



## Buchyn v Scirocco

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1 of 11 PRESENT: HON. MICHAEL R. CUEVAS JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK COUNTY OF SARATOGA

DAVID BUCHYN,

Petitioner-Objector, -against-

FRANK SCIROCCO, EDWARD MORCONE, KEVIN CRONIN and GEORGE BROWN, purported Conservative Party Judicial Delegate and/or Alternate Judicial Delegate candidates for the 113 th Assembly District, 4 th Judicial District of New York State, and NEW YORK STATE BOARD OF ELECTIONS, Respondents. SUPREME COURT

DECISION AND ORDER

Proceeding No. 1 EF2022893

For an Order, pursuant to Article 16 of the Election Law, declaring invalid and striking the Conservative Party designating petitions of Frank Scirocco, Edward Morcone, Kevin Cronin and George Brown, for Judicial Delegate and/or Alternate Delegate candidates for Assembly District 113, 4 th Judicial District and restraining, enjoining, prohibiting and/or preventing the New York State Board of Elections from placing and/or certifying the names of Respondent-candidates on the June 28, 2022 primary ballot as candidates of the Conservative Party for the party position of Judicial Delegate for the 113 th Assembly District, 4 th Judicial District.

FRANK SCIROCCO, EDWARD MORCONE, KEVIN CRONIN and GEORGE BROWN, Petitioners, -against- NEW YORK STATE BOARD OF ELECTIONS, And DAVID BUCHYN, Respondents.  
DECISION AND ORDER

Proceeding No. 2 EF20221023

For an Order, pursuant to Article 16 of the Election Law, declaring valid, proper and legally effective



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the designating petitions designating the Petitioners as Candidates for the public offices of Delegates and/or Alternate Delegates to the , 4 th Judicial District Nominating Convention, 113 th Assembly District in the Conservative Party Primary Election to be held on June 28, 2022, and for further judgment directing the Respondent-Board to place the names of Petitioners on the official primary ballots and voting machines as candidates for such public office at the primary election on June 28, 2022.

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2 of 11 APPEARANCES: Joseph T. Burns, Esq., attorney for Petitioner-Objector in Proceeding No. 1 and Respondent Buchyn in Proceeding No. 2 Greenberg Taurig, LLP (Robert M. Harding, Esq. And Joshua L. Oppenheimer, Esq.) for Respondent-candidates in Proceeding No. 1 and Petitioners in Proceeding No. 2 Aaron Higgs, Esq. for Respondent New York State Board of Elections MICHAEL R. CUEVAS, J. INTRODUCTION

Petitioner, David Buchyn (hereinafter referred to as "Buchyn"), instituted Proceeding No. 1 pursuant to Election Law Article 16 by filing a Verified Petition and Exhibits, an Emergency Affirmation of Counsel and a proposed Order to Show Cause with the Saratoga County Clerk on April 17, 2022. Due to the recusals by other Justices, this proceeding was assigned to this Court on April 20, 2022. An Order to Show Cause was then issued directing the manner of service, the dates for filing and service of further pleadings and setting the date for hearing. Respondent-candidates, Frank Scirocco, Edward Marcone, Kevin Cronin and George Brown, (hereinafter the "Candidates") filed a Verified Answer and Objections in Point of Law on April 26, 2022. Respondent New York State Board of Elections (hereinafter "the Board") filed a Letter/Answer, taking no position on the merits of the proceeding and filed copies of its records relevant to this proceeding, as directed by the Order to Show Cause. On April 28, 2022, Petitioner filed a Reply with additional exhibits. On the return date, counsel stipulated that: (1) this matter would be adjourned until May 3, 2022, as the New York State Board of Elections was scheduled to make its final determination of Buchyn's Objections to the Candidates' designating petition on May 2, 2022; and (2) should the Board vote to invalidate Candidates' designating petition, counsel could immediately file a validating proceeding and the Court would make that

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3 of 11 proceeding also returnable on May 3, 2022 with electronic service upon counsel for Buchyn by May 2, 2022 deemed sufficient. As Petitioners, Frank Scirocco, Edward Morcone, Kevin Cronin and George Brown ("Candidates"), instituted Proceeding No. 2 pursuant to Election Law Article 16 by



