466

Judge: John J. Leo

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X  
In the Matter of the Application of

HON. JOHN J. LEO

NEIL A. ROSENBERG and VINCENT F. LIGUORI

DECISION AND  
ORDER

Petitioners-Objector,

Index No. 13-19466

-and-

ANTHONY MUSCEMI,

Candidate-Aggrieved,

-against-

WILLIAM LINDSAY, III

Respondent-Candidate,

-and-

SUFFOLK COUNTY BOARD OF ELECTIONS, ANITA  
S. KATZ, Commissioner of the Suffolk County Board of  
Elections, and WAYNE T. ROGERS, Commissioner of the  
Suffolk County Board of Elections, together constituting the  
Suffolk County Board of Elections,

Respondents,

-----X  
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Upon petitioner's motion the Court held a hearing and considered the following papers on the above captioned Election matter:

Order to Show Cause, Verified Petition, Affirmation, & Exhibits .....	1
Order to Show Cause, Verified Petition, Affirmation, Supplemental Affirmation & Exhibits.....	2
Affidavit in Opposition.....	3
Verified Answers of each Respondent Commissioner.....	4
Verified Return of the Suffolk County Board of Elections.....	5

Petitioner seeks an Order: (1) pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the petitions the Respondent-Candidate as candidates of The Working Families Party for the Public Office of Suffolk County Legislator for Eighth District for the General Election on the Tenth day of November 2013; and (2) Restraining the Board of Elections from printing and placing the name of said Respondent-Candidates, as such, upon the Official Ballots of such General Election.

Respondent-Candidates seek an Order: (1) Dismissing the above-captioned Election Law proceeding upon the grounds that both the Order to Show Cause and Petition in support thereof are defective on their face as none of the respondent candidates are candidates of the Working Families Party for Suffolk County Legislator, Eighth Legislative District and as such said Petition requests relief that may not be granted, or alternatively, if granted would be a nullity; and (2) Dismissing the above-captioned proceeding as to Michael Miller, upon the grounds that none of the petitioners have standing to challenge the designating petition filed on his behalf for the nomination of the Working Families Party to be voted on at the Primary Election to be held on September 10, 2013.

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 objections in accord with Election Law 6-154(2). In order for an individual to be qualified to file such objections, they must be a voter qualified to vote for the public office identified in the candidate designating petitions.

In this case, neither Petitioner Rosenberg, nor Petitioner Liguori, is a qualified objector since neither is qualified to vote for the office of Suffolk County Legislator of the Eighth Legislative District, thus, neither has standing to bring this proceeding. (See, Matter of Galow v. Dutchess County BOE, 242AD2d 344; Matter of Ciccootti 186 AD2d 979; Matter of Seaman v. Bird, 176 AD2d 1061).

As a candidate for the public office of Suffolk County Legislator in Eighth Legislative District, Petitioner Muscemi is an aggrieved candidate, and as such has standing to institute this action. However, Election Law 16-116 requires that a special proceeding under Article 16 shall be



heard upon a verified petition. In this instance, there is no verification of the invalidating petition by Petitioner Muscemi. Such verification is a jurisdictional prerequisite to commencing such a proceeding. (Goodman v. Hayduk, 45 NY2d 804; Matter of Tennerillo v. BOE, 63 NY2d 700, Frisa v. O'Grady, 297 AD2d 394). The fact that Petitioners Rosenberg and Liguori did verify the invalidating petition, does not save the proceeding, given that neither stated that they were united in interest with any other a party, (CPLR 3020 (d)). Second, an aggrieved candidate and objector are not united in interest since each have different legal status and different rights. Each is separately identified by Election Law and have separate rights and required processes to follow in order to institute a proceeding under Election Law. An objector need not be aggrieved to be a petitioner, but a candidate must be so aggrieved. Finally, in concert with this Court's determination that neither Rosenberg nor Liguori has standing to initiate this proceeding, there is no basis to deem Muscemi to be "united in interest" with a non-party whose verification is of no legal value. Such a determination would allow any person without an interest to verify an invalidating petition and subsequently permit a non-verifying party to point to such verification.

Petitioner attorney's argument that the issue that the disqualification of Petitioner Muscemi, as an objector, was not raised in a timely manner is to no avail, since a motion to dismiss upon such grounds was made returnable on that issue and was interposed on the agreed upon return date of the application. Moreover, this matter was served on the last day permissible by statute, so any time to correct such a verification would have been time barred, in any event. Finally, the Petitioner's reliance on Seda v. Richards, 89 AD2d 952, is misplaced, as that case refers to petitioners who were all candidates for either public or party office and on that basis, that court deemed those petitioners to be "united in interest". The facts of Seda, are distinguished from the instant proceeding, where the petitioners are two objectors and a candidate-aggrieved. Therefore, the invalidating petition is dismissed for failure to include proper verification

In order to reflect a full record, the Court now turns to the issue of the Petitioner's cover sheet objections.

