New Jersey
Appleseed

July 30, 2012

Hon. Jack M. Sabatino
Richard J. Hughes Justice Center
25 Market Street
Trenton, N.J. 08625-0977

Hon. John C. Kennedy
LeRoy F. Smith, Jr. Public Safety Complex
60 Nelson Place
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Hon. Marianne Espinosa
158 Headquarters Plaza, Suite 1101
Morristown, N.J. 07960-3965

Re: Berry et al. v. Di Josie,
Docket No. A-5569-11T4
Motion No. M-7071-11
Sat Below: Hon. Louis R. Meloni, J.S.C.

Dear Judges Sabation, Kennedy and Espinosa:

Plaintiffs Joshua Berry, Thomas Crone, Elizabeth Holzman, Don Choyce and Robbie Traylor (the "Plaintiffs" or "Committee of Petitioners") submit this letter-brief in further support of their motion for emergent relief and their appeal of the trial court's decision upholding Defendant DiJosie's rejection of their Local Public Contracting Law Initiative Petition as "insufficient." The two questions before this court are whether Defendant DiJosie, the Gloucester Township Clerk, erroneously

rejected 205 otherwise valid signatures based on her legal conclusion that the corrected circulator affidavits were "improper[ly] acknowledge[d]," (Db10); and, if so, whether such violation of Plaintiffs' substantive right of initiative, as provided in N.J.S.A. 40:69A-184 *et seq.*, constitutes a violation of section (c) of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 (that would render Plaintiffs, as the prevailing party, entitled to reasonable attorneys fees and costs). Plaintiffs assert that the answer to these related questions is an unqualified "yes." Defendant DiJosie does not offer any facts or law that dictate otherwise.

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PRELIMINARY STATEMENT

In her response papers, the Township Clerk now states for the first time that she would have accepted corrected circulator affidavits if prepared pursuant to methods other than the one she prescribed. (Db2). Perhaps, if she had set forth those options at the time she initially notified the Committee of Petitioners of her determination of insufficiency, we would not be here today. Nonetheless, she still deems the method employed by the Committee of Petitioners to be improper, because the "procedure [employed by the Committee] lends itself to the conclusion that the affidavit was signed without a petition form attached." (Db4).

Indeed, all the methods she now deems acceptable (*i.e.*, submitting the corrected affidavits attached to copies of the petitions, (Db3-4); signing and notarizing the affidavits in her office (Db7-8); and "present[ing]" a notary at her office to further "certify that each acknowledgement clause was signed with a form of the petition attached" (Db8)) would require a Committee of Petitioners to prove, at the time of filing, that the circulator affidavits (not just corrected affidavits) were signed and notarized when attached to the relevant petition. This burden of proof is not supported by N.J.S.A. 40:69A-186 or the law governing the obligations of a notary public. The initiative statute simply requires that the circulator affidavit

be attached to each petition paper at the time of filing; it neither requires that the affidavit be "contained" in the petition, as the full text of the ordinance is required to be, nor appear "on" each paper, as is required of the name of each member of the Committee.

Accordingly, it was a clear abuse of her discretion to reject the 205 signatures appearing on petitions associated with circulator affidavits that were signed and notarized in accordance with the law governing notaries, and where the Committee of Petitioners sought to attach such affidavits to the relevant petitions, identified by corresponding numbers, at the time of filing. The correction method employed by Plaintiffs was not just proper as a matter of law, but as a matter of statewide policy. It represents an optimum accommodation of the Clerk's obligations to retain possession of public records filed with her office, at the same time that it permits, on a liberal basis, correction of circulator affidavits that often involve several circulators and/or notaries.

LEGAL ARGUMENT

I. PLAINTIFFS CORRECTED THE DEFICIENT CIRCULATOR AFFIDAVITS IN ACCORDANCE WITH THE LAW REGARDING SWORN STATEMENTS WITNESSED BY A NOTARY PUBLIC AND SUBMITTED SUCH CORRECTED AFFIDAVITS IN ACCORDANCE WITH N.J.S.A. 40:69A-186 AND 188.

For the first time in this litigation, Defendant DiJosie states that the Committee of Petitioners was not obligated to

follow the "the method of correction" that she suggested. (Db2). See also (Db9-10) ("Nowhere was it suggested that the only correction measure was that suggested by the Township Clerk"). However, she continues to insist that the "method chosen by the Committee of Petitioners was an incorrect method. (Db10)

A review of the methods she deems acceptable as well as her explanation as to why she found Plaintiffs' method wanting indicate, however, a fundamental misunderstanding of the facts of this case, and the governing law. First, Defendant DiJosie keeps repeating throughout her response that Plaintiffs delivered sheets of paper "containing a notary statement, but without attachment." (Db3). See also (Db4)("a 'bare' notary statement without attachment"); (Db7)(submitted affidavits were "signed separate and apart from any petition and submitted void of any attached petition").

