

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

In the Matter of

HARRIS WEISS and AUSTIN STERNLIGHT,

Petitioners-Appellants,

-against-

ZEPHYR R. TEACHOUT,

Respondent-Respondent,

and THE NEW YORK STATE BOARD OF ELECTIONS,

Respondent,

APPELLANTS' BRIEF

QUESTION PRESENTED

1. May a candidate for Governor with dual residences retroactively change her election of her Vermont residence as her domicile over the past four and a half years to her New York residence in order to meet the five-year residence qualification of Article IV, Section 2, of the New York Constitution?

The court below answered yes.

NATURE OF THE PROCEEDING

This is an invalidating proceeding under Article 16 of the Election Law. It was commenced by the filing of an Order to Show Cause and Petition on July 22, 2014 and service of a copy of these papers by Guaranteed Overnight Delivery mail on that same day and the next day by affixing of a copy of the papers on the door of Respondent Zephyr R. Teachout's (hereinafter "Respondent") Brooklyn residence listed on her designating petition filed with the New York State Board of Elections.

The designating petition names Respondent as a candidate for Governor in the Democratic Party Primary Election to be held on September 9, 2014. Appellants' did not challenge the validity of the designating petition. Rather, they sought Respondent's disqualification from the ballot based on her failure to meet the five-year residency requirement for eligibility to hold the office of Governor as mandated in Article IV, Section 2, of the constitution. See, Election Law §6-122.

No threshold procedural issues were raised in the proceeding. Trial was held in Supreme Court, Kings County, on August 7 and 8.

This is an appeal from the Order issued and entered on August 11, 2014, by the Hon. Edgar G. Walker, that denied the Appellants' motion to disqualify Respondent from being a candidate on the Democratic Primary ballot for Governor.

STATEMENT OF FACTS

With the permission of the court, and by agreement of both sides' counsel, the trial proceeded rather expeditiously with Petitioners' and Respondent's cases going out of order as facilitated putting witnesses on the stand when they appeared in order to meet the need to conclude the trial under the time constraints of an expedited Election Law proceeding.

Respondent testified credibly and with admirable candor. She grew up in Norwich, Vermont and left to attend college at Yale. She then returned to Vermont where she worked for awhile before moving to New York City. She left to attend Duke Law School graduating in 1999. After clerking for a federal judge in Philadelphia, she returned to North Carolina to practice law. She later moved to Washington, DC to run a non-profit. From 2002 to 2007 she was involved in various advocacy and political campaigns. During that time her principal residence was in Vermont.

Respondent returned to Duke Law School in 2007 as a Visiting Assistant Professor. In 2009 she received an offer from Fordham Law School for a tenure track position as an Associate Professor. In the summer of 2009 she left North Carolina sending all of her furnishings and most of her belongings to her family's home in Norwich, Vermont. She came to New York City to take up the faculty

position at Fordham.

After arriving in New York Respondent stayed with friends, sublet and shared apartments and leased apartments. She generally used her Fordham office address for mail. Other mail went to her family address in Norwich, Vermont.

In addition to the substantial documentary evidence discussed *infra* Respondent's ongoing ties to her Vermont childhood home since 2009 have consisted of spending every Thanksgiving, Christmas and Easter there, and other occasional visits. She kept her automobile there and rarely brought it to New York. She spent summers at a cabin owned by her parents in Vermont and maintained community ties by performing in a summer theater in Vermont. She did research and writing during the summers in Vermont. (Tr., p. 47, l. 21 to p. 48, l. 22)

Petitioners-Appellants introduced into evidence a number of writings and documents without objection. Respondent unhesitatingly identified these documents and acknowledged her signature wherever it appeared as well as confirming her receipt or filing of them.

Fordham University Records

Pursuant to subpoena, Fordham University produced its employment records concerning Respondent and they were introduced into evidence without objection. The initial Fordham document is a letter to Respondent, dated August 4, 2009 offering her a tenure track position as an Associate Professor in the School of Law

for the 2009-2010 academic year. It is addressed to Respondent at her Durham, North Carolina address.

A June 15, 2010 letter, addressed to Respondent at her old North Carolina address, informs her that her salary will be increased for the 2010-2011 academic year. On December 15, 2010, a letter addressed to Respondent at 59 Sugartop Road, Norwich, Vermont (hereinafter “the Vermont address”) offers her reappointment as Associate Professor for two more years.

On February 1, 2011, the Fordham Provost wrote to inform Respondent of a salary increase for the 2010-2011 academic year was again increased. This letter uses Respondent’s former address in North Carolina.

