

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA**

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In the Matter of

GREGORY C. FINGAR, Chairman of the
Columbia County Republican Committee,
ELIZABETH L. YOUNG, TOM KIELY, ERIK TYREE,
RAYMOND DALRYMPLE, CHERYL ROGERS,
and **EDWARD E. WALDRON**,
Petitioners,

-against-

THE COLUMBIA COUNTY BOARD OF ELECTIONS,
Donald Kline and Virginia Martin²,
Commissioners constituting the Board,

DECISION & ORDER

Index No.
7456/09-7494-09¹
RJI No.
10-09-0601

-and-

CHRISTOPHER NOLAN, Chairman of the
Columbia County Democratic Committee,
LORETTA HOFFMAN, LARRY KADISH, JOYCE
THOMSPON. JEFF TALLACKSON, AUDREY
KORAN, and TOM YOUHAS³,
Respondents.

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- ¹ The separate actions indicated by the separate index numbers were joined by the Order of the Court and the consent of the parties on November 30, 2009.
- ² The Court dismissed that portion of the Petitioners' petition that sought to proceed against Ms. Martin in her individual capacity on December 2, 2009.
- ³ The motions to intervene by candidate Petitioners, Respondent Nolan and candidate Respondents were granted by the Court without opposition on November 30, 2009.

Appearances:

John Ciampoli, Esq.
677 Broadway, Suite 202
Albany, New York 12207
Attorney for Petitioners

James E. Walsh, Esq.,
514 State Street
Schenectady, New York 12308
Attorney for Petitioners

Willkie, Farr & Gallagher, LLP
Daniel M. Burstein, Esq., of counsel
787 Seventh Avenue
New York, New York 10019-6099
Attorney for Respondent Martin

Kathleen O'Keefe, Esq.,
65 Anthony Drive
Earlton, New York 12058
Attorney for Respondent Nolan & Respondent Candidates

Dan Tuczinski, Esq.
Columbia County Attorney's Office
401 State Street
Hudson, New York 12534
Attorney for the Board of Elections

NICHOLS, J.

Respondents Martin, Nolan and the Respondent candidates enumerated above, move for the dismissal of the petition brought by the Petitioners under Election Law § 16-106.

The Respondents' motion seeks dismissal pursuant to CPLR Rule 3211 (a)(1), (a)(2), (a)(7) and (a)(10). The Court will consider the various branches of the

Respondents' motion *seriatim*.

That branch of the Respondents' motion brought pursuant to CPLR Rule 3211 (a)(1) is **DENIED**. In moving to dismiss based on a defense founded on documentary evidence, the Respondents bore the burden of demonstrating the existence of such evidence and, further, that the evidence " . . . negate(s) an essential element of the cause of action." Blonder & Co. v. Citibank, 28 A.D.3d 180, 187. In the case *sub judice*, the Respondents have failed to meet that burden. In particular, the documentary evidence submitted by the Respondents consisting of a newspaper article, is neither documentary evidence in the sense contemplated by statute inasmuch as it would cause the Court " . . . to look outside said document for information pertinent to (the) determination of (this) matter," (Brown v. Solomon & Solomon, 181 Misc.2d 461, 462) and, in any event, fails to address, much less negate, the Petitioners' cause of action. The remaining documentary evidence submitted by the Respondents (*see, infra*), only serves to demonstrate the existence of the case and controversy that caused the Petitioners to seek the intervention of the Court in the first instance. *See, Dellith v. Oneonta City School District*, 280 A.D.2d 864, 866.

The Court also **DENIES** the Respondents' motion brought pursuant to CPLR Rule 3211 (a)(2). The Court is clearly vested with the requisite jurisdiction to entertain this matter by statute, including, *inter alia*, Election Law §§ 16-100, 16-106 (1).

