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 11<sup>th</sup> day of August, 2014.

PRESENT:			
HON. EDGAR G. WALKER	Justice.		
In the Matter of the Application of	71		
HARRIS WEISS AND AUSTIN STERNL	ІСНТ,		
Petitio	oners,		
- against -		Index No. 7	'00014/14
ZEPHYR R. TEACHOUT,			
and THE NEW YORK STATE BOARD	OF ELECTIONS,		

Respondents.

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Designating Petition as it Purports to designate Respondent-Candidate for the Public Office of Governor of the State of New York, in the Democratic Party Primary Election to be held on September 9, 2014, and Restraining the NEW YORK STATE BOARD OF ELECTIONS from Printing and Placing the Name of Said Candidate Upon the Official Ballots of Such Primary Election.

In this special proceeding brought pursuant to Article 16 of the Election Law, the petitioners Harris Weiss and Austin Sternlicht seek to declare invalid the designating petition purporting to designate respondent-candidate Zephyr R. Teachout for the public office of governor of the State of New York in the Democratic Party Primary Election to be held on

September 9, 2014 on the ground that the respondent Teachout does not meet the residence requirements of Article IV, Section 2, of the New York State Constitution.

On or about July 14, 2014, a designating petition was filed with the respondent New York State Board of Elections (Board of Elections) designating Ms. Teachout a candidate for the office of governor for the Democratic Party primary election to be held on September 9, 2014. Following the filing of the designating petition, petitioners commenced this action and an action in Albany County for declarations that the petition was invalid and Ms. Teachout has counterclaimed to validate her petition in this action and commenced a special proceeding to validate in Albany county. It is undisputed that the Board of Elections found that the petition had sufficient signatures to place Ms. Teachout on the ballot. The parties have withdrawn the petitions in Albany County, and petitioners have since indicated that the only issue in this special proceeding is whether Ms. Teachout satisfies the constitutional residency requirements for the office of governor, an issue that the parties concede is beyond the jurisdictional purview of the Board of Elections (see Schwartz v Heffernan, 304 NY 474, 480 [1952]; Matter of Lindgren, 232 NY 59, 61-62 [1921]). This court held a trial on August 7, 2014 and August 8, 2014 to determine the issue of residency.

At issue in this trial is the requirement of Article IV, Section 2, of the New York State Constitution that, among other things, no person shall be eligible for the office of governor unless he or she has been a resident of New York for the five years preceding the general

election.1 "Residence" is "deemed to mean that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return" (Election Law § 1-104[22]; see Camardi v Sinawski, 297 AD2d357 [2002]). Under the Election Law, residence and domicile are treated as one and the same (see Fernandez v Monegro, 10 AD3d 429, 430 [2004]; Matter of Isabella v Hotaling, 207 AD2d 648, 650 [1994], lv. denied 84 NY2d 801 [1994]; Matter of Markowitz v Gumbs, 122 AD2d 906 [1986], lv denied 68 NY2d 605 [1986]). "The crucial determination whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent, coupled with, physical presence 'without any aura of sham'" (People v O'Hara, 96 NY2d 378, 385 [2001] quoting Matter of Gallagher v Dinkins, 41 AD2d 946, 947 [1993], affd 32 NY2d 839 [1973]; Thompson v Karben, 295 AD2d 438, 439 [2002]). Thus, to be a resident of a place, a person must be physically present with the intent to remain for a time (see Matter of Palla v Suffolk County Bd. of Elections, 31 NY2d 36, 47 [1972]; see also, Williams v Salerno, 792 F.2d 323, 327 [2d Cir.] [1986]).

New York courts have recognized that, in our modern mobile society, an individual can have more than one bona fide residence (*People v O'Hara*, 96 NY2d at 384). "[A]n individual having two residences may choose one to which [he or] she has legitimate, significant and continuing attachments as his or her residence for purposes of the Election

Article IV, Section 2, of the New York State Constitution provides that, "No person shall be eligible to the office of governor or lieutenant-governor except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding the election a resident of this state."

