IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2004

No. 04-7857

SAMUEL H. SLOAN - PETITIONER

vs.

NERO GRAHAM, FREDERIC M. UMANE, WEYMAN A. CAREY, MICHAEL J. CILMI, MARK B. HERMAN, DOUGLAS A. KELLNER, TERRENCE C. O'CONNOR, NANCY MOTTOLA-SCHACHER, STEPHAN H. WEINER, Commissioners of Elections of the City of New York, constituting the Board of Elections in the City of New York and BIBI S. KHAN, THEODORE ALATSAS, KHOURSHED CHOWDHURY, DIANE HASLETT RUDIANO, GLADYS PEMBERTON, AARON MASLOW, LORI MASLOW, HY SINGER, HARVEY R. CLARKE, KING'S COUNTY REPUBLICAN PARTY,

- RESPONDENTS -

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK - APPELLATE DIVISION - SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

Samuel H. Sloan
920 Belmont Avenue
Brooklyn NY 11208
(718) 327-3669

E-Mail: samsloan@samsloan.com

Web Address: http://www.samsloan.com/candidates.htm

QUESTIONS PRESENTED

1. To what extent may state governments set requirements for US Congress beyond those enumerated in the Constitution, which are only that the person must be 25 years old and have been a citizen for seven years and reside in the state?

2. Under what circumstances may a state or city or county Board of Elections kick a candidate for US Congress off the ballot, as has happened here?

Petitioner is a Candidate for Election to the United States Congress for the Tenth Congressional District of New York. The incumbent is Edolphus Towns, a Democrat, who has not faced a Republican Opponent for 14 years since 1990. Petitioner was approved as a Republican Party Candidate at a meeting of the Executive Committee of the Kings County Republican Party in Brooklyn on May 5, 2004. Subsequently, Diane Rudiano, who is both secretary of the Kings County Republican Party and Chief Clerk of the Kings County Board of Elections took a disliking to the petitioner and decided that she did not want his name on the ballot. She has ever since conducted a campaign against petitioner, using her full powers as both an election official and a party official.

I petitioned three days later to the Kings County Supreme Court. That court signed an order to show cause but gave me only seven hours to serve it. I did so, but that court, the judge of which is a retired Democratic state assemblyman, dismissed my petition the next day because I had not filed the affidavits of service by 9:30 AM the following morning.

I appealed up to the Court of Appeals of New York without success.

An Emergency Hearing is required on this matter because the Election will be held on November 2, 2004, which is only five days from today.

In New York State, perhaps more than any other state, the candidates are controlled by the party officials. Almost all elections are uncontested. In addition, as this case demonstrates, the rules and procedures are completely ignored. Petitioner maintains that the entire procedure is unconstitutional. This case has demonstrated that it is not merely difficult but impossible to run against a party machine controlled by a handful of officials in New York State. Petitioner requests review of the entire election procedure, for reasons more fully explained in the attached motions which were filed in the US District Court and in the US Court of Appeals.

JURISDICTION

The Decision of the Appellate Division Second Department was dated August 18, 2004 and was corrected on October 6, 2004. http://www.courts.state.ny.us/reporter/3dseries/2004/2004_06407.htm Subsequently, a petition for rehearing was denied and leave to appeal to the New York Court of Appeals was denied. Petitioner has 90 days to file this petition. There are no reported decisions except that the decision of the Appellate Division is reported at 2004 NYSlipOp 06407 .

STATEMENT OF THE CASE

POINT I

CPLR 2103 (a) DOES NOT APPLY AND CPLR 2103 (b) APPLIES

The decision of this court cited CPLR 2103 (a). However, CPLR 2103 (a) was not cited by the court below. Rather, the court below cited only 308(1). I was caught off guard by the reference to CPLR 2103 (a) and had not looked it up.

I believe that the decision by this court was erroneous for a number of reasons, the most important of which was that the decision cited the wrong provision of CPLR. The decision cited CPLR 2103 (a). However the applicable provision is CPLR 2103 (b). This is because the Order to Show Cause required service on Theodore Alatsas and Gary Sinawski and both Theodore Alatsas and Gary Sinawski are attorneys at law and members of the New York Bar.

CPLR 2103 (b), unlike CPLR 2103 (a), does not require service by a person “not a party” to this proceeding. CPLR 2103 (b) does not require personal service. It allows for service on the office of the attorney, by leaving it with his secretary or if the secretary is not present by leaving it in his mail slot.

