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MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

August 1, 2014

Mr. Scott W. Kroll, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Kroll:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Middlebrook, Larry Jr. v. Erie County Board of Elections and Melzetta Eve*
Document Received:	Order to Show Cause
Name of Petitioner:	Larry Middlebrook, Jr.
Petitioner's Attorney:	Edward A. Betz, Esq. DeMarie & Schoenborn, P.C. 403 Main Street, Suite 615 Buffalo, New York 14203

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: _____
Jeremy C. Toth
Second Assistant County Attorney
jeremy.toth@erie.gov

JCT:dld
Enc.

This paper received at the
Erie County Board of Election's Office
From Edward Betz
On the 1 day of August 2014
At 9:15 am
Signature of BOE Employee

At a term of the Supreme Court of the State of New York, County of Erie, on the 31 day of July, 2014.

PRESENT:
HON. John F. O'Donnell J.S.C.
in the absence of Patrick Lenahan

CHECK PAID
CASH
JUL 31 2014
ERIE COUNTY CLERK'S OFFICE

In the Matter of the Application of

LARRY MIDDLEBROOK, JR., Aggrieved Candidate,

Petitioner,

v.

THE ERIE COUNTY BOARD OF ELECTIONS, and MELZETTA EVE Objector,

Respondents.

ORDER TO SHOW CAUSE

Index No.: I 2014-135

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Valid the Designating Petition Designating the Petitioner- Candidate for the Democratic Party Position of Member of the County Committee, ~~Ellicott Ward, 20th District;~~ University 26 mc. County of Erie, State of New York, to be voted for at the Democratic Primary Election to be held on September 9, 2014 and to Order the said BOARD OF ELECTIONS to Print and Place the Name of Said Candidate Upon the Official Ballots of Such Primary Election.

ERIE CO BOE AUG 1 '14 AM 9:13

Upon the annexed petition of LARRY MIDDLEBROOK, JR., duly verified the 31st day of July 2014, and upon the original Democratic Party designating petition designating the Petitioner-Candidate as a candidate for the party position of

Candidate for the Democratic Party Position of Member of the Democratic Party County Committee, University Ward, 26th District, City of Buffalo, County of Erie, State of New York and upon all the proceedings heretofore and herein;

LET, the Respondents named herein above Show Cause before this Court at a Special Term for Election Proceedings, to be held at the Supreme Court ~~Chambers~~ Courtroom Part 34, 50 Delaware Avenue, Buffalo, State of New York, on the 6 **day of August, 2014** at 10:00 a.m. of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein:

1. Declaring sufficient and valid the designating petition(s) filed with the ERIE COUNTY BOARD OF ELECTIONS, designating the Petitioner-Candidate as particularized in the annexed petition as a candidates for the September 9, 2014 Democratic Party Primary Election; and

2. Declaring Valid the Designating Petition Designating the Petitioner-Candidate for the Democratic Party Position of Member of the Democratic Party County Committee, University Ward, 26th District, City of Buffalo, County of Erie, State of New York, to be voted for at the Democratic Primary Election to be held on September 9, 2014 and to Order the said BOARD OF ELECTIONS to print and place the name of said Candidate upon the official ballots of such Primary Election, and why the Petitioners should not have such other and further relief as to this Court may seem just and proper in the premises; and it is further

ORDERED, that the Respondent ERIE COUNTY BOARD OF ELECTIONS be and is hereby ordered and directed to produce upon the hearing of this Order to Show Cause and on all adjournments thereof, the aforesaid designating petition, cover sheet(s) and amended cover sheet(s) and any other documents purporting to designate and/or nominate the said Respondent(s)-Candidate(s), together with the objections and

specifications relating to the aforesaid designating petition, any written notification of a determination of non-compliance together with proof of service upon the candidate designated therein, any writing purporting to cure or correct said determination of non-compliance, the permanent personal voter registration poll records of voters, computer generated registration lists for the last four (4) years and official maps for the Democratic Party Position of Member of the Democratic Party County Committee, University Ward, 26th District, City of Buffalo, County of Erie, State of New York, and the report of the Clerks of the said BOARD OF ELECTIONS made on such objections and specifications for examination by this Court.