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filing a Verified Petition and Exhibit, an Affirmation of counsel and a proposed Order to Show Cause with the Saratoga County Clerk on May 2, 2022. An Order to Show Cause was then issued directing the manner of service, the dates for filing and service of further pleadings and setting the date for hearing. As a Respondent in the second proceeding, Buchyn filed a Verified Answer on May 3, 2022. Respondent New York State Board of Elections (hereinafter "the Board") filed a Letter/Answer, taking no position and filed copies of its records relevant to this proceeding, as directed by the Order to Show Cause. Proceedings Nos. 1 and 2 were then heard jointly by the Court since Proceeding No. 2 was in the nature of a cross-claim as an proceeding to validate, filed in response to the Board's action on the objections underlying the Proceeding No. 1, to invalidate. Due to the common factual issues and the identity of the parties, the Court issues this Decision and Order deciding both proceedings. FACTUAL BACKGROUND A. BACKGROUND Petitioner in Proceeding No. 1, David Buchyn, is a registered voter, enrolled in the Conservative Party who resides in the 113 th Assembly District which is in the 4 th Judicial District. NYSCEF Document 1, Petition. Candidates are all registered voters, enrolled in the Conservative Party and residents of the 113 th Assembly District. NYSCEF Document 1, 3 - 6. On or about April 7, 2022, a Conservative Party designating petition, with a Cover Sheet indicating it was Volume 1 of 1, was filed with the Board. The petition purported to designate the Candidates for the party position of Delegate and/or Alternate Delegate to the Conservative Party 4 th Judicial District Nominating Convention. NYSCEF Document 4. Buchyn filed a general objection and specific objections with the 3

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4 of 11 New York State Board of Elections against Candidates' Conservative designating petition. NYSCEF Document 5. According to the NYS Voter Signature Requirements by Assembly District (NYSCEF Document 7), a Conservative Party designating petition for the 113 th Assembly District must contain a minimum of 75 valid signatures. According to the Conservative Party Call (NYSCEF Document 6), there are two Judicial Delegate positions available in the 113 th Assembly District. The Fourth Judicial District in New York consists of the entirety of eleven counties: Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, Saratoga, Schenectady, St. Lawrence, Warren and Washington. The 113 th Assembly District is comprised of portions of Saratoga, Warren and Washington counties. On May 2, 2022, the Board issued a Determination finding that Candidates' Petition contained a total of 118 signatures, that the Board found 44 signatures to be invalid, leaving 74 valid signatures. Since 75 valid signatures are required for the designation, the Board found the petition invalid. NYSCEF Document 26. In making its' Determination, the Board adopted its' Hearing Officer's Report. NYSCEF Document No. 16. THE LAW AND DISCUSSION

A. PROCEEDING NO. 2 Candidates identified in their Petition five signatures that they allege the Board incorrectly ruled invalid. Therefore, the allegations of the Petition were sufficiently particularized. See, *Lacorte v. Cytryn*, 109 AD3d 544 (2d Dept 2013) order aff'd 21 NY3d 1022; *Matter of Jennings v. Board of Elections of City of N. Y.*, 32 AD3d 486,486 (2d Dept 2005). Four signatures, those found on: Page 1, lines 2 and 5; Page 8, line 3 and Page 14, line 2 were ruled invalid for listing



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the wrong Town or City. In each instance, the signer listed "Saratoga" as his or her Town/City when, in fact, each signer was a resident of the City of Saratoga Springs. Both parties acknowledged that there is a Town of Saratoga in Saratoga County. 4

[\* 4] aff'd, aff'd, INDEX NO. EF20221023 NYSCEF DOC. NO. 11 RECEIVED NYSCEF: 05/05/2022

5 of 11 In a proceeding to validate a designating petition, the burden of proof is on the candidate to establish that the petition is valid. *Boniello v. Niagara County Board of Elections*, 131 AD3d 806 (4th Dep't 2015). Additionally, Findings by the board of elections as to the invalidity or validity of petitions or the signatures on them are presumptively correct. The burden of proving the validity or invalidity is on the person who questions the action of the board in rejecting or accepting the petition.