Based on the record such statements are inaccurate and misleading at best: Each notary statement (*i.e.*, notarization by the notary public) was contained on the same page as the circulator affidavit; and each circulator affidavit was prepared, sworn to and signed by a given circulator with reference to a particular petition, as indicated by the number appearing on the corrected circulator affidavit. (Pa38) In addition to the corrected affidavits themselves, Plaintiffs produced evidence to the Court below describing the process the

Committee of Petitioners employed when correcting the affidavits. (Pa104). This testimony was consistent with the corrected affidavits themselves, which each indicate a petition number on its face, and the testimony of Ms. DiJosie (Pa92, ¶16)

In addition to submitting "bare" circulator affidavits, Defendant DiJosie finds fault with Plaintiffs' instruction to her "to place them on unidentified petitions." (Db10) She finds that this correction method failed to "satisfy the [notary's] requirement of care [and] the requirements of N.J.S.A. 40:69A-186." Id. See also (Db3)(Plaintiffs instruction to the Clerk as to "where to attach the undocumented notary clause was improper and lacked any level of credibility or veracity").

Again, the record indicates, despite Ms. DiJosie's silence on the matter, that Plaintiffs directed her, at the time of filing, to attach a given circulator affidavit to the original petition that had the same number on it as the corrected affidavit. In this way, petitions were not "unidentified," as she currently asserts. Rather, circulators were aware of the exact petition to which they were certifying that they were the circulator, and the public notary was able to confirm that the circulator (*i.e.*, the affiant) was aware of the statements given and to which the affiant was swearing the truth. Accordingly, there is nothing in the record that supports DiJosie's

conclusion that the notary breached her duties since she did not know how the circulator affidavit would be used. (Db9)[1]

The correction methods that Ms. DiJosie now deems would have been acceptable also indicate her erroneous interpretation of N.J.S.A.40:69A-186, and the law governing notaries. Contrary to the Clerk's implicit legal conclusions, Sec. 186 does not require the circulator affidavit to be attached to the relevant petition at the time it is signed and notarized, rather than at the time of filing.[2] Furthermore, as she now admits, the duty of

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[1] In her response, Defendant DiJosie complains that neither the circulator "affiant nor the notary" came to her office to provide her with "a method of verification" that affidavits were prepared in the presence of copies of the originals. (Db8-9) She also states that the Committee of Petitioners did "not produce such notary at the July 10th hearing to support their explanation." (Db9). First and foremost, the corrected affidavits themselves are evidence that Plaintiffs had copies of the original petitions at the time of signing and notarization. Otherwise, they would not have been able to identify the relevant circulator with the relevant petition, nor the additional two petitions that needed to be corrected. In addition, the July 10th plenary hearing was solely to determine whether DiJosie should have rejected additional signatures based on affidavits that she received during the process; Plaintiffs had no right to produce evidence at that hearing pertaining to its claims under the June 20, 2012 Order. See (Db6)(admitting that the record of July 10th is silent as to the issues on appeal).

[2] Each of DiJosie's acceptable methods involve proof that the circulator completes the affidavit and has it notarized after it is attached to the relevant petition: submitting the corrected affidavits attached to copies of the petitions, (Db3-4); signing and notarizing the affidavits in her office (Db7-8); and "present[ing]" a notary at her office to further "certify that each acknowledgement clause was signed with a form of the petition attached" (Db8))It should be noted, however, that

a notary extends to "ensur[ing] herself that the signers of the circulator affidavits were the persons they purported to be and that those affiants had knowledge of the statements to which they were swearing to the truth." (Db9). No more and no less.

In contrast to the full text of an initiated ordinance, or the name of each of the Committee of Petitioners, N.J.S.A. 40:69A-186 does not require the circulator affidavit to be contained within the petition paper that is circulated to the voters. Indeed, completion of the circulator affidavit can only be made after a given circulator has solicited all the signatures appearing on the petition and she is at the point of preparing to submit the petition to the clerk. Again, there is nothing in the statute that requires that a blank circulator

