

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL DIVISION**

**DELAWARE COUNTY REPUBLICAN
EXECUTIVE COMMITTEE**

v.

BOARD OF ELECTIONS

NO.: CV-2020-007523

ORDER

Before the Court are two Petitions. The first is the Emergency Petition to Intervene of Candidate for Political Office, Dasha Pruett, and Observers Gregory Stenstrom and Leah Hoopes. The second is an Emergency Petition Against the Board of Elections for Contempt for Violating Judge Capuzzi's 11/4/2020 Order and for Violating Election Code Provisions Allowing Observers. For the reasons set forth in the Opinion below, both Petitions are **DENIED WITH PREJUDICE**.

OPINION

Without per adventure, the general election of 2020 was the most contentious, most impassioned and most disputed in modern history. While this Court is not oblivious to this, it is the duty of the judiciary to apply the rule of law free and clear of outside influences or the clamor that has arisen. A fair and impartial jurist who adheres to the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania in accordance the oath of law that binds the conscience is what is mandated and what is expected. It is through this lens that the Court has addressed the issues presented.

The essence of the Petitions are as follows: First Petitioners seek to intervene in the original matter as captioned above. Second, Petitioners seek to have the Board held in contempt for

allegedly violating the Court's order as follows: Petitioners claim that they were not granted full access to a rear room where mail-in and absentee ballots were being resolved; observers were not permitted to enter a rear locked area where ballots were stored; and observers were confined to a "pen" which did not allow meaningful access to observe/view the area where the sorting machine was in use. As a result, Petitioners seek the USB V cards that when inserted into the computer tabulated the votes and to enjoin the United States House of Representatives from seating Dasha Pruett's opponent. These claims lack a scintilla of legal merit.

At the very outset it is extremely important to highlight that the Delaware County Republican Executive Committee, which was the party that filed the original petition, has not raised an issue with the Board of Elections compliance with the Court's Order of November 4, 2020. Likewise, the Republican Executive Committee has not filed a response to the Petitions presently before the Court. Furthermore, each alleged factual averment within the petitions was known weeks before this 11th hour, pre-holiday filing of December 22, 2020 and, thus, did not constitute such an emergency that the Board of Elections not be given adequate time to research and respond accordingly.¹

In order to place the current controversy in perspective and to appreciate the canvassing of ballots, it is necessary to set forth the election process of 2020, which, in this Commonwealth, was substantially different from prior elections. Following the general election of 2016, there was grave concern that foreign governments had interfered with the election process. There was further concern that these foreign governments or others could or may have hacked into the computerized voting systems employed in many jurisdictions. Additionally, some of these computerized

¹ The time frame set forth in the Petitions was between November 3, 2020 and November 5, 2020, and whereas the Petitions were not filed until December 22, 2020, the Court deemed these not to be emergent and did mandate that the Board of Elections be given adequate time to respond.

systems lacked a paper trail that could be subject to audit, if needed or required, in order to validate the count. Finally, it was crystal clear that the expected voter turnout would far surpass recent elections. It is with this backdrop that Governor Wolf and the Legislature changed, altered, and/or modified the manner in which elections in the Commonwealth are conducted.

In 2018, U.S. Department of Homeland Security Secretary, Kirstjen Nielsen, called on all state and local election officials to make certain that by the 2020 presidential election every American votes on a system that produces a paper record or ballot that can be checked and verified by the voter and audited by election officials. The Pennsylvania Department of State informed all 67 counties that it must have voting machines that produce voter-verifiable records and meet 21st century standards of security, auditability and accessibility by December 31, 2019. As of June 2020, all Pennsylvania counties had complied. *See, Department of State website.*

In addition to absentee ballots, the Legislature significantly modified the election process by adding a provision which enabled any qualified elector to apply for a mail-in ballot without restriction or reason. *25 Pa. C.S. §3150.12 (a). See, Section 14 of Act 2019, October 31, P.L. 552, No. 77.*

NO CASE OR CONTROVERSY IN WHICH TO INTERVENE

The original petitioner was the Delaware County Republican Executive Committee. The original petitioner has not challenged this Court's original ruling and order, nor has it filed anything in response to the current petitioners' request to intervene. Therefore, there is nothing before this court that would require the intervention of a third-party.

Pennsylvania Rule of Civil Procedure 2327 sets forth who may intervene. The Rule is as follows: "At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if:

- (1) The entry of judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) Such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof; or
- (3) Such person could have joined as an original party in the action or could have been joined therein; or
- (4) The determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pursuant to Pa. R.C.P. 2329, the court may refuse an application for intervention where the interest of the petitioner is adequately represented; or the petitioner has unduly delayed in making application for intervention. Here, the interests of the observers were more than adequately represented by the Delaware County Republican Executive Committee at the relevant time. Furthermore, the alleged violation occurred on November 5th, making this post-election application of December 22nd untimely. Thus, the denial.