22 *Carmody-Wait* 2d § 137:53; *Pataki v. Hayduk*, 87 Misc. 2d 1095, (Sup 1976), judgment 55 AD2d 861, (2d Dep't 1976). See also, *Warsoff v. Cohen*, 264 AD 953, (2d Dep't, 1942.), 289 N.Y. 108 (1942); *Matter of McDonnell v. Cohen*, 252 AD 277, aff'd 275 N.Y. 644. Here, assuming the "use of customary abbreviations of addresses" stated in Election Law §6-134 (5) applies, Candidates failed to produce any evidence to support their claim that "Saratoga" is a customary abbreviation for Saratoga Springs. This is significant where the parties conceded, and the Court can take judicial notice of the fact that there is a Town of Saratoga in Saratoga County.

While Candidates argue the relative insignificance of listing the correct Town or City, on this issue, the Court of Appeals has held: Section 6-130 of the Election Law provides that "a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed." Because, in a number of instances, the petition signers did not accurately set forth the town, the candidate did not have sufficient signatures. We adhere to our precedent in *Matter of Frome v Board of Elections of Nassau County* (57 NY2d 741, 742-743 (1982); see also *Matter of Zobel v New York State Bd. of Elections*, 254 AD2d 520 (1998)) that compliance with the statute is required, as it constitutes a matter of substance and not of form. An amendment of the statute such as candidate seeks is for the Legislature to make. Moreover, in 1996, the Legislature amended section 6-130 by, among other things, eliminating the requirement of designating wards, election districts and assembly districts. Significantly, it left intact the provision requiring the designation of towns and cities (L 1996, ch 709, § 1-a).

*Stoppenbach v. Sweeney*, 98 N.Y.2d 431,433, (2002)

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6 of 11 Further, it cannot be said that placing the name "Saratoga" in the City/Town column of the signature lines could not possibly confuse, hinder or delay any attempt to ascertain the identity, status and address of the signers. See, *Zobel v. New York State Board of Elections*, 254 AD2d 520 (3d Dept, 1998) [ Strict compliance with the town or city requirement set forth in Election Law § 6-140 serves the legitimate purpose of facilitating the discovery of fraud (see, *Matter of Rubinstein v Board of Elections*, 122 AD2d 974, 975, Iv denied 68 NY2d 605) and allows the rapid and efficient verification of signatures within the restrictive time periods imposed by the Election Law (see generally, *Schulz v Williams*, 44 F3d 48, 57)] Here, the concern raised in *Zobel* applies as one could logically assume that the signers resided in the Town of Saratoga rather than in the City of Saratoga Springs. Consequently, this Court must sustain the Board's determination that these four signatures are invalid. Candidates' second argument is that the signature on Page 7, line 5 should not have been invalidated despite the signer's listing of only a month and day ("3/27"), omitting a year.

Election Law § 6-130 provides that "[t]he sheets of a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed" (Election Law § 6-130). Election Law § 6-132 also requires that each signature on a designating petition bear the date it was made (see *Matter of Vassos v. New York City Bd. of Elections*, 286 A.D.2d 463, 730 N.Y.S.2d 251). These requirements must be strictly complied with, as it is a matter of prescribed content (see *Matter of Stoppenbach v. Sweeney*, 98 N.Y.2d 431, 749 N.Y.S.2d 210, 778 N.E.2d 1040; *Matter of Hutson v. Bass*, 54 N.Y.2d 772, 443 N.Y.S.2d 57, 426 N.E.2d 749; *Matter of DeBerardinis v. Sunderland*, 277 A.D.2d 187, 717 N.Y.S.2d 892).