Law" ( *id.* at 385 [internal quotations marks omitted]). Furthermore, it is well settled that a challenger claiming that a candidate's residence is not his or her true residence has the burden of proving the same by clear and convincing evidence (*see Matter of Chaimowitz v Calcaterra*, 76 AD3d 685, 686 [2d Dept 2010]; *Matter of Stavisky v Koo*, 54 AD3d 432, 433-434 [2d Dept 2008]; *Fernandez*, 10 AD3d 429).

Applying the foregoing statements of law to the credible facts presented at trial, the court finds that the petitioners have not met their burden of proving by clear and convincing evidence that Ms. Teachout fails to meet the constitutional residency requirement (*see Hosley v Curry*, 85 NY2d 447 [1995]; *Thompson*, 295 AD2d at 440; *Rosenthal v Kelly*, 275 AD2d 429 [2000]).

The testimony adduced at trial revealed that Ms. Teachout was raised in Norwich, Vermont with her parents and four siblings. She moved out of her parent's Vermont home in 1989 when she graduated from high school. She thereafter attended Yale University in New Haven, Connecticut and graduated in 1993 with a BA degree. Ms. Teachout then attended Duke Law School, in North Carolina, and received her law degree in 1999. She is admitted to practice law in the state of North Carolina. Following graduation, Ms. Teachout did a judicial clerkship with the 3<sup>rd</sup> Circuit Court of Appeals in Philadelphia. She also worked as a death penalty lawyer in North Carolina, did both private sector and non-profit consulting work, and was involved in various advocacy and political campaigns. During this time frame (2002 until 2007), Ms. Teachout claimed that her principal home was in Vermont

(she testified that she lived in Montpelier and then Burlington, Vermont). She thereafter moved to North Carolina for two years (2007 to 2009) in order to take a two-year visiting assistant professorship position at Duke Law School. In May, 2009, Ms. Teachout accepted a tenure-track Associate Professor position at Fordham University Law School (Fordham), located in Manhattan, New York. Ms. Teachout thereafter moved to New York in or about June, 2009 in order to commence teaching as a full time faculty member for the Fall semester in August, 2009.

As to the petitioners' residency challenge, which specifically pertains to November, 2009 to the present date, the evidence and testimony adduced at trial established the following:

- 1. In June, 2009 Ms. Teachout moved to New York State and briefly resided at a sublet furnished apartment at 22 Irving Place in New York City until August, 2009.
- 2. September, 2009 to November, 2009 Ms. Teachout rented an apartment located at 228 West 25<sup>th</sup> Street in New York City.
- 3. December, 2009 to March, 2011 Ms. Teachout resided with a friend and rented space in her apartment located at 241 East 7<sup>th</sup> Street in New York City.
- 4. April, 2011 to October, 2011 Ms. Teachout resided at an apartment at 153 Roebling Street in Brooklyn, New York.
- 5. November, 2011 to November, 2012 Ms. Teachout resided at an apartment at 72 West 82<sup>nd</sup> Street in New York City.

6. In November, 2012, Ms. Teachout took up residence at an apartment located at 171 Washington Park, in Brooklyn, New York where she currently resides.

Ms. Teachout, as well as two other witnesses (friends of Ms. Teachout), all presented credible testimony showing the bona fides of her physical presence at the above-referenced apartments, and that they were all places where Ms. Teachout lived, ate her meals, slept, kept her personal items/clothing, furnished and/or decorated, and where she occasionally entertained. This testimony is also supported by documentary evidence in the form of rent and utility checks (Respondent's Exhibits B, E, H, I, O, P and S), leases (Petitioners' Exhibit 13; Respondent Exhibits L and R), and various e-mails/correspondence related to housewarming parties, lease renewals, and moving arrangements (Respondent's Exhibits, C, D, F, G, J, K and M).

In addition, at trial it was further established that in May, 2010, Ms. Teachout registered to vote in New York, and has not voted in any other jurisdiction since she moved to New York in 2009. The evidence also revealed that Ms. Teachout filed New York State Income Tax returns for years 2009, 2010, 2011, 2012 and 2013. (Petitioners' Exhibits 8, 9, 10 and 11; Respondent's Exhibits U, V and W). Her 2009 New York State IT-203 Nonresident and Part-Year Resident Income Tax Return sets forth "NY" as county of residence and listed "241 E. 7th Street, New York, NY as her "permanent home address" (Petitioner's Exhibit 8). The return further indicates the date she moved into New York State as 7/1/09. Ms. Teachout's 2010 New York State Income IT-201 Resident Tax Return