This is what petitioner did. In addition, if the Order to Show Cause required personal service, that was impossible because the petitioner did not receive a copy of the Order to Show Cause until 4:55 PM on the last day to file and the Order to Show Cause required him to serve papers by Midnight the same night. This the petitioner did by leaving a copy of the order to show cause on the desk of the secretary of Gary Sinawski, because Gary Sinawski was gone for the day, and by leaving a copy of the order to show cause and the papers upon which it was based on the doorknob of Theodore Alatsas, all before Midnight the same night.

Petitioner later moved for a rehearing. The second order to show cause was signed on August 11, 2004. This time, the court gave the petitioner the more reasonable time of Midnight the following day to serve papers. Petitioner did this double, serving the office of Theodore Alatsas twice, the second time finding Mr. Alatsas in his office. Mr. Alatsas

personally signed for the papers.

CPLR 2103 provides, in pertinent part:

> Rule 2103. Service of papers. (a) Who can serve. Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over.
> (b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party`s attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:
> 1. by delivering the paper to the attorney personally; or
> 2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney`s last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or
> 3. if the attorney`s office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if the attorney`s office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney`s office letter drop or box; or
> 4. by leaving it at the attorney`s residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney`s residence unless service at the attorney`s office cannot be made; or

It is noteworthy that when this case was presented to the Appellate Division, the Appellate Division did not require personal service of the brief on the attorneys. Service by e-mail was sufficient.

The case presented here is essentially an appeal of an administrative order of the New York Board of Elections which removed the name of the petitioner from the ballot. The objector in the Graham and Republican Party Case was Bibi S. Khan. However, on the form for general and specific objections, Bibi S. Khan listed as her contact person Theodore Alatsas. Thus, it was not necessary for the petitioner to serve Bibi S. Khan. Service on Theodore Alatsas was sufficient. At the same time, it is important to point out that the whereabouts of Bibi S. Khan are unknown. Her address of record is 100 Hill Street, Brooklyn NY 11208. However, Petitioner has been to that address many times and has established from talking to the people who reside at that address that Bibi S. Khan does not live there and has not lived there since 1997. Petitioner does not know where Bibi S. Khan lives now and when asked this direct question during argument of this case before Judge Levine in the Supreme Court, Theodore Alatsas did not answer the direct

questions of where Bibi Khan lives.

A requirement that Petitioner serve the objector directly is unfair and unconstitutional when the objector's counsel refuses to reveal where she lives.

There were three other appeals filed at the same time as Petitioner's appeal and all of them touch on related issues. In the appeal of Towns vs. Joseph from a decision of the Appellate Division - Second Department dated August 19, 2004, the fact pattern was the same as that of all cases from the King's County Supreme Court. There were 42 cases on the calendar there and in all 42 cases Judge Joseph Levine sua sponte questioned the affidavits of service. The case of Towns vs. Joseph had exactly the same facts as the case of Andre Soleil. The only difference is that Mr. Towns having one million dollars in campaign contributions every time he runs in an uncontested race for Congress, has a lot of money to pay for an appeal, whereas Mr. Soleil does not. Take a look at http://www.fec.gov/2000/nyhse99.htm which shows that Ed Towns raised and spent $1,148,894 in the uncontested 2000 election.

In the Supreme Court, Judge Levine did not dismiss the original petition because Petitioner served the order to show cause himself, but rather because Petitioner failed to file the affidavits of service BEFORE 9:30 AM. Judge Levine dismissed several other petitions for the same reason. Those others have apparently not appealed, but they could still appeal, as their statutory time has not yet run.

The two Nassau County cases which are also on appeal to this court involve Nassau County judges who ruled in EXACTLY THE OPPOSITE WAY from Judge Levine in the instant case, and yet the Second Department affirmed those two decisions. Although a different panel of the Appellate Division was sitting and the affirmance was on different grounds, Petitioner submits that differing decisions by two different panels of the same appellate division constitutes ground for this Court of Appeals to hear this appeal.

The court in "Matter of Flores v. Kapsis", decided on appeal on August 19, 2004, Justice Stack ruled:

> Respondents' Application to Dismiss
>
> Respondents moved for dismissal of petitioners' application for lack of jurisdiction on the grounds of defective service. Respondents alleged that pursuant to CPLR §2103 "papers may be served by any person not a party [to the action]". They submitted that Michael S. Peregine, a respondent, had served the order to show cause and accompanying documents. This service was made, as ordered, by "delivering a copy thereof to . . . the United States Postal Service . . . waiving the requirement of a receipt signature, to each said respondent's home . . . ." Order to Show Cause, ¶ 4. The same direction for service existed for all respondents.