*DiSanzo v. Addabbo*, 76 A.D.3d 655, 656, (2d Dept, 2010)

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7 of 11 When a subscribing witness writes the incorrect date on which signatures were affixed to the designating petition, those signatures should be invalidated. See, *DiSanzo v. Addabbo*, 76, AD3d 655, 906 N.Y.S. 2d 607; *Matter of Kent v. Bass*, 83 A.D.2d 898, 442 N.Y.S.2d 123; *Matter of Nunley v. Cohen*, 258 App.Div. at 746, 15 N.Y.S.2d 104; see generally *Matter of Stoppenbach v. Sweeney*, 98 N.Y.2d at 433, 749 N.Y.S.2d 210, 778 N.E.2d 1040; *Matter of MacKay v. Cochran*, 264 A.D.2d 699, 699-700, 695 N.Y.S.2d 113). In *Kent*, the Second Department upheld the invalidity of a signature bearing the date "8-21-81" which was preceding and by signatures dated July 21, 1981, even though it was an "obvious error". While the date listed here on Page 7, line 5 may appear to be an "obvious error", this Court is compelled to concur with the Board's finding and find it invalid. B. PROCEEDING NO. 1.

In this proceeding, Buchyn had the burden of going forward and the initial burden of establishing a



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prima facie case to establish the invalidity of the designating petition and those signatures that he claims the Board incorrect found valid.

At the hearing, Buchyn limited his challenges to the Board's determinations to the following signatures:

Page 1, line 3 - Basis: Duplicate of a prior signature at Page 14, line 1. The parties conceded that the two signatures are signatures of the same person. The signature on page 1 was dated 3/29/22 and the signature on page 14 was dated 3/10 (presumably 2022).

Court's Ruling: Objection sustained. Board's Determination overruled. As the page 1, line 3 signature was the later of the two, it should have been invalidated and the page 14, line 1 signature should have been found valid. The net result is the same - one valid and one invalid signature.

Page 2, line 3 - Basis: Signer listed "Railroad Street" instead of "S. Railroad Street".

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8 of 11 Court's Ruling: Objection sustained. Board overruled. Signature invalidated. Election Law 6-130 requires the full and complete address of the signer; omission of any invalidates the signature. The NYS Voter information (part of NYSCEF Document 16), in evidence, shows the signer's street address as 27 S. Railroad Street. The Court cannot speculate as to the lack of confusion. The Board's determination is overruled and the signature is invalidated. See, Matter of Lane v. Meissner, 24 AD2d 720, 721(2d Dept, 1956) (failure to state full and correct post office address); Stark v. Kelleher, 32 AD2d 663 (3d Dept, 2006) (failure to list correct town or city).

Page 3, line 1: Basis: printed rather than signed signature.

Court's Ruling: Objection sustained; Board Determination overruled. Signature invalidated. The NYS Voter information (part of NYSCEF Document 22), in evidence, shows the signer's signature in cursive writing. There was no testimony to explain the discrepancy. The signature is invalid. Henry v. Trotto, 54 AD3d 424 (2d Dept, 2008).

Page 4, Statement of Witness: Basis: Incorrect Town listed in Witness Identification section.

Court's Ruling: Objection denied; Board's Determination sustained. The two petition page signatures are valid. Full address information provided by subscribing witness so incorrect Town in Witness ID is immaterial. Powers v. Kozlowski, 54 AD3d 540 (4 1h Dept, 2008).



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Page 7, line 7: Basis: Petition listed address on "Henry Robens Road" while Voter Record lists "Robens Road".

Court's Ruling: Objection denied; Board's Determination sustained. Candidates provided extrinsic evidence that the street name is correct in the form of a Town of Stillwater tax bill for the signer. NYSCEF Document No. 29.

Page 8 1 line 6: Basis: Date listed as "3/8/21" and not "3/8/22".

Court's Ruling: Objection denied; Board's Determination sustained. Upon close examination under magnification, the date appears to be "3/8/22". There is insufficient evidence to overrule the Board.

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9 of 11 Page 8 1 line 8: Basis: Incorrect Address - "15A 1 Jefferson Terr." as opposed to 5B2 Jefferson Terrace".

Court's Ruling: Objection denied; Board's Determination sustained. Board did not find signer and invalidated; no change.

Page 9, line 5: Basis: Address incorrect - missing apartment number.

Court's Ruling: Objection denied; Board's Determination sustained. Apartment number not required outside New York City. This signature is valid.

Page 9, line 8: Basis: Uninitialed Alteration to Date.

Court's Ruling: Objection denied; Board's Determination sustained. Insufficient basis, even under magnification, to sustain objection.

Page 9, line 20: Basis: Address incomplete.

Court's Ruling: Objection denied; Board's Determination sustained. Missing Street or Road after name of street or road is inconsequential.

