Originally published in

New York Law Journal

Government and Election Law

August 28, 2019

Summer 2019 Election Law Round-Up


By Jerry H. Goldfeder and Myrna Pérez

In their Government and Election Law column, Jerry H. Goldfeder and Myrna Pérez address several of the latest rulings by New York courts concerning limitations on the public's involvement in elections; the apparent lack of consequences for forgers in ballot access cases; and the doctrine of "unintentional fraud."

The recent decision by the U.S. Supreme Court allowing partisan gerrymanders (*Rucho v. Common Cause*, 139 S.Ct. 2484 (2019)) and the ruling by the U.S. Court of Appeals for the Tenth Circuit holding that members of the electoral college are free to vote their conscience (*Baca v. Colorado*, — F.3d.— (10th Cir. Aug. 20, 2019)) will each have far-reaching consequences for our elections—and each will be written about in due course. Today, we address several of the latest rulings by New York courts concerning limitations on the public's involvement in elections; the apparent lack of consequences for forgers in ballot access cases; and the doctrine of "unintentional fraud."

Election Winner

The New York Court of Appeals very rarely grants leave to appeal in an election case. This year was no exception, but it did hear an appeal from an Appellate Division, Third Department case

in which there were two dissents. CPLR §5601. In *Kosmider v. Whitney*, —- N.Y.3d —-, 2019 WL 2453619 (2019), the court, in a 4-3 decision, made it even more difficult for voters in New York to confirm results in close elections. (A narrative of the decision appeared in the New York Law Journal by Lynn K. Neuner and William T. Russell Jr. in *Scanned Ballots Protected From Disclosure*, NYLJ, July 16, 2019.) Unlike many states that require a manual recount when the margin in a race is close, New York has no such automatic fail-safe provision (*Johnson v. Martins*, 15 N.Y.3d 584 (2010)), though a local board of elections may impose one. In New York City, for example, if the margin between the two leading candidates is under one-half of one percent, a hand-recount of every ballot will be undertaken. This policy led to the manual counting of some 90,000 votes in the Queens District Attorney Democratic primary election race last month.

But, according to the court in *Kosmider*, in the absence of a court order, a candidate or interested citizen who wishes to view the actual ballots or machine-scanned copies of such ballots to confirm whether the machine results of a close race were accurate cannot even employ New York's Freedom of Information Law to view either until two years after the election. This is especially problematic because voting machines count votes that should be voided (because of intentionally placed extraneous marks on the ballot) and fail to count votes that were irregular but valid (where the voter circled or checked a candidate's name rather than completely filling in the oval next to the candidate's name). Thus, candidates and voters may not know for two years if candidates who have been declared the winner in close races actually received more votes than their competitors.

This lack of access is echoed by the fact that various boards of elections—which determine whether a candidate remains on the ballot or gets thrown off—do not require a public hearing. In *Reese v. Erie County Board of Elections*, 172 A.D.3d 1942 (4th Dep't 2019), the Appellate Division rejected a candidate's argument that the state's Open Meetings Law allowed him to record the local board of elections' meeting, adopting the Second Department's 2017 holding that a board's meetings on ballot access challenges "did not involve deliberation on a matter of public policy." *Krauss v. Suffolk County Bd. of Elections*, 153 A.D.3d 1211 (2d Dep't 2017). For the courts to pronounce that a board of elections' ballot access decisions does not involve "public policy" is certainly a pinched reading of the Open Meetings Law.

The lack of transparency relating to ballots cast and board of elections deliberations needs to be addressed by Albany.

Forgeries on Designating Petitions

Although candidates and their supporters should remember the difference between zeal and criminal conduct, violators often do not face real consequences. In *Overbaugh v. Benoit*, 172 A.D.3d 1874 (3d Dep't 2019), the Appellate Division affirmed a Greene County Supreme Court's finding that the testimony of a subscribing witness concerning a signature he obtained was not credible. A voter testified that he signed his wife's signature and the wife corroborated this fact, explaining that they signed each others' names frequently during their forty-year marriage. The subscribing witness, on the other hand, falsely testified in great detail about the wife signing the petition. Supreme Court invalidated the signature.

