State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 13, 2021 533243

In the Matter of DAWN BISHOP,
Appellant,
v

SCHUYLER A. LEAHEY et al.,
Respondents,
and

BRODY W. FRENCH et al.,
Respondents.

(Proceeding No. 1.)

MEMORANDUM AND ORDER

In the Matter of MICHELLE McCARTHY,
Appellant,
v

TREVOR J. RATIGAN et al.,
Respondents,
et al.,
Respondents.

(Proceeding No. 2.)

Calendar Date: May 13, 2021

Before: Garry, P.J., Lynch, Clark, Aarons and Pritzker, JJ.

Couch White, LLP, Albany (Joshua A. Sabo of counsel), for appellants.

David L. Gruenberg, Troy, for Brody W. French and another in proceeding No. 1 and Trevor J. Ratigan and others in proceeding No. 2, respondents.

Per Curiam.

Appeal from an order of the Supreme Court (Zwack, J.), entered April 27, 2021 in Rensselaer County, which dismissed petitioners' applications, in two proceedings pursuant to Election Law § 16-102, to, among other things, declare invalid (1) the designating petition naming respondents Schuyler A. Leahey and Brody W. French as the Working Families Party candidates for the public office of Member of the Town Council of the Town of North Greenbush in the June 22, 2021 primary election, and (2) the designating petition naming respondents Brenda J. Hammond, Trevor J. Ratigan, Nicola M. Hamlin and Michael Rossello as the Working Families Party candidates for the public office of Member of the Rensselaer County Legislature for the Second Legislative District in the June 22, 2021 primary election.

In these proceedings, petitioners seek to, among other things, declare invalid the designating petitions for certain candidates of the Working Families Party (hereinafter WFP) for the public office of Member of the Town Council of the Town of North Greenbush (proceeding No. 1) and for the public office of Member of the Rensselaer County Legislature for the Second Legislative District (proceeding No. 2) in the June 22, 2021 primary election. In proceeding No. 1, petitioner Dawn Bishop alleged that the designating petition was fraudulent because respondents Schuyler A. Leahey and Brody W. French, the two named candidates in the designating petition, did not consent to being named therein.[1] Bishop also alleged, among other things,

[1] Once the designating petition was filed in proceeding No. 1, Leahey executed and filed a declination of nomination, after which respondents Brenda J. Hammond, Trevor J. Ratigan and Nicola M. Hamlin, who were named in the designating petition as

that certain signatures on the designating petition were fraudulently obtained. In proceeding No. 2, petitioner Michelle McCarthy alleged that the designating petition was fraudulent, including allegations that the candidates and other public officials from the Conservative and Republican Parties attempted to defraud the WFP voters. Following a combined hearing on both petitions, Supreme Court, among other things, rejected petitioners' claims of fraud and dismissed both petitions. Petitioners appeal.

Initially, Bishop contends that the placement of Leahey's name on the designating petition allegedly without her consent, standing alone, amounts to fraud and requires invalidation of the designating petition (see Matter of Green v McNab, 96 AD2d 918, 918-919 [1983], affd for reasons stated below 60 NY2d 600 [1983]; Matter of Richardson v Luizzo, 64 AD2d 942, 943 [1978], affd for reasons stated below 45 NY2d 789 [1978]). However, even if we were to agree with this standard advanced by Bishop (but see Matter of Thomas v Simon, 57 NY2d 744, 745 [1982]; Matter of Mahoney v May, 40 NY2d 906, 907 [1976]; Matter of Lynch v Duffy, 172 AD3d 1370, 1373 [2019], lv denied 33 NY3d 906 [2019]; Matter of Ruck v Greene County Bd. of Elections, 65 AD3d 808, 809 [2019]; Matter of Ferguson v New York Liberal Party State Comm., 90 AD2d 586, 586 [1982], lv denied 57 NY2d 608 [1982]), Bishop failed to satisfy her initial burden of establishing, by clear and convincing evidence, that Leahey did not consent to the placement of her name on the designating petition naming her as a candidate for the public office of Member of the Town Council of the Town of North Greenbush.[2]

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the Committee to Fill Vacancies, executed and filed a certificate of substitution naming a new candidate, respondent David Hostig, who consented to being nominated as a WFP candidate for the public office of Member of the Town Council of the Town of North Greenbush.

[2] We need not and, on this record, cannot resolve the question of whether a designating petition may be invalidated in its entirety if it is shown by clear and convincing evidence that a candidate did not consent to being placed on the designating petition.

Indeed, no affidavit or testimony from Leahey was ever offered into evidence, and the relevant proof introduced at the hearing consists of only one statement from the son of Leahey's opposing candidate suggesting that Leahey was, at some point in time, surprised by her candidacy. Moreover, Bishop never requested an adjournment to obtain the necessary testimony. Simply stated, this proof is patently insufficient to sustain the fraud claim on this basis and invalidate the designating petition in proceeding No. 1.

Turning to the remaining contentions, we reject petitioners' argument that Supreme Court should have applied an adverse or negative inference in support of their fraud claims given the failure of the respondent candidates in both proceedings to appear at the hearing and provide testimony. The failure of a respondent or certain witnesses under the respondent's control to appear may result in an adverse inference (see Matter of Lavine v Imbroto, 98 AD3d 620, 621 [2012]; Matter of Haas v Costigan, 14 AD2d 809, 810 [1961], affd 10 NY2d 889 [1961]; Matter of Adams v Klapper, 182 Misc 2d 51, 53 [Sup Ct, Kings County 1999], affd 264 AD2d 696 [1999]). However, such an inference is permitted when the respondent or the respondent's witnesses were issued a subpoena and disregarded the same (see e.g. Matter of Lavine v Imbroto, 98 AD3d at 621; Matter of Adams v Klapper, 182 Misc 2d at 53), or, in the absence of a subpoena, when the facts and circumstances of the conduct are so egregious as to warrant the adverse inference (see Matter of Haas v Costigan, 14 AD2d at 810). Here, petitioners failed to subpoena the respondent candidates from whom they sought testimony,[3] and, given the nature of the

[3] Even if we were to accept petitioners' argument that an order to show cause could be used in "a proper case" to compel party witnesses to appear at a set time and place to provide testimony at a hearing (CPLR 2214 [d]; see generally CPLR David D. Siegel & Patrick M. Connors, NY Prac §§ 248, 382 at 478-480, 742-745 [6th ed 2018]), we note that the orders to show cause in these proceedings, which displayed a stamp stating "PERSONAL APPEARANCES ARE REQUIRED ON THE RETURN DATE," contained no such express and unambiguous directive therein for the respondent candidates to appear on the return date to provide testimony.

alleged conduct, we discern no error in Supreme Court's decision not to draw a negative inference (cf. Matter of Lavine v Imbroto, 98 AD3d at 621; compare Matter of Haas v Costigan, 14 AD2d at 810; Matter of Adams v Klapper, 182 Misc 2d at 53).

Finally, we decline petitioners' invitation to address their claim that Supreme Court erred in refusing to allow them to impeach their own witnesses at the hearing, as resolution of this claim, as petitioners concede, would not be dispositive here. To the extent that we have not addressed petitioners' remaining contentions, they are either academic or have been examined and found to be without merit.

Garry, P.J., Lynch, Clark, Aarons and Pritzker, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court