Page 10, line 13: Basis: Signature printed, not signed.

Court's Ruling: Objection sustained; Board's Determination overruled. The NYS Voter information (part of NYSCEF Document 16), in evidence, shows the signer's signature in cursive writing. There





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was no testimony to explain the discrepancy. The signature is invalid. *Henry v. Trotto*, 54 AD3d 424 (2d Dept, 2008).

Page 11, line 15: Basis: Wrong Town or City listed on signature line for 11 Knauber Road is Mechanicville, instead of Malta.

Court's Ruling: Objection sustained; Board Determination overruled. Signature invalidated. Election Law 6-130 requires the full and complete address of the signer; omission of any invalidates the signature. The NYS Voter information (part of NYSCEF Document 16), in evidence, shows the signer's Town as Malta. The Board's determination is overruled and the signature is invalidated. See, *Stark v. Kelleher*, 32 AD2d 663 (3d Dept, 2006) (failure to list correct town or city).

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10 of 11 Page 13, line 3: Basis: Signature does not match any registered voter a address: 9 Grove Street, Mechanicville.

Court's Ruling: Objection sustained; Board Determination overruled. Signature invalidated. Because of illegibility, signature cannot be matched with the name of a registered voter at the address. While the signature could possibly be initials of P.A. Gaudette, Jr., the signature does not match that in the NYS Voter information (NYSCEF Document 16) and no evidence to explain the difference was offered.

Page 13, line 4: Basis: Uninitialed Alteration to date on signature line.

Court's Ruling: Objection sustained; Board Determination overruled. There is clearly a visible change or cross out of the date on the signature line that is not an overwrite and is not initialed or explained, as such it constitutes a material alteration, and the signature must be invalidated.

Page 14, line 1: This signature is a duplicate of the signature on Page 1, line 3.

Court's Ruling: This signature was improperly invalidated instead of the signature on page 1, line 3. Therefore, this signature is restored as valid.

### C. CONCLUSION

This Court finds that Candidates designating petition required 75 valid signatures. Candidates submitted a petition containing 118 signatures on 14 pages. The Court finds 48 invalid signatures, leaving 70 valid signatures. Candidates' Petition is invalid and the names of Frank Scirocco, Edward





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Marcone, Kevin Cronin and George Brown, shall not appear on the Primary Election ballot for the Conservative Party Primary to be held June 28, 2022 as a candidates for the office of Delegate or Alternate Delegate, 4 th Judicial Nominating Convention, in the 113 th Assembly District.

THE COURT'S RULING For the reasons stated above, it is hereby

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11 of 11 ORDERED, The Petition of David Buchyn in Proceeding No. 1 be and hereby is granted; and it is further

ORDERED, that the Designating Petition of Frank Scirocco, Edward Marcone, Kevin Cronin and George Brown, purporting to designate them as candidates for the party positions of Delegate and/or Alternate Delgate to the Conservative Party 4 th Judicial District Nominating Convention for the Primary Election to be held June 28, 2022 be and hereby is invalidated; and it is further ORDERED, that the New York State Board of Elections be and hereby is directed to reject said Designating Petition as invalid; and it is further ORDERED, that the New York State Board of Elections be and hereby is restrained, enjoined and prohibited from placing the names of Frank Scirocco, Edward Marcone, Kevin Cronin and George Brown on the ballot for the Conservative Party Primary Election to be held June 28, 2022, as candidates for the offices of Delegate, 4 th Judicial Nominating Convention, from the 113 th Assembly District and Alternate Delegate, 4 th Judicial Nominating Convention, from the 108 th Assembly District, respectively; and it is further ORDERED, that the petition of Frank Scirocco, Edward Marcone, Kevin Cronin and George Brown in Proceeding No. 2 to validate their designating petition be and hereby is denied in its entirety; and it is further ORDERED, that this constitutes the Decision and Order of the Court.

Dated: May 4, 2022 at Schenectady, New York

Papers Considered: HON. MICHAEL R. CUEVAS Supreme Court Justice

Proceeding No. 1: NYSCEF Documents 1 -32 Proceeding No. 2: NYSCEF Documents 1 -10

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