> Evidence presented at the hearing demonstrated that counsel for petitioners accompanied by respondent Michael S. Peragine, traveled to the Hicksville Post Office where the express mail envelopes were deposited. Each envelope bore the return address of respondent Michael S. Peragine and, in the space provided to waive the receipt signature, he placed his initials.
>
> While it is correct that any envelope not delivered would have been returned to the respondent's home address and equally correct that he controlled the waiver of signature, these factors do not equate with "service by a party." The intent of the statute was clearly to avoid personal service by one party on another. Further, CPLR §312-a states in pertinent part, "As an alternative to methods of personal service . . . a notice of petition and petition may be served by the plaintiff or any other person by mailing to the person . . . to be served." Mckinney's Consolidated Laws, CPLR, Article 3
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> The cases cited by counsel are inapposite in that they refer to personal service by one party on the other which service resulted in a dismissal of the action. This court does not find respondents' argument persuasive in this regard. Accordingly, respondents' application to dismiss for lack of jurisdiction is denied.

Here it can be seen that the Nassau County Judge decided that the fact that petitioner Peragine served the papers himself was not fatal.

In addition, the requirement by Judge Levine that the papers be served personally, and only seven hours given to do so, was not in conformity with the statute. In his order to show cause, Petitioner copied the exact words of a standard form in the book entitled “Election Law Forms” page 38. A copy of that page is annexed hereto. The order to show cause prepared by Petitioner said:

> and that personal service of the Order to Show Cause together with a copy of the papers upon which it is granted upon the individual respondents-objectors BIBI S. KHAN, THEODORE ALATSAS, KHOURSHED CHOWDHURY, DIANE HASLETT RUDIANO, GLADYS PEMBERTON, AARON MASLOW, LORI MASLOW, HY SINGER, HARVEY R. CLARKE and KING'S COUNTY REPUBLICAN PARTY designated as objectors be dispensed with, and that service of a copy of this order upon said respondent-objectors be made by enclosing the same in a securely sealed and duly postpaid wrapper addressed and mailed to each of the said respondent-objectors on or before the _____ day of August, 2004 be deemed good and sufficient service thereof.

As can be seen, that is word for word exactly the same language that is used in the book

"Election Law Forms". The same or very similar language is also used in Bender's Forms, McKinney's Forms and every other book of forms dealing with New York Election Law. Thus, Judge Levine made his own special rules, rules which have not been made by any other New York Supreme Court Judge.

The end result was that on August 9, 2004 there were 42 cases on Judge Levine's Election Law calendar and in each and every one of those 42 cases Judge Levine sua sponte raised the issue of affidavit if service, even though in almost every case the opposing party was present in court and was not contesting service. In all but one of those 42 cases, Judge Levine dismissed the petition on affidavit of service grounds. In the remaining case, Judge Levine dismissed the petition on a different grounds. In is important to note that in almost all of those 42 cases, the petitioner was represented by highly paid and highly qualified counsel. It is a remarkable fact that in 42 cases (not counting Petitioner's two cases) none of those 40 attorneys could seem to put together a simple affidavit of service that would satisfy Judge Levine.

The end result of the present cases now on appeal is not merely that the voters in the Tenth Congressional District are deprived of the right to vote for Petitioner. Rather, they are deprived of the right to vote AT ALL.

As a result of these two contradictory decisions, the September 14, 2004 primary will be uncontested and the November 2, 2004 General Election will also be uncontested. Mr. Towns will have been re-elected without facing an opponent. This raises a Constitutional question.

It is noteworthy that Mr. Towns has never faced a seriously contested election since 1990, when Barry Ford last ran. One wonders how many other times Mr. Towns has succeeded in having ALL of his opponents thrown off the ballot. One also wonders what Mr. Towns does with the ONE MILLION DOLLARS he reports to the Federal Election Commission that he has received in campaign contributions every two years to fight these uncontested races. Again, take a look at http://www.fec.gov/2000/nyhse99.htm which shows that Ed Towns raised and spent $1,148,894 in the uncontested 2000 election.

