

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF OTSEGO

In the Matter of the Application of

LYNN KROGH,

Petitioner-Objector,

vs.

Index No. 2015-0611

ANDREW MARIETTA,

Respondent-Candidate(s),

and

**SHEILA ROSS and RICHARD ABBATE,
COMMISSIONERS CONSTITUTING THE
OTSEGO COUNTY BOARD OF ELECTIONS,**

Respondents.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

APPEARANCES: LAW OFFICES OF JAMES E. WALSH
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DECISION, ORDER & JUDGMENT

Mulvey, Robert C., J.

The petitioner seeks a declaration that the designating petitions filed with the Otsego County Board of Elections to designate and/or nominate respondent Andrew Marietta as a Democratic Party candidate for the office of Otsego County Representative, 8th District, are invalid, and further seeks an order and judgment enjoining the said Board of Elections from allowing the name of the respondent Marietta from being printed or placed on the official ballots of the November 3, 2015 general election on the Democratic Party line.¹

A hearing on the application was conducted on August 13, 2015 at the Otsego County Courthouse.

At the commencement of the hearing, the petitioner limited his challenge to the alleged uninitialed and unexplained change of the number of signatures ("13") affixed to Sheet No. 2 of the Designating Petition witnessed by Christina Noto.

Material unexplained and uninitialed alterations invalidate designating petitions. **Matter of Quinlan v. Pierce**, 354 AD2d 690 (Third Dept., 1998) However, the threshold question presented to the Court is whether the number "13" written in the space by witness Christina Noto constitutes an alteration.

The Court has examined the original sheet (as part of Petitioner's Exhibit A) and finds that there is no indication that anything was altered. Both numerals 1 and 3 appear to be darkened by the writer, and there is no evidence of any other number other than the 1 and the 3 beneath. Therefore it is, at most, an overwriting which did not change what was originally written, see **Matter of Schroeder v. Smith**, 21 AD3d 511 (Second Dept., 2005).

Consequently, the Statement of Witness Noto on Sheet No. 2 is valid and the sheet is valid.

Even if the writing of the number "13" is deemed an alteration, the Court finds that the affidavit of Christina Noto, appended to the Answer submitted by respondent Marietta, is admissible as evidence explaining the alteration, **Matter of Gartner v. Salerno**, 74 AD2d 958 (Third Dept., 1980) leave denied, 49 NY2d 703 (1980). There was no proof offered by the petitioner at the hearing which created any issue of fact as to any possible tampering with the Designating Petition. The Court has reviewed the decision cited by the petitioner to the effect that such an affidavit constitutes inadmissible

¹The parties have confirmed that there is no other Democratic Party candidate for the office and therefore there will not be a primary election for this office.

hearsay, **Matter of Schultz v. Farkas**, (36 Misc3d 1231(A) [Supreme Court, Albany County, 2012]), and notes that it did not address the Appellate Division's holding and rationale in **Matter of Gartner**, supra.

The respondent Marietta was allowed to present the testimony of Richard J. Sternberg, the subscribing witness to Sheet No. 4 of the Designating Petition, as an offer of proof, in support of the respondent's effort to validate that sheet. The Court must agree with the petitioner that, absent a cross-petition for validation, the Court does not have jurisdiction to entertain that claim. **Starr v. Board of Elections**, 89 AD2d 991 (Second Dept., 1982).

CONCLUSION

For the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the Petition to invalidate is hereby denied and it is further

ORDERED that counsel for respondent ANDREW MARIETTA shall serve a copy of this Decision, Order and Judgment with notice of entry upon all other counsel forthwith.

This constitutes the Decision, Order and Judgment of the Court.

Signed this 18TH day of August, 2015 at Ithaca, New York.



ROBERT C. MULVEY, J.S.C.