

At a Motion Term of the Supreme Court
of the State of New York, held in the
County of Chenango at the Court House in
Norwich, New York, on the 7th day
of September, 2007

Present: **HON. KEVIN M. DOWD**
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT: COUNTY OF OTSEGO

HALL F. WILLKIE, JULIET F. LAURICELLA,
THOMAS A. LAURICELLA, DAVID HENDRICKS,
JULIANNE BOND-SHAPIRO, DAVID SPRY,
MARIA SPRY AND STEPHEN ROBBINS,
Petitioners,

VS.

Index#20070804

DELAWARE COUNTY BOARD OF ELECTIONS
Respondent.

MEMORANDUM DECISION AND ORDER

Memorandum Decision and Order

This is a proceeding brought under Section 16-108 of the Election Law of the State of New York. The petitioners are eight residents of Bovina, New York, a small rural community of approximately 600 people located in Delaware County. During the course of 2007 there was a local controversy in the Town of Bovina that ended up at the polls. The eight petitioners in this case took the side which ultimately prevailed. In what is becoming a trend in America the losers sued. In this case the losers sued to remove the eight petitioners from the voter registration roles. This was done under a belief that because these eight residents (and most assuredly others) maintain dual residences in both Bovina and some other locale. The Delaware County Board of Election did remove the eight petitioners and they have now sued seeking reinstatement of their voter registration in Bovina.

Initially, the respondent Board of Elections has moved for a change of venue claiming that Otsego County is not the proper venue. That motion is denied. Clearly, this is a special proceeding brought pursuant to Section 16-108 of the Election Law and hence covered by the provisions of CPLR Section 506(b) which state that a "proceeding against a body or officer shall be commenced in any county within the judicial district where respondent made the determination complained of..." Additionally, respondents claim that the Court has not acquired jurisdiction over the respondent Board of Elections. That contention has no merit One of the commissioners of the Delaware County Board of Elections was served and this is sufficient under CPLR Section 312.

Further, in addition to adjudicating the rights of the other six petitioners the Court will adjudicate the rights of Julianne Bond-Shapiro and David and Maria Spry who respondent claims are on inactive status and thus should not be a part of the sought after relief.

It appears that the Delaware County Board of Elections relied on certain wording found in a pamphlet put out by the State Board of Elections. This wording was utilized by them in their decision striking petitioners from the voting rolls. Their decision was wrong. New York's Election Law requires that a voter be a resident of New York and of the county, city or village for a minimum of thirty days preceding such election. Under the Election law, residence is defined as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." (N.Y. Election Law Sections 5-102; 1-104(22)).

One of the most important criteria that the Board is to look at is the expressed intent, conduct, and "all attendant surrounding circumstances." Fortunately, through court decisions the State of New York has forged a set of practical rules that provide fairly decent guidance to be followed by Boards of Election. The bottom line on these guidelines is that the election officials are to establish that the prospective voters address is a real one and not a sham and then to look at the expressed wishes of the voter. Once the determination is made that the address given is a real one and not merely a phony address put forth solely to facilitate improper voting then the voter's choice will control.

The Court of Appeals in Ferguson v. McNab, 60 NY2d 598 (NY 1983) allowed a person to vote out of her residence on Huntington on Long Island even though she only used the Huntington residence twice per week while living the other five days a week in a residence outside of the Huntington voting district. The Court found that the petitioner's attachment to Huntington was legitimate and not merely contrived for the purpose of running for office. The Court held that a person having two residences "may choose one to which she has a legitimate, significant and continuing attachments as her residence for voting purposes of the Election law" Id . at 600.

Ferguson was in keeping with existing legal authority in New York. See Bressler

v. Holt-Harris, 37 AD2d 898 (3rd Dept. 1971). It has also been consistently followed. See Geller v. Lasher 196 AD2d 613 (2d Dept. 1993); Umland v. Bd of Elections of City of New York, 143 AD2d893 (2d Dept. 1988)

To vote the prospective voter "must manifest an intent, coupled with physical presence without any aura of sham." People v. O'Hara, 94 NY2d 378,385 (N.Y. 2001)

In looking at the above cases and reviewing the evidence put forth by both petitioners and respondent in this matter it is clear to this Court that the petitioners have expressed an intent to vote in Bovina, they have renounced their right to vote elsewhere and it is clear that they all have legitimate, significant and continuing attachments to their voting residence of choice.

Therefore, it is the decision of this Court the petitioners be reinstated to the rolls of voters in the voting district(s) in Bovina forthwith. In directing this the Court declares that these petitioners have established that their expressed intent was to vote in Bovina, they have renounced any right to vote in any other jurisdiction and they have established a legitimate, significant and continuing attachment to their voting residence of choice.

This Court further enjoins the Board of Elections to henceforth apply the above stated standard in future determinations of voting residence for dual residents in connection with their registration applications and any challenges to their registration.

This Decision shall constitute the Order of this Court.

Dated: October 30, 2007

Ken A. O'Neil
Supreme Court Justice

Willkie Farr & Gallagher, LLP
787 Seventh Ave
New York, NY 10019

Peter Henner, Esq.
PO Box 326
Clarksville, NY 12041-0326

Richard Spinney, Esq.
PO Box 219
74 Main Street
Stamford, NY 12167

Gloria Chandler, Chief Clerk
Supreme and County Court
w/original Memorandum Decision and Order (dated October 30, 2007), Notice of Motion, Verified Petition with attached exhibits, Memorandum of Law, Reply Memorandum of Law, Notice of Cross-Motion, Affidavit of William Buccheri, Answer, Affidavit of Bruce Kraus with attached exhibit and book of exhibits.

THE ORIGINAL OF THIS MEMORANDUM AND DECISION HAS BEEN FILED WITH THE OTSEGO COUNTY CLERKS OFFICE.

THE SIGNING OF THIS DECISION AND ORDER SHALL NOT CONSTITUTE ENTRY OR FILING UNDER CPLR 2220. COUNSEL IS NOT RELIEVED FROM THE APPLICABLE PROVISIONS OF THAT SECTION RELATING TO FILING, ENTRY AND NOTICE OF ENTRY.