Another appeal to this court, also involving Nassau County, but decided by a different judge, also pertains to an issue in this case. In Fischer v. Peragine, Justice De Maro held:

> "The only issue remaining for the Court to address is the avowed policy of respondents, Chairman, Peragine and Vice Chair Bonnie Green, to add a substantial number of candidate names for Committee members, to nominating petitions, without the permission of such candidate. Where the names of persons are put on the ballot as candidates without their consent there is a "fraud" committed on the voters of the same party. Richardson v. Luizzo, 64 AD2d 942 affd. 45 NY2d 789."

In conclusion, the court found the respondents guilty of this fraud and barred them from

holding party office.

In the petition here, Petitioner alleges the exact same fraud. Petitioner alleges that he, Sam Sloan, is the real Republican Party Candidate for US Congress. At a candidate's meeting in Bay Ridge Manor on May 5, 2004, Petitioner was grantee a Wilson-Pakula by a majority vote of those present and was nominated as a candidate for US Congress. However, eight days later the Party had petitions printed listing Adrienne Britton as the candidate, even though Adrinne had not been informed of this nor had she consented to have her name on the petitions. After Adrienne Britton protested, her name was removed and instead the name of Isabelle Jefferson was put on the petitions. Isabelle Jefferson was not informed of this either and in fact had gone to Charleston, South Carolina for three months to stay with her family there. By the time Isabelle Jefferson returned to New York, signatures had already been collected and she was on the ballot. She immediately objected. Then, her name was taken off and the name of Harvey Clarke, a newly registered voter, was put on.

All this was obviously a conspiracy to stop Sam Sloan from being the candidate.

Thus, the Republican Party Officials are ALL GUILTY OF FRAUD by putting first the name of Adrienne Britton and then the name of Isabelle Jefferson on the nominating petitions without informing either of them of this.

This case should be remanded for hearings on these issues.

It is noteworthy that the local press has commented on this situation. For example, Flatbush Life for August 23, 2004, page 10 and at http://www.lidbrooklyn.org/bp082304.htm states:

> "Sloan's effort was an example of how impossible it can be for a non-lawyer to run for office and navigate the legal system on his own."

Similarly, an article dated July 19, 2004 appearing in Bay News, page 10 and at http://www.lidbrooklyn.org/bp071904.htm states the following:

> "A federal judge said he was inclined to agree with Sam Sloan's argument that Sloan received a valid Wilson-Pakula from the Republican Party, qualifying him to seek ballot access on the Republican line. Unfortunately for Sloan, the case was heard just a week before the petition deadline, leaving him with the impossible task of getting valid signatures from 886 registered Republicans in the 11th Congressional District by midnight on July 15."

Please note the repeated use of the word IMPOSSIBLE to describe Petitioner's situation. This raises issues of Constitutional proportions.

POINT II

THE ACTUAL OBJECTOR TO THIS PETITION IS THE CHAIRMAN OF A PARTY COMMITTEE, WHO IS BARRED BY STATUTE FROM OBJECTING.

It is completely clear that the law specifically prohibits the Chairman of a Party Committee, any party, even a different party, from objecting to a petition when that objection would result in a primary election being cancelled.

Election Law Section 16-102 states:

> S 16-102. Proceedings as to designations and nominations, primary elections, etc. 1. The nomination or designation of any candidate for any public office or party position or any independent nomination, or the holding of an unconteste d primary election, by reason of a petition for an opportunity to ballot having been filed, or the election of any person to any party position may be conteste d in a proceeding instituted in the supreme court by any aggrieved candidate, or by the chairman of any party committee or by a person who shall have filed objections, as provided in this chapter, except that the chairman of a party co mmittee may not bring a proceeding with respect to a designation or the holdi ng of an otherwise uncontested primary.

The operative words in the above paragraph are: “except that the chairman of a party com mittee may not bring a proceeding with respect to a designation or the holding of an other wise uncontested primary.”

In Soda v. Dahlke, decided August 18, 2004, http://www.courts.state.ny.us/reporter/3dseries/2004/2004_06380.htm , the Appellate Division - Fourth Department ruled that the Chairman of the Democratic Party could not object to a petition with respect to a candidate in the Independence Party.

In each of my cases, the objector was not an opposing candidate, since there was no opposing candidate except for Ed Towns who did not object, but rather the Chairman of the party through the Party Counsel. Mr. Theodore Alatsas representing the Republican Party objected to my Republican Party petition and Mr. Gary Sinawski representing the King's County Independence Party objected to my Independence Party Petition.