The presumably happy news of another salary increase, for the 2011-2012 academic year is announced in a June 15, 2011 letter to Respondent addressed to her at the Vermont address.

On November 2, 2011, the Fordham Associate Vice President wrote to Respondent concerning the procedure for renewing her contract beyond August 31, 2013. This letter, addressed to Respondent at the Vermont address, states: “Notification of the decision will be mailed to your home address on May 15, 2012.”

The Fordham Provost sent a May 15, 2012 letter to Respondent at the Vermont address, notifying her that she was being offered reappointment for the

period September 1, 2013 to August 31, 2016.

A June 15, 2013 letter to the Vermont address informed Respondent that her salary for the 2013-2014 academic year would be \$185,974. Finally, a June 15, 2014 letter to Respondent at the Vermont address informs Respondent that until the resolution of discussions concerning salary increases for the Law Faculty her salary would remain the same.

All of the foregoing correspondence from Fordham is marked into evidence collectively as Petitioners Exhibit 1 (Pet. 1). Respondent acknowledged she received these letters. (Tr., pp. 8-9)

Fordham University also produced an “Employees Withholding Allowance Certificate”, the IRS Form W-4, that Respondent filed with Fordham upon beginning her employment in 2009. Filled in and signed by Respondent, for “home address” on the form Respondent provided the Vermont address. The W-4 form also advises: “Your employer may be required to send a copy of this form to the IRS.” Respondent acknowledged signing and submitting this for to Fordham. (Pet. 3; Tr., p. 33, ll. 4-14)

Also in evidence is the New York State Form IT-2104 filled out, signed and submitted by Respondent to Fordham when she began work there in 2009. She listed the Vermont address in the space for “Permanent home address”. (Pet. 4)

The annual W-2 statements for 2009 and 2010 issued by Fordham to

Respondent list for her the Vermont address. These forms show that no New York City income tax was withheld from Respondent's salary. (Pet. 5)

In addition, the W-2's for 2011, 2012 and 2013 list the Vermont address for Respondent and show that no local New York City income tax was withheld from her salary. (Pet. 6).

Respondent acknowledged filling out the W-4 and IT-2104 and receipt of these W-2's each year and testified that she knew copies of these forms were provided to the government tax agencies. (Tr., pp. 33 – 35, l.6; p. 36, l.11 – p.37, l.6)

State of North Carolina

Respondent admitted that in her 2013 North Carolina Bar Registration she gave the Vermont address. (Respondent's Pre-Trial Memorandum, p. 8; Tr., p. 42, l. 23 to p. 43, l. 11)

She also acknowledged having been disciplined in 2005 by the North Carolina Bar for failing to keep a North Carolina court and counsel informed as to her address and contact information after she left the State. (Tr., p. 43, ll. 12-23). The reprimand is a public document.

(<http://www.ncbar.gov/orders/volume%207/06050950.pdf>)

A certified record from the Superior Court of Durham County, North Carolina, reveals that Respondent provided that court with the Vermont address in

a 2013 case wherein she was the defendant answering a traffic citation. (Pet. 15).
(Tr., p. 47, ll. 11-15)

Federal Election Commission

In 2012 Respondent made a \$250 contribution to the Obama Victory Fund 2012. The contribution was duly reported to the Federal Election Commission. The address given for Respondent was the Vermont one. (Pet. 7)

Respondent acknowledged her professional familiarity with the Federal Campaign Finance Law and that she knew that a campaign committee would be filing a disclosure statement with the Federal Election Commission relying on the address given by a contributor. (Tr., p. 39, l. 21 to p. 40, l. 20)

She further testified that the contribution was made in connection with a fundraiser she co-hosted in New York. She attributed her using the Vermont address in making the contribution to “muscle memory”. (Tr., p. 41, l. 8 to p. 42, l. 2)

Transportation Safety Agency

Respondent testified that she had taken domestic airline flights on a number of occasions since 2009. Asked what she had provided as identification to TSA agents upon boarding the flight, she answered that sometimes she had used her passport and sometimes she had shown her Vermont driver’s license with the Vermont address. (Tr., p. 50, l. 11 to p. 51, l. 16)

New York DMV

The New York State Department of Motor Vehicles produced records and a witness who testified as to what the records meant.