Ironically, in the very action they wish to be part of, Petitioners' claim that the Delaware County Republican Executive Committee does not adequately represent their interest. As the transcript of the emergency hearing that was held the evening of November 4, 2020 demonstrates, the resolution of the controversy adequately addressed the claims of the original petitioner who stood in the shoes of the Republican observers and candidates. Additionally, the ruling by this court fully comported with the law as it pertained to observers and no appeal was taken of the order that was issued.

The third-party cannot latch onto the original petition. If the third-party truly believed there was a violation of this court's order, then it should have filed a new action under a separate docket number.

LACK OF JURISDICTION

The Order that Petitioners contend has been violated was issued on November 4, 2020. That Order specifically addressed the issue of when and where observers were permitted.

Once an order is issued, the Court of Common Pleas retains jurisdiction for thirty (30) days. During this thirty-day period, the court may modify or rescind the original order. *42 Pa. C.S. §5505*.

In the instant matter, the Petitioners could have challenged the manner in which the Board of Elections complied with the Order at the time they allege they were denied the opportunity to observe and requested a modification of the Order. As noted in the Petition, observer Stenstrom called this judge's chambers twice on November 5th and was advised by the judge's staff to obtain legal representation. This was not done.

It must also be noted that during this thirty-day period, the observers could have filed an appeal to the Commonwealth Court if they believed this Court's directive did not comport with election law. Again, this was not done.

DOCTRINE OF LACHES

Petitioners' challenge violates the doctrine of laches given their utter failure to act with due diligence in commencing this action. Laches is an equitable doctrine that bars relief when a

complaining party is guilty of want of due diligence in failing to promptly institute an action in prejudice of another. *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998).

A plain reading of the Petition for Sanctions sets forth allegations that occurred during the pre-canvassing and canvassing of election ballots. Assuming *arguendo*, that the allegations enjoyed even some smidgen of merit, the remedy rested at the time of the occurrence, not seven weeks after the canvassing was completed. This is the epitome of lack of due diligence.

INDISPENSIBLE PARTY

An indispensable party is one whose rights are directly connected with and affected by the litigation that he must be a party of record to protect such rights. *Columbia Gas Transmission Corporation v. Diamond Fuel Company, et al.*, 464 Pa. 377, 346 A.2d 788 (Pa. 1975). It has long been established that unless all necessary and indispensable parties are parties to the action, the Court is powerless to grant relief. *Tigue v. Basalyga*, 451 Pa. 436, 304 A.2d 119 (Pa. 1973). Under Pennsylvania law, the failure to join an indispensable party implicates the trial court's subject matter jurisdiction. *Orvian v. Mortgage I.T.*, 118 A.3d 403 (Pa. Super. 2015).

Petitioners, in the *ad damnum* clause, seek an order, declaration and/or injunction enjoining the "winning" U.S. House of Representative candidate from exercising official authority. The Court takes judicial notice that the winning candidate was U.S. Representative Mary Gay Scanlon. Representative Scanlon has a direct interest in this matter, as it seeks to prevent her from exercising her duties in the House of Representatives. Therefore, Representative Scanlon is an indispensable party; yet, Petitioners never served her with process, thereby denying her the right to be heard. Furthermore, failure to do so deprives this court of subject matter jurisdiction.

MOOTNESS

The identical issue before this court has been addressed by our Supreme Court. *IN RE: Canvassing Observation, Appeal of: City of Philadelphia Board of Elections*, 241 A.3d 339 (Pa. 2020) decided November 17, 2020. In advance of the election, the Philadelphia Board of Elections arranged workspace for its employees at the Philadelphia Convention Center for the pre-canvassing and canvassing of mail-in and absentee ballots.² Discreet sections of a designated area within the Convention Center were devoted to various aspects of the process.

Pursuant to the election code, designated observers were permitted to physically enter the Convention Center hall and observe the entirety of the process from behind a waist-high security fence that separated the observers from the work-space of Board employees. At 7:45 a.m. on the morning of the election, the Trump Campaign filed a suit challenging the location where observers could watch the process. A hearing was held at which time the attorney for the Campaign argued “that Section 3146.8(b) of the Election Code- which allows designated watchers or observers of a candidate to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded, 25 P.S. §3146.8(b) – requires that the observers have the opportunity to “meaningfully” see the process. In rejecting the argument, the trial court noted that Section 3146.8 contained no language mandating “meaningful observation”; rather, the court interpreted the section as requiring only that the observers be allowed to be “present” at the opening, counting and recording of the absentee or mail-in ballots.” *Id.* @ 343. The trial court also noted that Section 4146.8 provides for no further specific activities for the watchers to do other than to simply be present. The court went onto opine that, under this

² The Delaware County Board of Elections leased space at the Wharf Office Building in Chester in order to accommodate the work staff and necessary machines.