SUFFICIENT CAUSE APPEARING THEREFORE, leave is hereby granted to the Petitioner(s) to submit, upon the return day of this Order to Show Cause and any adjournments thereof, and the argument thereof, such additional evidence, exhibits, and other proof as may be necessary.

SUFFICIENT CAUSE APPEARING THEREFORE, it is further

ORDERED, that service of a copy of this order, together with a copy of the papers upon which it is granted, on the Respondent ERIE COUNTY BOARD OF ELECTIONS be made by leaving a copy of said order and papers at the Office of the said BOARD OF ELECTIONS at 134 West Eagle Street, Buffalo, NY, or by delivering same to any one of the Commissioners of Elections of the said BOARD OF ELECTIONS, on or before the 1 day of August, 2014;

That service of a copy of this Order to Show Cause, together with a copy of the papers upon which it is granted, upon the Respondent(s)-Objector(s), be made either

(1) by delivering the same to each such Respondent-Candidate personally pursuant to CPLR 308 (1) on or before the 1 day of August, 2014; or (2) by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to each such Respondent-Objector at the address set forth in his or her designating petition filed with the Erie County Board of Elections and by depositing the same in a Post Office Branch regularly maintained by the United States Postal Service in Erie County, New York on or before the 1 day of August, 2014 (with certificate of mailing) and by affixing the same to the door of the residence of such Respondent-Objector at the address set forth in his or her specific objection filed with the Erie County Board of Elections.

And responding papers due on or before August 4th.

ENTER

/S/ HON. JOHN F. O'DONNELL
in the absence of Patrick Nemoyer
JUSTICE OF THE SUPREME COURT
THE STATE OF NEW YORK

OF

GRANTED
July 31, 2014
/S/ Mary Louise Enser
Print

At a term of the Supreme Court of the State of New York, County of Erie, on the 31 day of July, 2014.

PRESENT: Hon John F. O'Donnell in absence of
HON. Patrick Nemoyer, J.S.C.

In the Matter of the Application of

LARRY MIDDLEBROOK, JR., Aggrieved Candidate,

Petitioner,

v.

THE ERIE COUNTY BOARD OF ELECTIONS, and MELZETTA EVE, Objector,

Respondents.

VERIFIED PETITION

Index No.: I 2014-135

Petitioner, LARRY MIDDLEBROOK, JR., by and through his attorneys, DeMarie & Schoenborn, P.C., Edward A. Betz, Esq., of Counsel, does hereby allege and respectfully show as follows:

1. Petitioner is a Candidate for the Democratic Party Office of Member of the Democratic Party County Committee, University Ward, 26th District, City of Buffalo, County of Erie, State of New York, having duly filed a designating petition containing seventy-two (72) signatures with the Respondent Erie County Board of Elections for the Democratic Party Designation.

2. Respondent Board of Elections is charged under the laws of the State of New York with the administration of Elections throughout the Erie County, and more particularly, here, with the administration of the election process in the University Ward, 26th District, City of Buffalo. This includes the filing of Petitions and the processing and determination of objections thereto.

3. Respondent Melzetta Eve purports to be a voter residing in the University Ward, 26th District, City of Buffalo who has filed objections to the subject Democratic Party Petitions designating Petitioner as a candidate.

4. Petitioner's designation for the Democratic Party line carried sufficient numbers of signatures of members of the Democratic Party for Petitioner to achieve ballot status.

5. Petitioner's designating petition was invalidated by Respondent Board of Elections upon the objections filed by Respondent Objector.

6. The basis of the Board's determination was based upon varied findings, not all of which are contested here.

7. Twenty-five (25) of the signatures were voided by the Board's finding that the subscribing witness failed to set forth a proper date of signing.

8. Petitioner is entitled to bring this proceeding under the provisions of the Election Law, Section 16-102, which provides, *inter alia*, that a candidate may bring a petition to validate to this Court within three (3) business days of invalidation.

