

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. 700003/2012

In the Matter of the Application of
LEWIS FIDLER,

Petitioner,

- against -

DAVID STOROBIN

- 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 Special Election held on March 20, 2012 for the Public Office of State Senator from the 27th State Senate 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 116-106(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.

In the Matter of the Application of
DAVID STOROBIN,

Cross-Petitioner,

- against -

LEWIS FIDLER,

- 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 Special Election held on March 20, 2012 for the Public Office of State Senator from the 27th State Senate District, in the County of Kings and directing the

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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 116-106(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.

PLEASE TAKE NOTICE, that within is a true copy of a Decision / Order dated May 7, 2012 and duly entered in the Office of the Clerk of the Supreme Court, County of Kings on May 8, 2012.

Dated: New York, New York
May 11, 2012

Respectfully submitted,



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At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of May, 2012.

PRESENT:

HON. LARRY D. MARTIN

Justice.

-----X

IN THE MATTER OF THE APPLICATION OF
LEWIS FIDLER,

Petitioner,

-against-

Index No. 700003/12

DAVID STOROBIN AND BOARD OF ELECTIONS IN
THE CITY OF NEW YORK,

Respondents,

-----X

IN THE MATTER OF THE APPLICATION OF
DAVID STOROBIN,

CROSS PETITIONER,

-against-

DAVID STOROBIN AND BOARD OF ELECTIONS IN
THE CITY OF NEW YORK,

CROSS RESPONDENTS.

-----X

The following papers numbered 1 to 4 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers Fidler's Bill of Particulars _____

Papers Numbered

_____ 1-2 _____
_____ 3 _____

_____ 4 _____

Upon the foregoing papers, and as well as the proceedings held before the court from May 1, 2012 until May 4, 2012, petitioner Lewis Fidler (Fidler) seeks to declare invalid approximately 119 ballots cast with respect to the March 20, 2012 special election for the office of State Senator from the 27th State Senate District on the ground that the absentee ballots were obtained by way of fraud on the part of respondent/cross petitioner David Storobin's (Storobin) campaign.¹

As to the merits of petitioner's fraud allegations, the court has considered the evidence adduced at the trial, including the exhibits received in evidence, and evaluated the credibility of the witnesses based upon their demeanor, the manner in which they testified, and the consistency, accuracy and probability or improbability of their testimony in light of all other evidence. Based upon the foregoing, the court finds that petitioner has failed to meet his burden of establishing, by clear and convincing evidence, that Ms. Pometko or Storobin are chargeable with knowledge of any fraud with respect to the procurement of absentee ballots (*see Testa v DeVaul*, 65 AD3d 651 [2009]; *Matter of Perez v Galarza*, 21 AD3d 508 [2005]; *Matter of McRae v Jennings*, 307 AD2d 1012 [2003]; *Matter of Ragusa v Roper*, 286 AD2d 516, 517 [2001]). In fact, the evidence adduced at trial falls far short of the allegations contained in the petition and bill of particulars.

¹ The relevant factual background and procedural history of this special proceeding are detailed in this court's order, dated April 23, 2012, denying Storobin's summary judgment motion, this court's order, dated April 30, 2012, determining Storobin's challenge to the validity of six absentee ballots, and this court's decision, dated May 7, 2012, stating the court's reasons for denying Storobin's motion to dismiss Fidler's petition with respect to the fraud claims.

In his pleadings, petitioner alleged that Storobin committed fraud by hiring Alla Pometko to conduct an "early voting operation" in which she persuaded voters residing at 161 Corbin Place in Brooklyn to designate her as their representative to receive an absentee ballot application on their behalf under threat of losing their apartments and/or public assistance benefits. Petitioner further alleged that Ms. Pometko arranged for voters to be brought to the Shorefront Y Senior Center to sign absentee ballot applications.

Specifically, Fidler alleged fraud with respect to absentee ballot applications that were filled out by Alla Pometko, who at trial conceded that she filled out absentee ballot application forms for approximately 177 voters and received 177 absentee ballots from the Board of Elections in the City of New York (the Board) on behalf of these voters. Of these ballots, approximately 130 were returned to the Board for canvassing. Approximately 11 of the voters actually voted at their polling site despite having submitted the absentee ballot.² However, by operation of Election Law § 209 (2) (a) (i) (A) , those ballots have been set aside and will not be cast or canvassed. Thus, Fidler has not been aggrieved by the return of these absentee ballots to the Board. Further, with respect to the approximately 47 ballots that were not returned to the Board, Fidler has failed to introduce any evidence showing fraud with respect to the failure to return these ballots.³ In any event, the court's jurisdiction

²In his petition, Fidler alleged that 16 voters returned absentee ballots and also voted at their polling place. However, in his subsequent bill of particulars, Fidler only listed 11 voters who fell into this category.