In the case presented here, the nominal objector did not appear. Only the General Counsel to the Kings County Republican Party appeared. Who paid the fees of this attorney? Did the nominal objector pay? I doubt it, since the nominal objector did not come to the hearing. If the Republican Party paid, this may constitute a criminal offense of misuse of party funds.

The nominal objector is just a front. She is not a candidate and has no reason to object. However, the Chairman wants to keep control of his party by making sure that only the persons he designates gets on the ballot and no primary election is held. It is precisely

because the Chairman of a Party would want to keep the party under his personal control to the exclusion of the voters and the other members of his party that New York State Law prohibits the Chairman of any Party Committee from objecting to a Petition, if the result is that there is no primary election. The relevant case law is: Davis v. Dutchess County Board of Elections 153 AD 2d 716, 544 NYS 2d 683 (1989 2d Dept.), Matter of Crawley v Board of Elections of County of Rensselaer, 218 AD2d 914, 915, lv denied 86 NY2d 704; Matter of Maltese v Anderson, 264 AD2d 457; Matter of Grogan v Conservative Party of N.Y. State, 77 AD2d 736, 736-737), Soda v. Dahlke, decided August 18, 2004, http://www.courts.state.ny.us/reporter/3dseries/2004/2004_06380.htm In short, this Bibi Khan, who is an employee of the party, is obviously a front. The actual objector is the Party Chairman. The Party Chairman and his counsel have committed a fraud on the other members of his party, on the Board of Elections and ultimately on the voters by putting up this front person to play the role of objector, when the Chairman, who is barred from this activity, is the real objector.

POINT III

ON THE MERITS, PETITIONER MUST PREVAIL

Here and in the court below and in the parallel federal case, opposing counsel has cited Montano v. Lefkowitz, 575 F.2d 378 (2d Cir. 1978). However, Federal Judge David Trager, who has already heard argument on this issue, has rejected the contention of the Republican Party.

Montano v. Lefkowitz presented almost the opposite situation. There, the Executive Committee of the Bronx County Republican Party appointed a candidate to fill a vacancy. However, the vacancy was in a predominantly Black Congressional District. Most of the committee members who voted resided outside the district and were White. A Group of Black voters petitioned the court to invalidate the choice made by the White guys as to who would represent the Black Congressional District.

In the case presented here, however, I am the outsider and the respondents are the insiders. They nominated me as their candidate. Subsequently, they changed their minds. Now, they do not want me any more. However, they did not re-vote the issue, because they realize that I have substantial support within the party and would win a revote, so they seek to invalidate the election of me by claiming that they did not follow their own rules.

Their contention is that some of the people at the Executive Committee meeting who voted for me do not reside in my Congressional District and therefore the vote was invalid. However, Judge David Trager ruled that provided I can establish at a hearing that even excluding all those votes by non-residents of the Tenth Congressional District I still have a majority, then I win anyway. Since the number of votes against me was very small and the vote in my favor was overwhelming, I am confident I can prevail on this issue. The Republicans are not even disputing this point.

CONCLUSION

For all of the reasons set forth above, this writ must be granted and this court must issue a temporary restraining order and a preliminary and permanent injunction granting the following:

1. A preliminary and permanent injunction requiring that the name of the Petitioner be placed on the ballot as a candidate for Congress for the Tenth Congressional District.

2. A preliminary and permanent injunction requiring that the name of the Petitioner be placed on the ballot in the General Election in November as a candidate for Congress from the 10th Congressional District.

3. An Order declaring valid, proper and legally effective the designating petitions heretofore filed in the office of the Board of Elections of the City of New York designating the petitioner herein, Samuel H. Sloan, as a candidate in the Republican to be held on September 14, 2004 for election to the Office of Congressman in the United States Congress representing the 10th Congressional District of Brooklyn New York; and

4. An Order directing, requiring and commanding the Board of Elections in the City of New York to place and print the name of the petitioner herein on the ballot as a candidate for election to the United States Congress from the Tenth Congressional District in the Republican to be held on September 14, 2004; and

5. An order enjoining and restraining the said Board of Elections in the City of New York from printing, issuing or distributing for use during said Election in the Tenth Congressional District any official ballot upon which the name of the petitioner does not appear as a candidate for election to the United States Congress.

6. Such other and further relief as may be just and equitable.

Dated: October 28, 2004

Respectfully Submitted,

Samuel H. Sloan