Though the Objectors have no standing in this matter, Petitioner Muscemeci has adopted their objections as his own, providing fair and adequate notice of what is objected to in the challenged designating petition. The Court held a hearing and a conducted a line-by-line review of the challenged designating petition. After the line-by-line review was completed, Petitioner Muscemi, through his attorney, conceded that the challenged designating petition contained a sufficient number of valid signatures. However, as set forth in the specific objections adopted by Muscemi, Petitioner maintained his arguments regarding alleged deficiencies in the cover sheet submitted with the designating petition.

The crux of Petitioner's argument as set forth in the adopted specification of objection, is that the numbering assigned to the cover sheet affixed to the challenged petition was not in compliance with the Suffolk County Board of Elections, Designating and Nominating Petition Guidelines and Requirements. The basis of the Petitioner's objection here is that, prior to the filing of the subject petitions, the Working Families Party had requested from the Board of Elections that certain Suffolk

County Identification Numbers which would reflect a prefix of "SU", be used to number the cover sheets used to file their petitions. At the time the challenged petitions were filed, the cover sheets did not contain those numbers, and instead were assigned an identification number with prefix of "W". There is no dispute or allegation to the contrary, that the cover sheet contains the proper and sufficient references to: the public office, residence, volumes, required petition sheet numbers, a statement that the designating petition had the number or in excess of the number of signatures, related to each candidate. Nor is there any assertion that the designating petition with cover sheet was not timely filed. The dispute lies in the recitation of the course of events that took place at the time of the filing submission of the designating petition with cover sheet. On this issue, the parties placed on the record, a stipulation as to what certain witnesses who were present at the Board of Elections counter when the petition was filed, would have testified to, if called. It was stipulated that one Board of Elections Republican representative present, would have testified that upon the filing of the subject petition and cover sheet, he informed the filers that there were no Suffolk County identification numbers as had previously been applied for by someone from the Working Families Party, on the cover sheet, and that such identification numbers were needed to be placed on the filing. The Democratic representative would have testified that she was present at the Board of elections counter along with the Republican representative, when the designating petitions were filed, but did not recall such a conversation, and that she also did not believe it was for her to decide whether the Suffolk County Identification numbers were needed. The Court then, on consent of all parties, entered into evidence the Designating and Nominating Petition Guideline & Requirements of the Board of Elections of Suffolk County. The Parties also stipulated that the Board of Elections did not send any cure letter to any one regarding the cover sheet in question in this proceeding.

The Court notes that the designating petition with cover sheet was duly filed and given an Identification Number of W13-16. Pursuant to the Board of Elections rules regarding Identification numbers, when an application is filed pursuant to Rules B(1) and B(3), those rules mandate that such identification numbers appear on the petition volume cover sheet and on the list of any candidate. However, according to Rule B(5) if a petition volume is filed without a pre-assigned number, the Board will affix a number. Moreover, an identification number of W 13-16 was assigned to this designating petition and cover sheet because it was filed without a pre-assigned number. The Court notes that there is no proof in the record that the persons filing the designating petition and those who previously requested the pre-assigned Suffolk numbers were the same persons or representatives of the Working Families Party. The burden to provide such proof rests upon the Petitioner. ( See, Boylard v Board of Elections of the City of New York, 104 A.D.2d 463; Dilan v Carulli, 57 A.D.2d 636).

Since the line-by-line objection was decided, the only objection relied upon by Petitioner Muscemi is with regard to the cover sheet, only. The specifications of objection avers that no SU number was assigned and that the Board of Elections requested the filers, to cure defects in the cover sheet, regarding identification numbers. The record is clear that there was no written notice to cure the challenged cover sheet, as required by the Designating and Nominating Petition Rules of the Suffolk County Board of Elections, (See § 6215.1 of the New York State Board of Elections Rules and Regulations, and § 6-134 of the Election Law). If the subject cover sheet was deficient, there



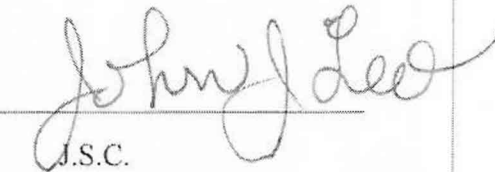
needed to be a written, not oral, notice to cure. The Court finds that in accordance with Suffolk County Board of Elections Rule B(5), the assigned identification numbers on the challenged cover sheet are sufficient. As previously noted, any cure procedures are absent in this matter.

Finally, though this Court does not reach a conclusion that the challenged cover sheet and petition contained deficiencies in their assigned numbering, it is noted parenthetically, that even if this court were to find such deficiencies existed, it would not penalize a candidate set forth in the designating petition, due to the assigning of an alternate set of identification numbers or an error or mistake by election board officials in not sending a notice to cure or orally stating that the submission was defective. (See, Hailey v. Niagara County Board of Elections, 31 Misc. 2d 650; Cellar v. Larkin, 71 Misc. 2d 17, affirmed, 31 NY2d 658.)

This Court additionally finds no danger of confusion or fraud in the case before it.

The proceeding is hereby dismissed for the reasons set forth above.

Dated: August 10, 2013



J.S.C.

**HON. JOHN J. LEO**