SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. 700026/2012

In the Matter of the Application of
RUSSELL C. GALLO,

Petitioner,

- against -

BEN AKSELROD,

- and -

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents,

For an Order Pursuant to Sections 16-106, 16-112 and 16-113 of the Election Law, Directing the preservation of all ballots cast in the Independence Party Primary Election held on September 13, 2012 for the Public Office of Member of Assembly from the 45th Assembly District, in the County of Kings and directing the examinations of all ballots cast in said election by Petitioner's counsel and agents; invoking the court's jurisdiction to rule on the casting or canvassing, or refusal to cast or canvass, any ballot as set forth in Election Law Section 16-106(1); preserving Petitioner's rights under Section 9-209(4)(d) of the Election Law and Section 16-113 of the Election Law, and related sections of law; declaring Petitioner the lawfully elected candidate in this election.

ATTORNEY'S AFFIRMATION

GENE BERARDELLI, ESQ., an attorney duly admitted to practice law in the State of New York, affirms that the following is true, under penalties of perjury:

1. I am the attorney for the Petitioner herein and as such I am familiar with the facts and circumstances herein. I write this affirmation in response to Hon. David I. Schmidt's request for the briefing of two issued outlined to the parties on September 28, 2012.
2. Specifically, the Court requested that the parties brief the following:
    a. Whether all necessary parties had been served in this matter, and
    b. If so, whether the Court have the authority to grant the relief requested by the Petitioner under the Election Law.
3. All necessary parties have been served. The Independence Party is not a necessary party herein because this action does not put any of the internal affairs of any political party at issue. Also, there are no other candidates that are necessary parties. To Petitioner's knowledge, no person ever notified the Respondent Board of Elections that s/he intended

to mount a write-in campaign for this Election. Also, case law is clear that where a person will not be affected by the court action requested, they are not considered a necessary party as defined by the CPLR.

4. Your Honor has the authority to grant the relief prayed for by the Petitioner. The Election Law not only grants the Court the ability to correct "errors" in the canvass and re-canvass, but relevant case law states that the Court has broad discretion to correct discrepancies in the collection of votes – specifically those errors resulting from a change in balloting. Also, there is no issue that Election Law § 16-104 clearly grants the Court the authority to order a new primary should it find enough irregularities that render determining the actual outcome impossible.

NO OTHER PARTIES ARE NECESSARY TO THIS ACTION.

5. The issue articulated by the Court is whether all necessary parties have been served herein.
6. A necessary party is one that "must be brought into the action when joinder is necessary to accord "complete relief" between the parties, or when the interests of the person might be "inequitably affected by a judgment in the action". Id. *citing* Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 819 (2003]), *cert denied* 540 US 1017 (2003), *quoting* CPLR § 1001(a).
7. Dismissal for failing to name a necessary party is not favored. Matter of Schultz v. Farkas, 2012 Slip Op 51571(U) (Sup. Ct., Albany County) *citing* Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals, 5 NY3d 452, 459 (2005); Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C1001:1.
8. When a petition puts at issue "legislatively mandated requirements of the Election Law", and not the internal affairs of a political party, failure to serve the executive board of a political party is NOT a fatal defect. Kopel v. Nassau County Board of Elections, 32 Misc3d 1233(A), 936 N.Y.S.2d 59 (N.Y. Sup, 2011).

9. In a matter where seven candidates for public office would not be affected by any final order relating to the proceeding, the Court held they were not necessary parties within the meaning of CPLR § 1001(a). Master v. Davis, 65 A.D.3d 646, 888 N.Y.S.2d 64 (2d Dept. 2009).

10. The Independence Party is not a necessary party herein. First, this primary was initiated by opportunity to ballot petitions, where party members, not the party leadership, opened the line to any and all eligible candidates. Thus, the Independence Party has not had any role in this Primary.

11. Also, here as in Kopel, the issue before the Court is a public election for a public office where the issue before the Court is whether the requirements of the Election Law were met – specifically, which votes count and whether the Primary election should be thrown out altogether. This case does not put the internal affairs of the Independence Party at issue. Thus, the Independence Party is not "necessary" in the matter for the Court to determine the issues herein.

12. In addition, no other known candidates for public office need be included in this action. Steven Cymbrowitz, the Democratic / Working Families party candidate for the public office at issue is not a "necessary party" herein because his candidacy would not be affected from any final order herein.