indicates "New York" as the county of residence, and that she maintained living quarters in New York City.<sup>2</sup> Her New York State Income IT-201 Resident Tax Return for 2011 indicates on the face of the return that she maintained living quarters in New York City during the year for 365 days/12 months (Respondent's Exhibit U). Additionally, her 2012 and 2013 New York State IT-201 Resident Income Tax Returns both indicate that Ms. Teachout maintained living quarters in New York City (Kings County) for the entire year, and list her current Brooklyn home address (171 Washington Park) as her "permanent home address" (Respondent's Exhibits V and W).

With respect to her summers, Ms. Teachout testified that she spent some time in Vermont visiting with her parents, and three siblings who reside there, working on her book, and engaging in other recreational activities (theater/performing arts). During the Summer of 2010, she spent three weeks in Washington D.C. doing research on her book at the Library of Congress, and a month in Arizona working with organizers in response to proposed legislation regarding racial profiling. She also spent a couple of weeks in Vermont during the Summer of 2011 helping her mother recuperate after breaking her leg.

<sup>&</sup>lt;sup>2</sup> Although is was revealed that Ms. Teachout filed amended income tax returns at the end of July 2014 for years 2009 and 2010, the modifications appear to relate to the New York City resident portion of her taxes. The revised 2009 tax return made a change to the "New York City Part year resident" section (E). The original return indicated that Ms. Teachout resided in New York City for 0 months, whereas the revised form states that she lived in New York City for 6 months (Petitioners' Exhibits 8 and 9). Her 2010 New York State tax return originally indicated that she resided in New York City for 292 days (10 months) of the year, but the amended return changed it to 365 days (12 months) (Petitioners' Exhibits 10 and 11).

It was further adduced at trial that in the Spring of 2010, Ms. Teachout spent seven weeks teaching a course at the Harvard Kennedy School in Cambridge, Massachusetts. During that time, Ms. Teachout also taught a class at Fordham. She testified that she spent three to four days in Cambridge, and the remainder of the week in New York to fulfill her responsibilities as a Fordham faculty member. Also, during those seven weeks Ms. Teachout never gave up her New York address, and made only temporary living arrangements in a furnished apartment in Cambridge that was typically used for visiting Kennedy faculty.

In the Spring of 2014, Ms. Teachout did not teach at Fordham, and instead spent four months (January to April) in Washington D.C. doing a fellowship at the New America Foundation. During that time, Ms. Teachout maintained her Fordham obligations by attending faculty meetings, and keeping up with her membership on certain committees. Although she sublet her Brooklyn apartment during this time, the sublet was only temporary, and she had only arranged for a temporary sublet in Washington D.C. during her time there.

Based upon the evidence adduced at trial, the court finds that commencing in or about June, 2009, to the present date, notwithstanding weekend trips, summer vacations and brief sojourns teaching courses in other states, Ms. Teachout has continuously maintained a domicile and residence in New York State, and was physically present here with the intent to remain for a time (*see Matter of Palla v Suffolk County Bd. of Elections*, 31 NY2d 36, 47 [1972]; *see also People v O'Hara*, 96 NY2d at 385). It is evident that since June, 2009, Ms.

Teachout has clearly "lived" in New York, as that term is commonly understood, in order to pursue her career as a Fordham professor.

In addressing the evidence, petitioners concede that Ms. Teachout has had a substantial physical presence in New York State for the past five years. Under ordinary circumstances, and at common law, the fact of this physical presence within New York is to be deemed consistent with the claimed change in permanent residence to New York (*see Matter of Palla*, 31 NY2d at 47). Moreover, petitioners make no assertion that any of the temporary interruptions during the summers or during the academic school year to teach at Harvard or to go to Washington, D.C. on a fellowship would be sufficient to demonstrate the invalidity of Ms. Teachout's New York residency connections. Indeed, the law provides that a person's temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged (*Matter of Newcomb*, 192 NY 238, 251 [1908]).