9. The third business day after July 28, 2014 is Thursday, July 31, 2014.

10. That statute of limitations has not run.

AS AND FOR A
FIRST CAUSE OF ACTION

11. Respondent-Objector has asserted that the date in the witness section is improper, in that it fails to set forth the date of signing. Your Petitioner concedes this point, and seeks this Court to correct this irregularity *nunc pro tunc*.

12. "[W]here a mere irregularity has been shown which the Court can correct without causing any prejudice to any person, the courts will not hesitate to so act in liberally construing and implementing the provisions of the Election Law." Verity v. Cristenfeld, 70 Misc.2d 310, 333 N.Y.S.2d 355 (2nd Dept., 1972), *citing* Application of Ferguson, 57 Misc.2d 1041, 294 N.Y.S.2d 174 (Sup.Ct. 1968); Sykes v. Millspaugh,

22 A.D.2d 710, 253 N.Y.S.2d 193 (1964); Application of Keough, 179 Misc. 1, 37 N.Y.S.2d 163 (Sup.Ct.1942); Application of Zichello, 50 N.Y.S.2d 48 (Sup.1944).

13. Here, prejudice to any person but your Petitioner. The ommittance of the year of signing is merely an oversight to which no hint of impropriety can be imputed. Clearly, each and every other line of the Petition bears the year "2014," and the witness would have had nothing to gain by inserting any other date. As in Verity, *supra*, "[u]nder such circumstances petitioner seeks to have the Court correct the irregularity Nunc pro tunc, and thus declare the designating petition in all respects valid and sufficient. It is clear that fraud and even the possibility of fraud must be guarded against at every opportunity, especially by the Courts which are empowered by s 330 to summarily decide any question of law and fact relating to the sufficiency of a designating or nominating petition such as the one in issue herein." Verity, *supra*.

14. That venue is properly based in Erie County.

15. Petitioner respectfully requests leave, and reserves the right to present further proof at a hearing or trial of this matter by way of affidavits, documentary proof and testimony of witnesses to substantiate the allegations contained herein, at the time set down by the Court, and to amend this petition as may be required to add objections to the subject designating petition which may not have been before the Respondent Board of Elections, or to reargue objections and obtain court review of adverse determinations thereon by Respondent Board of Elections.

16. Alternate means of service have been requested by Petitioner because time is of the essence, due to the short statute of limitations imposed by the Election Law, and upon the advice and direct experience of counsel, it is often the case that the Respondent will be, and/or will make himself inaccessible or unavailable for personal service.

17. Petitioner has no other remedy or relief at law or in equity other than applied for herein.

18. Counsel hereby certifies the allegations contained herein are not frivolous, pursuant to 22 NYCRR 130-1.1a.

19. No application for the relief requested has been made to any court EXCEPT as described hereinabove.

WHEREFORE, Petitioner, Larry Middlebrook, Jr. respectfully requests the Court:

1. Declare Petitioner Larry Middlebrook, Jr.'s designating petition naming him as Candidate for the Democratic Party Office of Member of the Democratic Party County Committee, University Ward, 26th District, City of Buffalo, County of Erie, State of New York valid; and

2. Order the Respondent Erie County Board of Elections to certify the aforesaid candidacy of Larry Middlebrook, Jr. and place his name upon voting machines and ballots to be used at the primary election of the Democratic Party to be held on September 9, 2014; and

3. For such other and further relief as the Court deems just and proper.

DATED: July 30, 2014
Buffalo, New York

Edward A. Betz
DeMarie and Schoenborn, P.C.
Attorneys for Petitioner
Larry Middlebrook, Jr.
403 Main Street, Suite 615
Buffalo, New York 14203
(716) 856-0024

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

Larry Middlebrook, Jr., being duly sworn, deposes and says:

That he is the petitioner in this proceeding; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to those matters stated to be alleged upon information and belief and stated in accordance with his advice, and as to those matters he believes them to be true.

Larry Middlebrook, Jr.

Sworn to before me this
31st day of July, 2014.

COMMISSIONER OF DEEDS
AND FOR BUFFALO ERIE COUNTY, N.Y.
My Commission Expires December 31, 2014

~~Notary Public~~
Commissioner of Deeds