



*Supreme Court*  
*State of New York*

*Breome County Courthouse*  
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*Eugene D. Faughnan*  
*Justice*

September 11, 2017

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Re: Marietta v. Walker, et al.

Index No.: 2017-0610 ; RJI No.: 2017-0278

Counselors:

Enclosed is the Court's Decision and Order in regard to the above matter. The original Decision and Order is being forwarded to the Otsego County Clerk for filing.

Thank you for your time and attention.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'F. Strom-Blodgett', written over a faint dotted line.

Florence Strom-Blodgett

Secretary to Hon. Eugene D. Faughnan

cc: Michael McGovern, Chief Clerk (original)

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Otsego County Courthouse, Cooperstown, New York, on the 7<sup>th</sup> day of September, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : OTSEGO COUNTY

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ANDREW R. MARIETTA,

Petitioner,

-vs-

TIMOTHY WALKER,

Respondent-Candidate,

and

OTSEGO COUNTY BOARD OF ELECTIONS,

Respondent.

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DECISION AND ORDER

Index No. 2017-0610  
RJI No.

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon an Order to Show Cause signed August 25, 2017 and a Verified Petition pursuant to Election Law §16-102 dated August 19, 2017. Andrew Marietta (“Petitioner”) seeks, *inter alia*, an order invalidating the independent nominating petition of Timothy Walker (“Walker”), with the Petition alleging a violation of Election Law §6-138 (3)<sup>1</sup>.

Marietta was a candidate for Otsego County Board of Representatives, District Eight in 2015.

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<sup>1</sup>Petitioner also sought relief invalidating Walker’s independent petition regarding alleged signature irregularities, but withdrew this branch of the petition at oral argument.

He passed independent party petitions and was ultimately a candidate for the “I Love Otsego” party, with a heart containing a waving flag as its symbol. On August 15, 2017, at or near the opening time of the Otsego County Board of Elections (“BOE”), Respondent-Candidate Walker filed an independent nominating petition for himself for the “I Love Otsego” party, with a heart containing a waving flag as its symbol. Marietta filed a petition for himself with the same party name and symbol at 1:30 PM that same day. Since Walker filed his petition first, his was accepted for filing and Petitioner was allowed to select another name and symbol

Petitioner now seeks an order invalidating Walker’s Petitions, and ordering the BOE to accept his petitions for filing and placing his name on the ballot as the candidate for the “I Love Otsego” party for Otsego County Representative, District Eight. Petitioner argues that since he used the party name and symbol for this office in 2015, Walker was prohibited pursuant to Election Law §6-136 (3), from utilizing the party name and symbol for the same office in 2017. Walker asserts that a candidate filing independent party nominations has no legal interest, or control, in the party name and symbol from year to year, and in light of Walker filing first in 2017, the BOE properly accepted his petitions for filing.

Pursuant to Election Law 6-138, “[t]he name selected for the independent body making the nomination shall be in English characters and shall not include the name or part of the name or an abbreviation of the name or part of the name, nor shall the emblem or name be of such a configuration as to create the possibility of confusion with the emblem or name of a *then existing party, or the emblem or name of an independent body selected by a previously filed independent nominating petition for the same office.*” Election Law §6-138 (3)(a) (emphasis added). Where a independent party name contains even the “root” of the name of an existing party or independent body previously filed, it is violative of Election Law §6-138 (3)(a). *DiResto v. Cornell*, 59 AD3d 643, 644 (2<sup>nd</sup> Dept. 2009), *Gleason v. Tutunjian*, 154 AD2d 834, 836 (3<sup>rd</sup> Dept. 1989).

In the present matter, the “I Love Otsego” party is not a constituted party pursuant to Election

Law §1-104.<sup>2</sup> It is clear from the plain language of §6-138 that no independent party name may contain the name, root of the name, or utilize the symbol of any party as defined by 6-104 (3). This restriction remains in effect so long as the constituted party remains such pursuant to Election Law 1-104 (3). In contrast, independent parties may not utilize the “the emblem or name of an *independent body selected by a previously filed independent nominating petition for the same office*. Election Law §6-138 (3)(a)(emphasis added). In other words, independent party names are only protected to the extent that their petitions for the same office are filed first, for that election cycle. There is nothing in the election law which provides any “year over year” protection to an independent party’s name or symbol.

The cases cited by Petitioner actually support the Court’s conclusion. In *Gleason*, an independent body was prohibited from using the name “Taxbusters Party” because another independent party had *previously filed* petitions for the same election using the name “East Greenbush Independent Taxpayers Party.” *Gleason* at 836. The second filing could not use the same name or part of the name of the earlier filed independent party. Likewise in *Carey, infra*, an independent party was prohibited from using the name “Independence of Henrietta” in light of *previously filed* “Henrietta Party” petitions for the same office. *See Carey v. Chiavaroli*, 97 AD2d 981 (4<sup>th</sup> Dept. 1983). In those cases, as in the current matter, the first independent petition filed was found entitled to use the name and symbol chosen. In this matter, Walker filed his independent petitions for this office first and therefore was properly found to be the “I Love Otsego” party candidate.

Finally, Petitioner relies on an opinion of the New York State Board of Elections (“SBOE”) to support his exclusive entitlement to the “I Love Otsego” party name and symbol. The SBOE opined that reading Election Law §6-138 (3)(a) in conjunction with Election Law §2-124 (2), an “existing independent body” is accorded a preference for a party name and symbol. SBOE 1978 Opinion #15.

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<sup>2</sup> “The term “party” means any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor.” Election Law §1-104 (3).

“Under well-settled principles of statutory interpretation, a statute is to be viewed as a whole and ‘its various sections must be considered together and with reference to each other’” *Till v. Apex Rehabilitation*, 144 AD3d 1231, 1233 (3<sup>rd</sup> Dept. 2016), *affd* 29 NY3d 909 (2017) *citing* *People v. Mobil Oil Corp.*, 48 NY2d 192, 199 (1979); *see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 92, 97, 98. Where a potential conflict exists, all parts of the statute must be given meaning and effect and, if possible, must be “harmonized to achieve the legislative purpose” *Sanders v. Winship*, 57 NY2d 391, 396 (1982).

Election Law § 2-124(2) provides, in relevant part, “[t]he name and emblem chosen shall not be similar to or likely to create confusion with the name or emblem of any other existing party or independent body”. The SBOE opinion concludes that “existing..independent body” suggests some durational resilience in independent bodies. However, the Court finds no authority for this interpretation. Reading this section in conjunction with Election Law §6-138(3)(a), the Court concludes that “existing...independent body” refers to an independent body that has “previously filed independent nominating petition for the same office” in the same year. To hold otherwise would place these two provisions of the Election Law at odds. Moreover, there is no case law which supports the Petitioner’s and SBOE’s interpretation of Election Law §2-124(2). Courts have consistently held that independent body names and symbols are available to the first to file their petitions in an election year.

For the reasons set forth herein, the Petition seeking to invalidate Walker’s independent petition is hereby **DENIED**, and the Petition is **DISMISSED**.

This constitutes the DECISION AND ORDER of this court.

Dated: September 11, 2017  
Ithaca, New York

  
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HON. EUGENE D. FAUGHNAN  
Supreme Court Justice