section, watchers are not directed to audit ballots or to verify signatures, to verify voter addresses, or to do anything else that would require a watcher to see the writings or markings on the outside of either envelope, including challenging the ballot or ballot signatures. *Id.*

Later, on election day, the trial court denied the Campaign's request that the Board modify the work area to allow for closer observation of the on-going ballot canvassing. The Campaign immediately appealed to the Commonwealth Court, wherein Judge Fizzano-Cannon held a status conference on the night of November 4, 2020 and issued an order on the morning of November 5, 2020, which reversed the trial court. Judge Fizzano-Cannon's order directed the trial court to enter an order by 10:30 a.m. to require "all candidates, watchers, or candidate representatives to be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to COVID-19 protocols." *Id.* 343, 344. In her opinion filed later that day, Judge Fizzano-Cannon found Section 3146.8(b) to be ambiguous and that in order for representatives to fulfill their reporting duty to their candidate, they are required to "have the opportunity to observe the process upon which they are to report, and so mere physical presence of the observers was insufficient to guarantee this "meaningful observation." *Id.* @ 344. The Board then filed an emergency petition for allowance of appeal with Supreme Court on the morning of November 5, 2020.

By Order dated November 9, 2020, the Supreme Court granted the Petition and set forth three issues, one of which was whether the Commonwealth Court erred in reversing the trial court. At the outset, the Court noted that because ballots were still being canvassed by the Board, the question was not moot and thus, ripe for determination.

The Supreme Court addressed the issue by stating that 3146.8(g)(1.1) requires only that an authorized representative"

“be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are pre-canvassed (emphasis added) and Section 3146.8(g)(2) likewise mandates merely that an authorized representative “be permitted to *remain in the room* in which the absentee ballots and the mail-in ballots are canvassed. (emphasis added). While the language contemplates an opportunity to broadly observe the mechanics of the canvassing process, we note that these provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they “remain in the room.” The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so. *See Sivick v. State Ethics Commission* __Pa.__, 238 A.3d 1250 (2020). Rather we deem the absence of proximity parameters to reflect the legislature’s deliberate choice to leave such parameters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code to make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.” *IN RE: Canvassing Observation, Appeal of: City of Philadelphia Board of Elections*, 349, 350.

In full accordance with the Supreme Court holding, the Delaware County Board of Elections was charged with establishing observation areas. Prior to the above Supreme Court ruling, this court entered an order which required the Board to allow for designated areas and times for observation activities which deviated from the areas established by the Board. The Board adhered to this order. Strikingly, at the time of the filing of this frivolous action, the issue now brought forth by the Petitioners had been adjudicated by the highest court in the Commonwealth, i.e., the Delaware County Board of Elections had full authority to establish observation areas as it deemed fit. Consequently, there is a total absence of legal merit in the Petitions.

RULE OF PROFESSIONAL CONDUCT

Petitioners, through counsel, pray the court hold the Board or Elections in contempt for disobeying the Order of November 4, 2020; hold the Board of Elections guilty of a misdemeanor for violation of provisions of the Election Code; require the Board of Elections to pay a \$1,000.00 sanction to Dasha Pruett; and sentence members of the Board of Elections to 1 year in prison.

Rule 3.3. requires Candor Toward the Tribunal. Pursuant to *Section 2*, a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

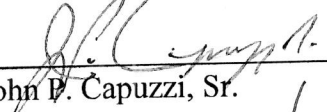
The above cited Supreme Court opinion was published on November 17, 2020. No where in the Petition, the accompanying memorandum of law, or Petitioner's Reply to Response of the Board of Elections does counsel for the Petitioners reference, let alone cite, this opinion which contains the controlling law. As one who obviously has invested significant time in crafting the legal positions of the client, due diligence mandated that counsel keep abreast of the legal landscape which was unfolding, and which was published on the Court's web site, and duly noted in newspapers of general circulation and The Legal Intelligencer. To neglect to exercise due diligence, when the claims made seek to alter or change the election canvassing process and the election results, is unconscionable and inexcusable. Consequently, this dereliction of duty has caused this court, court staff and the respondent to waste valuable time when the resultant ruling was preordained. While the Petitioners seek sanctions against the Board of Elections, they come before this court with unclean hands and they themselves are the ones whose conduct is contemptable.

CONCLUSION

The Delaware County Board of Elections had the authority to establish observation areas in the facility where the pre-canvassing and canvassing of the absentee ballots and mail-in ballots was taking place. In response to a petition by the Delaware County Republican Executive Committee, this Court ordered the Board to allow for closer observation at specific locations and specific time intervals, as the case warranted. The Board fully complied with this order.

The Petitions herein are untimely and do not comport with the law. As our Supreme Court stated, it is the responsibility of the legislature to define distance parameters for positioning of observers and, absent these, the responsibility lies with county board of elections.

BY THE COURT:



John P. Capuzzi, Sr. J.
1/12/21

Cc: Deborah Silver, Esquire
Manly Parks, Esquire
William Martin, Esquire