³In this regard, at oral argument before the court, Fidler intimated these 47 ballots were not returned to the Board because the voters voted for him instead of Storobin.

under Election Law § 16-106 is limited, and does not extend to providing any relief with respect to these 47 ballots (*see generally Delgado v Sutherland*, 97 NY2d 420 [2002]).

Pursuant to Election Law § 8-400 (3) (c), when filling out an application for an absentee ballot, the voter is required to, *inter alia*, make a “statement, as appropriate, that on the day of such election the applicant *expects in good faith* to be in one of the following categories: (i) absent from the county of his or her residence, or if a resident of the city of New York absent from said city; provided, however, if the applicant expects to be absent from such county or city for a duration covering more than one election and seeks an absentee ballot for each election, he or she shall state the dates when he or she expects to begin and end such absence; or (ii) unable to appear at a polling place because of illness or physical disability or duties related to the primary care of one or more individuals who are ill or physically disabled.” Thus, as noted by the court in *Matter of Cristiano v Otsego County Board of Elections*, 181 AD2d 941 [1992]), the issue is “not whether a voter was actually disabled but whether the application was made in good faith that the voter would be disabled” and, as such, what matters “is not the voter's physical capabilities on the day of the election, but rather the voter's expectations at the time of applying for an absentee ballot.” Furthermore, the court notes that while section 8-400(4) previously required the voter to show “the particulars of his illness or disability” in order to qualify as permanently disabled, that requirement was removed as of April 28, 2010 (*compare id.*, with Election Law §8-400[4] [McKinney 2009]).

Upon the credible testimony and evidence adduced at the hearing herein, the court finds that the petitioner has failed to establish, by clear and convincing evidence, that Ms. Pometko engaged in any fraudulent activities with respect to her efforts to procure absentee ballots on behalf of voters (*see Miller v Boyland*, 143 AD2d 237 [1988]). Although the testimony at trial has arguably revealed some irregularities relating to the procurement of some of the absentee ballots, the petitioner has failed to meet his burden of demonstrating by clear and convincing evidence that such irregularities were the result of fraud, or that any fraudulent conduct took place on the part of Ms. Pometko or anyone else affiliated with the Storobin campaign (*see Matter of Harris v Duran*, 76 AD3d 658, 659 [2010]; *Matter of Hennessey v DiCarlo*, 21 AD3d 505, 506 [2005]; *Matter of McRae v Jennings*, 307 AD2d 1012, 1013 [2003]).

For instance, although Ms. Pometko testified that she did not personally deliver the absentee ballots to everyone for whom she submitted an application, and that she allowed other Storobin campaign volunteers to deliver absentee ballots to said individuals, the court does not find any implication of fraudulent conduct on Ms. Pometko's part.

Furthermore, the petitioner has failed to establish, by clear and convincing evidence, that Ms. Pometko knowingly submitted false absentee ballot applications claiming permanent disability for persons who were not in fact disabled. During the trial testimony, it was revealed that Ms. Pometko was the one who filled out the absentee ballot application for many of the prospective voters at 161 Corbin Place. The court, however, notes that, except for the signature, there is no requirement in the Election Law that the absentee ballot

application must be filled out personally by the applicant (*see* Election Law § 8-400 [6], [7]). The Election Law provides that before a voter may cast an absentee ballot, he or she must complete an absentee ballot application (*see* Election Law § 8-400 [2]). The application must include certain information; for example, the voter must specify the reason for his or her absence as well as their full name, date of birth, and residence address, mailing address if different from the residence address, and his or her town or city and an address to which the ballot shall be mailed (Election Law §8-400[3]).

At the hearing, the petitioner presented the testimony of several individuals who resided at 161 Corbin Place, all of whom testified that on the day of the election, they voted in person at the polling site located on the first floor of their building, despite having signed an absentee ballot application. Although their respective applications for absentee ballots indicated that they were "requesting, in good faith, an absentee ballot due to permanent illness or physical disability" all of the witnesses testified that they never made any representations to anyone that they were either too sick or otherwise incapable of getting to the polling site on the day of the election. However, based on the testimony of these witnesses, it cannot be said that Ms. Pometko engaged in any fraudulent conduct. There was no evidence that she coerced or induced any of the witnesses to falsely apply for an absentee ballot. Nor was there evidence presented that Ms. Pometko made any false representations or threats to these voters in her efforts to procure an absentee ballot on their behalf. Four of the five witnesses admitted that they in fact signed their respective absentee ballot applications. One witness, Mr. Polyakov testified that he did not think that it was his

signature on the absentee ballot application. However, the court asked him to sign a blank piece of paper and compared that signature to the signature on the absentee ballot application, as well as to the signature on Mr. Polyakov's voter registration card, all of which the court found to have been made by the same person. Again, the court finds that the testimony of these witnesses fails to establish by clear and convincing evidence that Ms. Pometko engaged in a fraudulent scheme to induce voters to submit false absentee ballot applications under threat of losing their apartment or public assistance.