13. Finally, no other persons who received votes in the Primary Election at issue are "necessary parties". First, there is no evidence that any other person ran a write-in campaign in this Primary Election, either by notifying the Board of Elections or by publicly campaigning for the Primary Election. Second, it is clear that no other person who received votes would be affected by any final order – any other candidate who apparently lost the election would still have lost the election. Finally, had they wished to seek an order throwing out the Primary Election results, they could have brought their own action, just as Petitioner has, but they failed to do so.

14. Based on the foregoing, Petitioner's action should not be dismissed because all necessary parties have been served herein.

THE COURT HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED HEREIN.

15. The issue herein as articulated by the Court is whether it has subject matter jurisdiction over an action contesting the results of a write-in primary initiated by opportunity to ballot petition where Petitioner seeks an Order to count disputed ballots where his name was written in by registered voters duly enrolled in the party of the Primary Election in question that were cast in the wrong election as a direct result of ministerial error by employees of the Respondent who, on the date of election, distributed the wrong ballots to those voters.

16. Election Law §16-106(4) provides that "the court may direct a recanvass **or the correction of an error,** or the performance of any duty imposed by law on such a state, county, town or village board of inspectors, or canvassers. (Emphasis added). The Supreme Court has no jurisdiction except to compel the election officials to perform their duties in accordance with statute, **and to correct obvious errors of election board in passing upon questionable or disputed ballots**. (Emphasis added). Reich v. Bosco, 21 Misc.2d 973, 195 N.Y.S.2d 117 (Westchester Sup., 1959), *affirmed* 9 A.D.2d 919, 196 N.Y.S.2d 557 (2d Dept. 1959 (emphasis added).

17. The concept of an election 'discrepancy' crept into Election Law through legislation more than 100 years ago. In Smith v. Board of Canvassers of Oneida County, 92 Misc. 607, 611-612, 156 N.Y.S. 837, 841 (N.Y.Sup.1915), The Court set forth a rather broad power to correct errors in election returns resulting from a change in the methodology of casting and counting ballots:

> *It seems to me reasonably clear that the design of the Legislature in adopting the amendment of 1908 was to furnish a method for the correction of errors in election returns in voting machine districts sufficie0nt* ***to cover all such errors susceptible of correction****, and that the word 'discrepancy' was not used in a narrow sense, but in such a sense as to justify certainly as much relief in cases of errors in voting machine districts as*

has been afforded for nearly 75 years in cases of errors in districts where there has been voting by ballot. (Emphasis Added)

18. The holding in Smith is especially significant to this matter. Smith sought to carve out a path for dealing with discrepancies resulting from the transition to a new technology for administering elections – the very same issue Petitioner faces today. The Court's approach is a simple one – **whatever can be corrected should be corrected**.

19. Petitioner is asking the Court to correct great errors that occurred on Primary Day resulting from a write-in primary where no candidate's name was listed on the ballot – an election that Respondent had never administered under the new election system.

20. The great errors at issue is that poll inspectors in 3 different election districts gave 4 voters the wrong party ballot on September 13, 2012 - and but for those errors by those inspectors, the ballots of at least 4 more voters who wrote in Russell Gallo on the wrong party ballot would be counted in Petitioner's favor, making him the winner of the 45th Assembly Independence Primary.

21. Petitioner intends to prove that these are obvious errors committed on Primary Day which the Respondent Board of Elections has failed to correct must be corrected in Petitioner's favor.

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22. Election Law § 16-102(3) states that "The court may direct… the holding of a new primary election… where it finds there has been such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected."

23. In addition, if a party seeking to challenge a primary election establishes the ". . .existence of irregularities 'which are sufficiently large in number to establish the probability' that the result of the election was affected", then that party is entitled to relief. Thompson v. Board of Election of the County of Rockland, 287 A.D.2d 667 (2d Dep't 2001).

24. There is no issue that Petitioner is entitled by statute to ask for a new primary based on the number of irregularities in this Primary Election. Petitioner argues in the alternative that the large number of discrepancies makes it impossible to determine the true outcome of the Primary Election.

25. Clearly, based on the irregularities pointed out by both Petitioner and Respondent Akselrod in his argument before the Court, the Court should hold a hearing.

26. Based on the foregoing, Petitioner respectfully requests that the Court immediately schedule a hearing on the merits of Petitioner's claim.

Dated: New York, New York
October 2, 2012

Respectfully submitted,

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ATTORNEY'S AFFIRMATION

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ATTORNEY'S CERTIFICATION. Pursuant to 22 NYCRR 130-1.1, upon reasonable inquiry under the circumstances, I certify that the presentation of these papers or contentions therein is not frivolous.

Dated: October 2, 2012

Gene Berardelli

Gene Berardelli, Esq.

To: See Affirmation