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submitting the corrected affidavits attached to copies of the petitions, like submitting the circulator affidavits attached to the initial petitions, does not actually prove that the circulator affidavits were signed and notarized when attached to the relevant petition. The inability of a clerk to determine when the affidavit was completed in the process is exactly the reason why Plaintiffs assert that the statute does not impose such a requirement. If it did the statute would require that the circulator affidavit be on the petition paper, like the initial petition form Plaintiff voluntarily employed in this case. Moreover, it is rather incredible to believe that had Plaintiffs attached the copies of the petitions to their corrected circulator affidavits and had resubmitted those copies that DiJosie would have found the affidavits acceptable. If failure to attach the copies of the petition to the affidavits was her determinative factor (in light of the petition numbers appearing on the circulator affidavits), she surely would be elevating form over substance, and her conclusion to reject the affidavits, not attached to petition copies, would be similarly defective.

affidavit be attached to or contained on the petition paper at the time it is completed. An affiant must simply know to which petition she is attaching her certification, prior to signing and notarizing it. In this case, each of the circulators --- and there were at least four of them[3]--- satisfied this obligation.

In this way, Plaintiffs do not take issue with Defendant DiJosie's "refusal to return the filed original petitions," as

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[3] In her response papers, Defendant DiJosie insists that the petitions "that contained an improper notary were petitions circulated by a member of the Committee of Petitioners (Elizabeth Holzman) with the exception of one petition containing 11 signatures." (Db3) She makes this assertion without reference to the record. However, the public record (not the court record) in this matter indicates that the corrected circulator affidavits involved four (4) circulators, including two Plaintiffs: Petition No. 1 (circulated by Tom Crone; initially notarized by Ida M. Ricks-McClendon) (Pa83;Pa88;Pa95); No. 5(circulated by Beth Holzman; notarized by Ida M. Ricks-McClendon); No. 8 (circulated by Beth Holzman; notarized by Ida M. Ricks-McClendon); No. 9 (circulated by Beth Holzman; notarized by Ida M. Ricks-McClendon); No. 11 (circulated by Beth Holzman; notarized by Ida M. Ricks-McClendon); No. 15 (circulated by Beth Holzman; notarized by Ida M. Ricks-McClendon);No. 16 (circulated by JoAnn Young; notarized by Maguerite E. Brecker); No. 17 (circulated by JoAnn Young; notarized by Maguerite E. Brecker); No. 21 (circulated by Beth Holzman; notarized by Ida M. Ricks-McClendon); No. 24 (circulated by James Rinier; notarized by Ida M. Ricks-McClendon); No. 25 (circulated by Tom Crone; notarized by Ida M. Ricks-McClendon); No. 55 (circulated by Tom Crone; notarized by Ida M. Ricks-McClendon); and No. 56 (circulated by Tom Crone; notarized by Ida M. Ricks-McClendon). Accordingly, correction of the relevant circulator affidavits required the presence of four circulators and a notary; not "only the presence of one member of the Committee of Petitioners and one circulator, with a notary public," as DiJosie incorrectly asserts. (Db3).

she claims. Plaintiffs agree that it is her duty to retain the original petition papers in her possession once they have been filed.[4] But it is also her duty to process initiative petitions in accordance with the law, interpret that law liberally, and not to impose unreasonable restrictions on the right of initiative nor make erroneous interpretations of law (let alone undermine municipal practice prevailing in other parts of the State). Defendant DiJosie's rejection of 205 otherwise qualified signatures simply because Plaintiffs did not correct the circulator affidavits in her office cannot withstand scrutiny. This finding holds regardless of whether this Court concludes that she sincerely believed (though there is evidence to the contrary) that it was the only way that Plaintiffs could establish that the circulators and notary properly completed the corrected affidavit forms.

II. PLAINTIFFS NEED NOT SHOW "THREATS, INTIMIDATION, OR COERCION" IN ORDER TO PREVAIL ON THEIR NEW JERSEY CIVIL RIGHTS ACT CLAIM.

In her response, the Township Clerk adamantly denies that she has deprived Plaintiffs or the voters of Gloucester Township their statutory right to initiative for purposes of the New

[4] See N.J.S.A. 47:3-17 (prohibiting clerk from transferring or disposing of public records, such as initiative petitions, except as allowed by state regulations); and N.J.S.A. 19:10-1(requiring clerk to preserve all documents relating to elections that are filed with clerk for a period of two years).