The DMV record shows that in May 2013 Respondent purchased a Honda automobile in New York City. She went to a New York DMV Office and filled out and filed an “In-Transit Permit/Title Application”. In section 2 of the form, in the box calling for “Primary Registrant Address Where You Live”, she filled in “88 Sugartop Road, Norwich, VT”. (Pet. 2)

As a result of this application, New York DMV issued an “in transit” permit giving her a temporary registration plates valid from May 22 to June 20, 2013. (Pet. 2)

Also, as a result of the representation as to her address made in this application, she did not pay New York City and State sales tax on the purchase of the vehicle. (Tr., p. 30, ll. 17 - 23)

The New York DMV records also reveal that on May 5, 2014 Respondent obtained a New York driver’s license based on exchanging her Vermont license under the two states’ reciprocity agreement. (Pet. 2; Tr., p. 28, l. 16 to p. 29, l. 9)

In court Respondent produced a temporary, paper, NY driver’s license issued to her since she lost the license she obtained in May. The DMV records show she applied for a replacement license on August 1, 2014. (Pet. 2)

Vermont DMV

Respondent testified that she acquired a Vermont driver's license when she came to New York to take up her job at Fordham Law School. (Tr., p. 11, ll. 5 – 23)

On July 13, 2011 she renewed her Vermont driver's license until her next birthday in 2012. She answered "yes" to the statement on line 6 of the renewal application: "I certify that I am a Vermont Resident, as defined in Title 23 V. S.A. § 4." She also gave the Vermont address in the box calling for "Physical Address". (Pet. 17)

On November 20, 2012, Respondent again renewed her Vermont driver's license answering "yes" to the same certification of being a Vermont resident on line 6 of the renewal application. However, the application form had been changed to call for the applicant's "Physical Address (Legal Residence)". Respondent provided the Vermont address in this space. (Pet. 19)

Finally, on June 3, 2013 Respondent filed with Vermont DMV for a vehicle registration for the Honda she had purchased in New York. She gave her Vermont address and paid the sales tax on the New York purchase of the auto—to the State of Vermont. (Pet. 18)

Federal and State Tax Returns

A copy of Respondent's original federal and State income tax returns for

2009 was introduced into evidence. They contain conflicting information regarding her residence addresses: listing her Durham, NC address on the federal return and the NY IT-203 “Nonresident and Part-Year Resident” NY State form; also, listing a New York address as her home address; NY as her county; and stating “0” as the number of months she lived in NY City. The returns also contain an IT-360.1 “Change of City Resident Status” form that lists “0” as the amount of her income attributable to “New York City resident period.” (Pet. 8)

Respondent’s 2010 federal and NY and Massachusetts state tax returns list her Fordham office address as her home address. With respect to her NY State tax return Respondent stated she lived in New York City for only 10 months of the year. (Pet. 10)

Also introduced into evidence was a covering letter from an accountant, Sidney Kaufman, dated July 28, 2014 (after this proceeding was commenced), transmitting an amended NY State tax return for 2009. This amended return changed the “0” listing for New York City residence to 6 months and resulted in Respondent owing an additional \$3,402. (Pet. 9)

An amended NY State tax return for 2010, also prepared by Mr. Kaufman and dated July 28, 2014, was also placed in evidence. This return changed the number of months claimed as a New York City resident to 12 and resulted in an additional tax liability of \$4,986. (Pet. 11)

Delving further into the weeds of tax returns, Respondent introduced into evidence her 2011 tax returns. She also testified that she had filed these returns in early 2012. However, these returns are not amended returns. Mr. Kaufman's cover letter is dated July 29, 2014 and the federal, NY State and New York Metropolitan Commuter tax returns are all dated July 29, 2014. (Resp. U)

Respondent's initially could not explain the foregoing discrepancy. However, she later introduced into evidence cancelled checks showing that she had paid all of the amounts due on the 2011 returns in December of 2012.

Respondent also introduced copies of self-prepared tax returns for 2012 and 2013 that are undated and unsigned. They list her office address as her home address. (Resp. V and W).

Voter registration

On May 4, 2010 Respondent registered to vote in New York from 241 East 7th Street, Apt. 3A, New York, NY. She testified that she moved from that address in March 2011.

She testified that she voted from that address in New York County in 2012 and 2013 when she was living in Kings County. (Tr., p. 147, l. 21 to p. 149, l. 18; p. 155, l. 17 to p. 156, l. 11)

She finally changed her voter registration address to Brooklyn on March 28, 2014.

Respondent's evidence

Respondent and her witnesses testified credibly that she had different apartments in New York City at all times between September 2009 and the present time.

