

Matter of Eisemann v Kosinski

2023 NY Slip Op 33240(U)

September 1, 2023

Supreme Court, Albany County

Docket Number: Index No. 907918-23

Judge: Thomas Marcelle

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At a term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse on the 1 day of September 2023.

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the application of
ALEXANDER E. EISEMANN, Candidate Aggrieved
Petitioner,

**DECISION, ORDER
& JUDGMENT**

Index No. 907918-23

-against-

PETER S. KOSINSKI, DOUGLAS A. KELLNER,
ANDREW J. SPANO and ANTHONY J. CASALE,
IVETTE CALISE, Commissioners of the New York State
Board of Elections; TAJIAN M. NELSON and
DOUGLAS A. COLETY, Commissioners of the Westchester
County Board of Elections; KATHLEEN M. PIETANZA and
PATRICIA A. GIBLIN, Commissioners of the Rockland County
Board of Elections; LOUISE VANDEMARK and
COURTNEY CANFIELD GREENE, Commissioners of the
Orange County Board of Elections; HANNAH BLACK and
ERIK J. HAIGHT, Commissioners of the Dutchess County Board
of Elections; CATHERINE P. CROFT and KELLY K. PRIMA VERA,
Commissioners of the Putnam County of Elections;
FRANCIS A. NICOLAI, Presiding Officer of the 2023 Judicial Convention
for the Ninth Judicial District; SUZANNE M. BERGER, Convener of the
2023 Judicial Convention for the Ninth Judicial District;
HARRY P. BITTKER, Secretary of the 2023 Judicial Convention for the
Ninth Judicial District;
NEW YORK STATE DEMOCRATIC PARTY; JAYS JACOBS,
Chair of the New York State Democratic Party; CHRISTINE QUINN,
Executive Committee Chair of the New York State Democratic Party;
FRANCESCA E. CONNOLLY, CHARLES F. WOOD,
ROLF M. THORSEN and LARRY J. SCHWARTZ, Candidates for the
Public Office of Justice of the Supreme Court of the State of New York,
9th Judicial District,

Respondents.

APPEARANCES: *Alexander E. Eisemann, Esq.*, New York, petitioner pro se

Abrams Fensterman, White Plains (*Robert A. Spolzino, Esq.*) for Respondents Francis A. Nicolai, Suzanne M. Berger, and Harry P. Bittker

Law Office of Jeffrey W. Gasbarro, Ossining (*Jeffrey W.H. Gasbarro, Esq.*) for Respondents Francesca E. Connolly, Charles D. Wood, Rolf M. Thorsen, and Larry J. Schwartz

Thomas Marcelle, J.

The court heard oral argument on August 25, 2023 and, for the reasons stated on the record on August 25, the court dismissed petitioner's proceeding for lack of standing (see Dkt. No. 31). After the court issued its bench decision, petitioner asked for an opportunity to make a motion for leave to amend his petition. The court granted petitioner's request permitting petitioner to submit his motion by letter with an opportunity for respondents to respond. Petitioner then made the instant motion to renew and reargue, to vacate the court's order, and for leave to amend (Dkt. Nos. 32-40). Respondents submitted responsive papers (Dkt. Nos. 41-44, 46-48). Petitioner then filed a letter "previewing arguments to be raised in reply" (Dkt. No. 45) and then hours later that same day filed a reply memorandum (Dkt. No. 49), which the court did not permit. In any event, for the following reason, petitioner's motion is denied.

First, a petition that has been dismissed cannot be amended. Having dismissed the petition, the court has no authority to grant leave to serve and file a second amended petition (*Carpenter v. Plattsburgh Wholesale Homes, Inc.*, 83 AD3d 1175, 1177 [3d Dept 2011]; *Favourite Ltd. v. Cico*, 208 AD3d 99, 108 [1st Dept 2022]).

Second, a proceeding pursuant to Election Law Article 16 may be commenced "by any aggrieved candidate, or by the chairman of any party committee or by a person who shall have

filed objections” (Election Law § 16-102 [1]). If the petitioner does not fall within one of these categories, there is no standing, and the petition must be dismissed (*Matter of Wood v. Castine*, 66 AD3d 1326, 1328 [3d Dept 2009]). The proposed petitioner falls within none of the classes of persons who have standing in such a proceeding.

Third, the proposed petitioner’s claim is untimely. Election Law § 16-102 (2) requires a claim alleging that a certificate of nomination is invalid to be interposed within 10 days of the date of the convention. Here, the convention was held on August 10, 2023 and the proposed petitioner did not interpose her claim until August 28, 2023. Compliance with Election Law § 16-102 is a jurisdictional requirement (*Matter of Scaringe v. Ackerman*, 119 AD2d 327, 333 [3d Dept 1986], *aff’d*, 68 NY2d 885 [1986]); and the Court has no authority to extend that time (*McCrorry v Westchester County Bd. of Elections*, 216 AD3d 857, 859 [2d Dept 2023]). The “relation back” doctrine does not save the untimely claim (*Matter of Aguirre v Hernandez*, 131 AD3d 716, 717 [2d Dept 2015]; *Matter of MacKenzie v. Ghartey*, 131 AD3d 638, 639 [2d Dept 2015]; *Matter of Williams v Rensselaer County Bd. of Elections*, 98 AD2d 938, 939 [3d Dept 1983], *aff’d sub nom. Matter of Quinn v. Tutunjian*, 61 NY2d 730 [1984]).

Fourth, the proposed second amended petition fails to state a claim. The court has already dismissed petitioner’s claim for lack of standing because petitioner is ineligible to serve as a Justice of the Supreme Court because he will not be less than 70 years of age when the term of service begins on January 1, 2024 (see Judiciary Law § 23; NY Const art VI, § 20; Election Law § 6-122). Substituting the petitioner does not somehow change this reality.

Finally, the only relief the proposed petition seeks is a new convention. Election Law § 16-102(3) provides however that the court can order a new convention only upon finding that “there has been such fraud or irregularity as to render impossible a determination as to who

rightfully was nominated or elected.” There appears to be no basis for such a finding here, even if all of the factual allegations in the proposed petition were true (*Matter of Limpert v Brandt*, 165 AD3d 1469, 1472 [3d Dept 2018]).

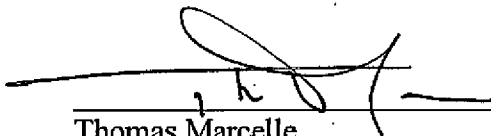
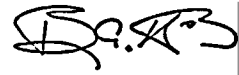
Regarding the motion to renew and reargue, it is without merit. The court did not overlook or misapprehend any relevant facts or controlling law (*Adderley v State of New York*, 35 AD3d 1043, 1043–1044 [3d Dept 2006]).

Therefore, it is

ORDERED, that petitioner’s motion to renew and reargue, to vacate the court’s order, and for leave to amend is denied in its entirety.

The foregoing shall constitute the Decision, Order, and Judgment of the Court.

Dated: September 1, 2023


Thomas Marcelle
Justice of the Supreme Court 
09/01/2023

This shall constitute the Decision, Order and Judgment of the Court. Counsel for respondent is directed to enter this Decision, Order and Judgment without notice and to serve petitioner with a copy, with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment and the papers considered to the County Clerk via NYSCEF. The signing of the Decision, Order and Judgment and delivery of a copy of it shall not constitute entry for filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry

Papers Considered: Dkt. Nos. 32-49 on NYSCEF