Originally published in

New York Law Journal

Government and Election Law

June 17, 2020

New York Elections During the Pandemic

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As the country experiences a pandemic and equally historic demand for political and criminal justice reform, New York moves forward toward its June 23 primaries and the November election. Among the many steps taken by Gov. Andrew Cuomo have included several emergency **Executive Orders**. He postponed the presidential primary from April 28 to June 23. He cancelled several special elections that were to fill vacancies in the state legislature and the office of Queens Borough President. He slashed the number of signatures on designating petitions to run for office in political party primaries, and shortened the period within which to circulate petitions. And he ordered that each registered voter will automatically receive in the mail an absentee ballot application, declaring that the existence of the COVID-19 virus was sufficient reason for everyone to vote by mail without having to satisfy the normal statutory conditions to do so.

His actions were reminiscent of his **Executive Order in the aftermath of Superstorm Sandy**, when he directed that any voter who lived in an affected county could vote by affidavit ballot outside his or her designated site.

Unlike the recent situation in Wisconsin, whose governor's order to liberalize mail-in procedures was fought tooth-and-nail by political adversaries, there has been minimal opposition to Cuomo's authority or his substantive orders. The obvious take-away is that if the electoral process can be streamlined so easily in the midst of a crisis, why not effect more fundamental election reforms during normal times?

Despite these reforms-by-Executive Order, the usual ballot access litigation continued, with trials and appeals held over skype or zoom. Three cases warrant our attention.

Complying with Filing Regulations. It is highly unusual for an incumbent to be thrown off the ballot, but two sitting Assembly members were, **Rebecca Seawright (D-Manhattan)** and **Carmen Arroyo (D-Bronx)**. First elected in 2014 on the east side of Manhattan, Seawright was seeking re-nomination by the Democratic Party and the Working Families Party. She submitted a sufficient number of signatures on each party's designating petitions, and did so on a timely basis. However, for the Democratic petition, she failed to timely submit an accompanying "cover sheet" (a required summary of the volumes of petitions submitted); and for the Working Families petition, she failed to submit an "Acceptance" (a required form when a candidate seeks a ballot line from a party in which she is not enrolled). After realizing these errors, Seawright retained counsel, submitted the required paperwork after the statutory deadlines, and appeared at a hearing at the New York City Board of Elections. The Board invalidated both sets of petitions. A special election proceeding was commenced and the Supreme Court, New York County, restored her to the ballot on both lines, ruling that the pandemic provided a sufficient excuse for her lateness. The Appellate Division, First Department, affirmed, also citing the pandemic and the absence of "specific actual prejudice."

The Board of Elections sought leave to appeal from the court of appeals, and it was granted. At this point, Seawright faced the hurdle of contrary rulings in similar cases by the **Second**, **Third** and **Fourth** Departments of the Appellate Division. The court of appeals, 5-2, reversed, holding that precedents required timely filings and any relaxation of such rules would "dilute the integrity of the election process' and 'jeopardize enforcement of the mandatory filing requirements set forth in the Election Law' [citation omitted]." The court added "Whatever may be our view [as to the equity of the situation], the legislature has erected a rigid framework of regulation, detailing as it does throughout specific particulars' [citation omitted]." *See Seawright v. Board of Elections*, 2020 WL 2568804, — N.Y.3d – (2020).

It is worth noting that literally dozens of other candidates' petitions were invalidated by the New York City Board for similar failures of timely filings.

Fraud. Assembly member Arroyo faced a different kind of problem. Having been a member of the Assembly since 1994, she was running for re-election this year. (I represented her opponent prior to the subject litigation.) On 41 of her 78 Democratic party designating petition sheets, all were dated prior to the day she picked them up from the printer; the number of back-dated signatures totaled 512 out of 944 submitted. The allegation at trial was that the number and

scope of these erroneously dated signatures constituted clear and convincing proof of fraud. Arroyo's attorney argued that documentary evidence itself did not prove fraud, suggesting that the cause of the problematic dating was not proven. Furthermore, even subtracting these signatures, Arroyo had filed more than the required number. The Supreme Court agreed with Arroyo, ruling that fraud was not proven, and the Appellate Division, First Department, affirmed. The court of appeals, however, granted leave to appeal and, in *Ferreyra v. Arroyo,* 2020 WL 2568798, — N.Y.3d. – (2020), reversed, 4-3, ruling that the facts were sufficient to find that the petition was "permeated with fraud" and should be invalidated.

Fraud is proven rarely in election cases. The fact that the court of appeals granted leave—a very rare occurrence in an election case—and ruled that, as a matter of law, the documentary evidence proved fraud is a cautionary tale for future candidates.

Residency. In a different kind of case, the courts wrangled once again with the issue of residency requirements. Relying on a **state constitutional requirement** and a court of appeals decision from 2016, *Glickman v. Laffin*, 27 N.Y.3d 810 (2016), an incumbent Assemblyman from Manhattan, Dan Quart, tried to knock his opponent off the ballot on the ground that he had not lived in the state for five continuous years. The gravamen of the complaint was that the insurgent had voted in Connecticut four times during the last five years, and, following *Glickman,* had thus severed his New York residency. *Glickman* involved a candidate for state Senate who had registered to vote in Washington, D.C. during the five-year period, and despite the long-standing rule that candidates, like voters, can have multiple bona fide residences, the court held that a candidate could have only "one electoral residence"—thus Glickman had not satisfied the New York continuous residency requirement. *Glickman* was followed in *Notaristefano v. Marcantonio,* 164 A.D.3d 721 (2d Dep't.), *lv. to app. denied* 31 N.Y.3d 1210 (2018) (candidate for Assembly disqualified for voting in North Carolina while a law student at Duke).

In the instant case, *Quart v. Kaufman,* 2020 WL 2478762, — A.D.3d — (1st Dep't. 2020), the Appellate Division, First Department, by a vote of 4-1, reversed a Supreme Court holding that disqualified Quart's Assembly opponent. The appellate court held that, unlike the Washington, D.C. and North Carolina laws governing the candidates in *Glickman* and *Notaristefano,* Connecticut law did not require a voter "to provide any additional evidence that he was a 'resident' of Connecticut…[or] renounce any voter registration in another state (as was the case in *Glickman* and [*Notaristefano*] …" As a result, Quart's opponent had not severed his electoral residency in New York. This holding was surprising in that a voter in one state is usually presumed to renounce his right to vote in another.

Leave to appeal was sought by Quart, but denied. Although the court of appeals had granted leave in five other election cases last month—a high number given its history of granting very few applications in such cases—one would have thought the court might have welcomed the opportunity to clarify residency requirements. It declined to do so, and, therefore, candidates

and election law practitioners, not to mention trial courts, must sort out this puzzling landscape until the court of appeals opines on the matter again.

These cases demonstrate that the rules governing ballot access are often applied very strictly—and sometimes they are not.

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