The court notes that petitioner has offered testimony regarding five of the absentee ballots submitted by Ms. Pometko and has failed to establish by clear and convincing evidence through the testimony of these witnesses that Ms. Pometko fraudulently induced any of these five applicants to submit false absentee voter applications, and has failed to introduce any evidence whatsoever pertaining to the remaining absentee ballots. Furthermore, the court notes that since each of these five witnesses appeared and voted at their polling site, their absentee ballots have already been invalidated (*see* Election Law § 209 [2] [a] [i] [A]). Additionally, the court notes that even if the court were to determine that there was some impropriety regarding what information Pometko conveyed to these five voters regarding the absentee ballot application, the court cannot make an inference regarding what information was or was not conveyed to the voters that did not appear and testify before the court.

Additionally, that fact that the property manager for 161 Corbin Place, Inna Stavitsky, testified that various voters, for whom Ms. Pometko had procured absentee ballots based on

permanently disabled grounds, were, in her opinion, capable of walking around and/or attending the dining room⁴, does not, standing alone, amount to fraud with respect to those voters.

Here, the court credits the testimony of Ms. Pometko that she always filled out the absentee ballot application in the presence of the prospective voter after discussing it with them (*see Matter of Harris v Duran*, 76 AD3d 658, 659 [2010][holding that the court's assessment of a witnesses' credibility is entitled to substantial deference]; *Matter of Drace v Sayegh*, 43 AD3d 481,482 [2007]). More importantly, the court notes that the petitioner has failed to introduce any evidence that Ms. Pometko filled in any information after the application had been signed by the prospective voter. Nor was any evidence presented by the petitioner that Ms. Pometko falsely informed or misled any voters into believing that he/she was eligible to cast an absentee ballot under the permanently disabled category. In considering this evidence, the court notes that the application form itself contains no mention of the statutory requirement that the voter be "unable to appear at a polling place" because of the disability (*cf.* Election Law § 8-400 [3] [c]).⁵ Finally, the court notes that petitioner failed to introduce any evidence whatsoever related to the allegations regarding Pometko procuring absentee ballot applications at the Shorefront Y.

⁴ The trial testimony revealed that an election polling site was located on the first floor of 161 Corbin Place, right next to the dining hall, and was accessible via an elevator.

⁵ The court further notes that the Board representative testified that the absentee ballot application did not come with a separate instruction sheet. It appears that the voter is only required to make a representation regarding his or her ability to appear at the polling place as part of the verification that is printed on the absentee ballot envelope.

In sum, the court finds that based upon its' review of the credible evidence during this hearing, the petitioner has failed to establish, by clear and convincing evidence, any conduct on the part of Ms. Pometko sufficient to rise to the level of fraud that would necessitate the disenfranchisement of these 119 voters who submitted absentee ballots indicating their intention to cast a vote in this special election (NY Const, art I, § 1).

Accordingly, the petition is denied and the Board of Elections is hereby **ORDERED** to cast and canvass all of the 119 absentee ballots at issue in this trial.

The foregoing constitutes the decision and order of the court.

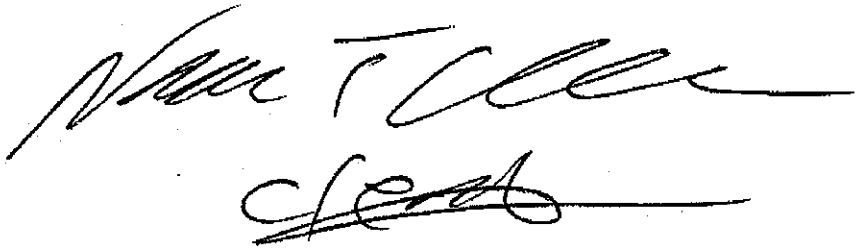
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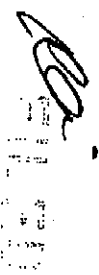
HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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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: May 11, 2012



Gene Berardelli, Esq.