The significance of this decision, however, goes beyond one false signature. The Appellate Division opined that Supreme Court was "reticent" to determine the obvious—that the subscribing witness committed perjury. Yet, the appellate court "perceive[d] no reason not to give deference to [Supreme Court's] findings …," and appeared to take no further action.

Similarly, in *Burman v. Subedi*, 172 A.D.3d 1882 (3d Dep't 2019), the same Appellate Division affirmed the invalidation of a designating petition in support of a candidate for Syracuse City Councilor. The Onandaga Supreme Court found that the candidate, acting as a subscribing witness, obtained thirty forged signatures by allowing individuals to sign other household members' names on his petitions: his "attestations as to…30 challenged signatures were knowingly false." The court noted that the candidate "freely admits his error," but added that the candidate's argument that he believed his actions were proper "is not supported by the record." Nevertheless, here, as in the previous case, the Appellate Division was silent as to whether such fraudulent conduct would be investigated further.

In cases where a trial results in a finding of fraud or perjury, should there not be a referral to an enforcement agency? In the absence of such, this kind of fraudulent and perjurious conduct is bound to continue.

Unintentional Fraud

In another case of improper conduct, in *Lynch v. Duffy*, Sup. Ct. Suffolk Co. (Index No. 02095/19), aff'd 172 A.D.3d 1370 (2d Dep't 2019), the Appellate Division affirmed a Suffolk County Supreme Court finding that election fraud could be committed "intentionally or unintentionally." The challenged candidate had been endorsed for the office of Town Trustee and agreed to have her name placed on the "official" Democratic Party designating petition's slate. After several days, she decided not to pursue that office, and instead opted to run for Town Council. She modified her petition to reflect her change of heart, which the Town's

Democratic Chair and her former slate-members knew about. In fact, her jilted colleagues spoke to the local press about it.

A citizen-objector challenged her petition for Council, alleging "upon information and belief" that the voters of the town "were deceived' because the candidates from the official slate were on her new petition without their consent. But no voters were called to testify as to if and how they were deceived.

The Supreme Court found that "there was no proof that [the candidate] or her agents intentionally mislead [sic]" any of the petition signers. And she timely filed a declination for the position of Trustee. Nevertheless, the Supreme Court invalidated her petition for Council because she was named on two petitions for different offices—and though neither party submitted any legal argument that she could not run for both Trustee and Council at the same time, the Supreme Court "deem[ed]" that she could not (though did not explain why).

The Supreme Court held that there was a "presumption" that she misled the public about which office she was seeking—and "she failed to rebut this presumption." Although she freely admitted to voters that she was running for Council and no longer for Trustee, apparently this was not sufficient to rebut the presumption of fraud. Perhaps had she taken the illogical step of filing a declination for Trustee as soon as she changed her mind (declinations are usually filed *after* a petition is filed), this would have satisfied the court. In any event, the Supreme Court found her unintentional fraud sufficient to disqualify her Council candidacy, and the Appellate Division affirmed.

The lesson here? A candidate can be found to have committed fraud unintentionally—even in the absence of proof that she intended to or did in fact mislead anyone.

Conclusion

Such cases underscore what we have been saying in previous columns: A comprehensive overhaul of New York's election laws is warranted. And while Albany is at it, the legislature should reform the Freedom of Information and Open Meetings laws as they pertain to the electoral process.

***Jerry H. Goldfeder**, special counsel at Stroock & Stroock & Lavan, teaches Election Law at Fordham Law School, and is the author of Goldfeder's Modern Election Law (NY Legal Pub. Corp., 5th Ed., 2018). **Myrna Pérez** is the Director of the Voting Rights and Elections Project at the Brennan Center for Justice at NYU School of Law, and regularly litigates voting rights cases.*