Jersey Civil Rights Act, ("NJCRA"). (Db11). She claims that she acted within the realm of her discretion, was responsive to Plaintiffs' "request to amend" their petition, and "fully responsive to additional signatures submitted." (Db12). Defendant DiJosie specifically asserts that her "conclusions . . . were not for purpose of depriving [Plaintiffs of] the right of initiative, and were most certainly not concluded to formulate any threats, intimidation or coercion." (Db11). Any deprivation of their civil rights, therefore, was caused by their own "failure", that is "their breach" of an obligation to follow the clear language and responsibility as Committee of Petitioners pursuant to the initiative statute." (Db11)

This "blame the victim" line of defense is very weak in face of the Clerk's rejection of 205 signatures appearing on petitions associated with circulator affidavits that were properly prepared, signed and notarized, as established in Point I, supra.; her rejection of 299 signatures because they were collected by persons other than the Committee of Petitioners, which was reversed by the trial court (Pa39-46); her refusal to reconsider her decision after receiving an extensive legal memorandum prepared for the Committee of Petitioners by their attorney indicating that her decision violated the law and New Jersey practice in other municipalities (Pa47-54); and her decision to decline investigating the facts and circumstances

surrounding affidavits that she received during the review process alleging that Plaintiffs had committed "fraud and misrepresentation;" and instead, to let those accusations hang over the Plaintiffs, only to be resolved after Plaintiffs brought an Order to Show Cause seeking reversal of rejection of their initiative petition (Pa89-93).

Moreover, such line of defense is wrong as a matter of law. Implicitly, Gloucester Township appears to being making the claim that Plaintiffs must show "threats, intimidation, or coercion" in order to prevail on their NJCRA claim. The Appellate Division, in Felicioni v. Admin. Off. of the Courts, 404 N.J. Super. 382 (App. Div. 2008), has already considered, and ruled against, this construction of the statute. In Felicioni, the Court explained:

> [P]roperly read, the statute provides a person may bring a civil action under the Act in two circumstances: (1) when he's deprived of a right, *or* (2)when his rights are interfered with by threats, intimidation, coercion or force."

Id. at 400 (emphasis in original). What Defendant did here was not merely to interfere with, but to actually deprive Plaintiffs of, their statutory initiative rights.[5] Unless reversed by this

[5] Defendant seems to be arguing that Plaintiffs have not been deprived of their statutory right to initiative since N.J.S.A. 40:69A-188 states that "[t]he finding of the insufficiency of a petition shall not prejudice the filing of a new petition for the same purpose." (Db8). Specifically, setting forth an alleged fact that is not in the record, Defendant states that

Appellate Court, Defendant's actions have deprived Plaintiffs of their right to force a public vote on their Local Contract Reform Ordinance, limiting the practice known as "pay-to-play." Absent Court intervention, the approximately 1,100 signatures submitted by Plaintiffs will never be accepted as sufficient, and no vote will be scheduled for this November. Defendant's conduct is far beyond ordinary "interference" and constitutes an outright denial and deprivation of Plaintiffs' rights. As such, they need not prove threats, intimidation, coercion, or force.

Furthermore, Plaintiffs reiterate that they do not argue that attorney's fees should attach every time municipal action is deemed arbitrary and capricious, as we assert is the case herein. Indeed, where an appellant prevails in the "ordinary" judicial review of decisions of the planning board, zoning board, or even rent control board, Plaintiffs agree that fee-shifting would be highly unlikely, as the Court observed in Silverman v. Rent Leveling Bd. of Cliffside Park, 274 N.J. Super. 524 (App. Div. 1994).

"[r]eference is provided in this section as to the same Committee of Petitioners have commenced circulation of second petition immediately following the June 8, 2012 ruling by the lower court." (Db4). Unless Defendant intends to argue that this case is moot (which as a factual matter it is not), the fact that the Committee of Petitioners have the theoretical capacity to circulate a second petition initiating the same reform ordinance does not detract from the principle that DiJosie has deprived them of their statutory right to initiative by unlawfully rejecting their otherwise valid petition.

What makes this case different is that in the ordinary land-use or rent control case, there is no state law affirmatively granting the litigants a statutory right beyond the procedural right to judicial review. Here, there is. As Plaintiffs argued in the trial court and here that the statutes that grant lawmaking rights to citizens are quintessential rights-creating laws that affect the rights of thousands of people, not just the few individuals whose rights may be at stake in a land use case. When a government defendant violates those rights, it is eminently appropriate to ask that they pay for the vindication of those rights.

CONCLUSION

For the reasons stated herein and in Plaintiffs' merit brief, the decision of the Township Clerk should be reversed, and the Court should order that the Plaintiffs' Public Contracting Reform Ordinance Petition, as amended, constitutes a valid and sufficient initiative petition under N.J.S.A. 40A:69-184. This Court should also remand the matter to the lower court for a hearing to determine the actual amount of attorneys fees to which Plaintiffs are entitled as the prevailing parties in this litigation (including fees incurred in pursuing this matter at the appellate level).

Respectfully submitted,

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