Without discussing in detail the exhibits she introduced into evidence, it suffices to say that she entertained in the places, slept there, kept personal belongings there. In sum, she had “a residence” in New York in the common understanding of the term.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN THE LEGAL ANALYSIS PERTAINING TO THE DETERMINATION OF DOMICILE IN A DUEL RESIDENCY SITUATION; THE CANDIDATE CLEARLY CHOSE VERMONT AS HER DOMICILE FOR THE LAST FIVE YEARS

As the court below stated, residence under the Election Law has long been held to be the equivalent of “domicile”. Markowitz v. Gumbs, 122 A.D.2d 906 (2d Dept.), lv. denied, 68 N.Y.2d 605 (1986).

However, the court below did not properly analyze the evidence applicable to a so-called “duel residency” situation. Rather the court treated the case as one

where the party challenging the “residence” is saying there is no real “residence” at the place the candidate claims one. Therefore, the court below applied the “clear and convincing evidence” burden to the proof of the wrong set of facts.

It ought to be clear that the constitutional provision stating that to be eligible for the office of Governor a person must have “been five years next preceding the election a resident of this state” is a legal requirement relating to the legal definition of resident as being a person who is domiciled in New York. NY Constitution, Art. IV, Section 2. Meehan v. Lomenzo, 34 A.D.2d 1024 (3d Dept.), affirmed, 27 N.Y.2d 600 (1970). Thus, recent cases suggesting that one may be a resident of one place for Election Law purposes and a domiciliary of elsewhere for other purposes have no applicability to the constitutional qualification.

It has long been axiomatic that a person may only have one domicile at a time. This has carried over into the election cases wherein a candidate has more than one residence in the ordinary meaning of the term. The principle that a person with more than one “residence” may chose one of them as her residence (i.e. domicile) under the Election Law has been upheld again and again. People v. O’Hara, 96 N.Y.2d 378, 384 (2001); Gallagher v. Dinkins, 41 A.D.2d 946 (2d Dept.), affirmed, 32 N.Y.2d 839 (1973); Ferguson v. McNab, 60 N.Y.2d 598 (1983).

Indeed, the decision below noted that Respondent “maintains a strong

connection with Vermont....” The evidence advanced by Appellants was not for the purpose of proving that Respondent did not have a residence in New York since the summer of 2009, Rather, it was to prove that between the two residences (New York and Vermont), by the documents filed with, and representations made to, various New York, Vermont, North Carolina and federal agencies she consistently made the choice that Vermont was her legal residence---her domicile. For this purpose the evidence is clear and convincing that Respondent chose the Vermont address as her legal residence, or domicile, in all or some of the years 2009, 2011, 20012 and 2013.

The only evidence that Respondent deviated in the election of the Vermont residence as her domicile is her voter registration filed on May 4, 2010. However, if that be deemed a manifestation of her choice of a New York domicile, notwithstanding all of the documents listing Vermont subsequently filed under the penalties of perjury,¹ it should be noted that the date of voter registration is too late to satisfy the five-year requirement. Her subsequent unlawful voting in New York County in 2012 and 2013 when she was staying in apartments in Kings County certainly ought not be the basis for holding her to have negated her choice of Vermont as her domicile.

The analysis undertaken in the decision below finds Respondent to be

¹ See, 23 V.S.A §§201, 202, 601. Also, See, NY VTL §1800.

credible in her testimony. However, it assumes she may have “misrepresented her actual residence address to regulatory bodies in New York and elsewhere for self-interested purposes” and states that “any improprieties are for other bodies to address and are not relevant to this determination.”

Appellants respectfully urge that the evidence ought to be viewed in a manner that gives effect to all of it as true, especially when it comes from a party whom the trier of fact has found to be a credible witness. That means all of Respondent’s statements, whether given in court, made in documents submitted to government agencies under the penalties of perjury, submitted to the bar officials and court in the state where she is admitted, or given on tax documents submitted to her employer, ought to be presumed to be true.

There is one way to reconcile all of the evidence to hold as true all of the statements made by Respondent, an attorney and law professor. That is to recognize that she has sufficient contacts with both New York and Vermont so as to have a “residence” in both states, and to hold that in 2009, 2011, 2012 and 2013 she elected the Vermont residence as her domicile. Appellants urge this Court to find this to be so as a matter of fact rather than to imply Respondent misrepresented the fact of her legal residence in multiple important matters.

Respondent appears to have changed the choice of the Vermont residence as her domicile when she decided to run for Governor in the Spring of 2014. Of

course, she may change the choice she made between the two residences. However, she may not change such a choice retroactively in order to cover the constitutionally mandated five-year period.

CONCLUSION

Wherefore, it is respectfully requested that the Order below be reversed, on the facts and the law, and that Respondent be disqualified as a candidate for Governor in the September 9, 2014 Democratic Party Primary Election.

Dated: Brooklyn, New York
August 15, 2014

Respectfully submitted,

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