Petitioners, nevertheless, assert that Ms. Teachout's actions have not manifested the requisite intent to make New York State her domicile within the meaning of the Election Law. In this regard, petitioners point to evidence establishing that, despite moving to New York and maintaining a physical presence in New York since June, 2009, Ms. Teachout continues to use her parent's Vermont address as her home or residence address relating to her driver's license, car registration, 3 North Carolina bar registration, and other documents

<sup>&</sup>lt;sup>3</sup> Ms. Teachout testified that she currently owns a car, which she stores in her parents' garage in Vermont and rarely drives in New York. Evidence adduced at trial revealed that she

filed with New York and federal governments (i.e, W-4 and Employee Wage withholding forms and Federal Election Commission<sup>4</sup>).<sup>5</sup> More specifically, with respect to Ms. Teachout's driver's license, petitioners emphasize that she did not apply for a New York State drivers licence until recently, May 5, 2014, and that prior to that date she had a Vermont drivers license listing the Norwich Vermont address as her home address. Based upon the foregoing manifestations of her connection to Vermont, petitioners contend that it cannot be said that Ms. Teachout ever formed the requisite "intent" to make New York State her domicile/residence in the first instance. This court disagrees.

Whether or not Ms. Teachout misrepresented her actual residence address to regulatory bodies in New York or elsewhere for self-interested purposes, any improprieties are for other bodies to address and are not relevant to this determination.

As to the issue of intent, Ms. Teachout testified that she moved to New York to take the tenure-track associate professorship position with Fordham. She further testified that, notwithstanding her usage of the Vermont address as her mailing address, and brief sojourns

bought the car in New York, but had it registered and insured in Vermont, listing her parent's Vermont address as her home address (Petitioners' Exhibit 2).

<sup>&</sup>lt;sup>4</sup>A Federal Election Commission document shows that Ms. Teachout made a contribution to the President Obama re-election campaign in September 2012 and listed the Norwich Vermont address as her address (Petitioners' Exhibit 7). When questioned about the event, Ms. Teachout testified that she co-organized the fundraiser, which took place in New York.

<sup>&</sup>lt;sup>5</sup> Ms. Teachout testified that although she uses the Vermont address for important documents she has not lived there since she graduated from high school in 1989. She further testified that she used the Vermont address as a "mail drop" because she considered it a reliable address to receive mail.

and summer vacations, she always intended to return back to New York. While the evidence also shows that Ms. Teachout maintains a strong connection with Vermont, the evidence relating to the Vermont connection is insufficient to show that she never formed an intent to make New York her primary residence. Ms. Teachout's continuance of her Vermont driver's license and her registration of her car in Vermont are reasonably explained by Ms. Teachout's testimony that she, like many New York City residents, generally does not use her car while she is in the City, and primarily uses her car when she is in Vermont (see Kartiganer v Koenig, 194 AD2d 879, 881-882 [1993]; Matter of Gadway, 123 AD2d 83, 86 [1987]). With respect to Ms. Teachout's 2009 New York Tax return, although she initially indicated that she lived zero days in New York City and does not appear to have paid New York City taxes, there is no evidence that she paid taxes anywhere but in New York and North Carolina for the portions of the year she resided in each state. Ms. Teachout also credibly explained that she used her parents' address in Vermont, at least initially, because her first apartment in New York City was a temporary sublet, and, until she moved into her current apartment, she had not spent much more than a year at any one apartment. Under the factual circumstances presented herein, the court finds that Ms. Teachout's physical presence in New York after June, 2009, coupled with her expressed intent to remain here permanently, is sufficient to establish New York State as her residence (see People v O'Hara, 96 NY2d at 385).

Petitioners have failed to establish, under the clear and convincing evidentiary standard, that Ms. Teachout did not reside in the State of New York after June, 2009, to the present date with the intent of making it her permanent home (*see Stavisky*, 54 AD3d at 434-435; *Matter of Johnson v Simpson*, 43 AD3d 478, 478 [2007]). Subdivision 22 of section 1-104 of the Election Law provides that the term "residence" means a "place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return". Petitioners adduced insufficient proof that New York was not Ms. Teachout's "residence" as that term is defined in the Election Law commencing on June, 2009, or at any point thereafter.

Based upon the foregoing, it is hereby

ORDERED that the petitioners' petition to invalidate is denied and dismissed; and it is further

ORDERED that the candidate's counterclaim is denied as moot.

ENTER FORTHWITH

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EDGAR G. WALKER, J.S.C.