In considering that part of the Respondents' motion to dismiss based on CPLR

Rule 3211 (a)(7), the Court observes that is well established that in determining whether or not a pleading is facially sufficient in the context of a CPLR Rule 3211 (a)(7) motion, the pleading is to be liberally construed (*see*, CPLR § 3013; Foley v. D'Agostino, 21 A.D.2d 60), with every inference determined in favor of the proponent of the pleading (Rovello v. Orofino Reality Co., 40 N.Y.2d 633, 634), and all evidentiary averments contained therein deemed as true for the purpose of determining the adequacy thereof. *See*, Williams v. Williams, 23 N.Y.2d 592. Finally, the evidentiary submissions of the moving party are afforded minimal import insofar as determining the existence of a cognizable cause of action within the confines of the pleading. *See*, Rovello v. Orofino Reality Co., *supra*.

Upon examining the petition at issue, it is apparent that the Petitioners have articulated a cognizable cause of action under Election Law § 16-106.

Moreover, in conjunction with the instant motion and without objection, the parties submitted for the Court's consideration documentary evidence in the form of, *inter alia*, objections, and the records of the Board of Election that touch upon the issues that underlie and impact allegations contained in the petition. Moreover, the Petitioners made a stipulation in open court that narrowed the assertions contained generally in their pleadings. Upon review of that evidence and that stipulation, it is apparent that the Respondents' motion also necessarily fails when considered upon a criterion adjudicating whether the Petitioners possess a cause of action, as opposed an

adjudication of whether a cause of action is articulated in their pleadings. *See, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275.

The Court **DENIES** that branch of the Respondents' motion brought pursuant to CPLR Rule 3211 (a)(10). Inasmuch the issue of the instant proceeding involves a challenge relative to the propriety of counting certain ballots, as opposed to a challenge designed to contest the registration of the voters who cast them (*see, Wilkie v. Delaware County Board of Elections*, 55 A.D.3d 1088, 1091), it was not incumbent on the Petitioners to join those voters whose ballots are in controversy as parties to this action. *See, Messina v. Albany County Board of Elections*, 66 A.D.3d 1111; *lv. den.*, ---N.E.2d ----, 2009 WL 3460659, 2009 N.Y. Slip Op. 87143 (N.Y. Oct 29, 2009).

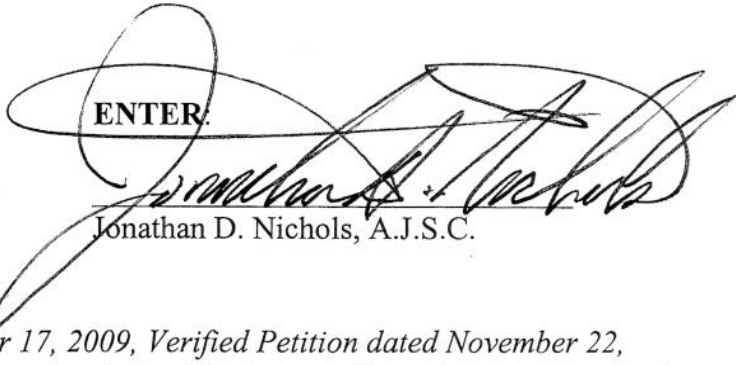
Based on the aforesaid, it is hereby

ORDERED, that the motion by the Respondents be and hereby is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: December 4, 2009.

ENTER


Jonathan D. Nichols, A.J.S.C.

Papers Considered:

Order to Show Cause dated November 17, 2009, Verified Petition dated November 22, 2009, Order to Show Cause dated November 23, 2009, Order to Show Cause dated November 23, 2009, Motion to Dismiss dated November 24, 2009, Memorandum, of Law in Support of Motion to Dismiss dated November 24, 2009, Petitioners Objections submitted under a cover letter dated November 29, 2009, Affirmation in Support of Motion to Dismiss dated December 1, 2009, -continued on page 6-

Respondents' objections dated December 1, 2009, Opposition to Motion to Dismiss dated December 2, 2009, Memorandum, of Law in opposition to Motion to Dismiss dated December 2, 2009, Respondents Nolan, et al's Memorandum, of Law dated December 3, 2009, Respondent Martin's Reply Memorandum, of Law dated December 4, 2009, Petitioners' Affirmation dated December 4, 2009.

Also Considered

The proceedings before the Court on November 30, 2009 and December 2, 2009.