



COUNTY OF ERIE

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December 12, 2011

GA

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

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:	<i>Smith, Ron vs Erie County Board of Elections</i>
Document Received:	Order to Show Cause
Name of Claimant:	Ron Smith
Claimant's attorney:	Frank Housh, Esq. 70 Niagara Street Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

JEREMY A. COLBY
Erie County Attorney

By: 
THOMAS F. KIRKPATRICK, JR.
Second Assistant County Attorney
thomas.kirkpatrick@erie.gov

TFK/mow
Enc.

cc: JEREMY A. COLBY, Erie County Attorney

1D-3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Melissa Dziejman
9 December 11
4:46

-----X
In the Matter of the Application of

RON SMITH

Juliet Symanski

Petitioner

VERIFIED PETITION

- vs. -

ERIE DO BOE DEC 9 '11 PM 4:46

Index No. 004784/2011

THE ERIE COUNTY BOARD OF ELECTIONS

Respondent,

For an Order, pursuant to Sections 16-106, 16-112 and 16-113 of the Election Law: directing the preservation of all ballots cast in the General Election held on November 8, 2011 for the Public Office of Supervisor for the Town of Alden, in the County of Erie, and directing the examination of all ballots cast in said election by Petitioner's counsel and agents; invoking the court's jurisdiction to rule on the casting or canvassing, or refusal to cast or canvass, any ballot as set forth in Election Law Section 116-106 (1); preserving Petitioner's rights under Section 9-209 (4)(d) of the Election Law and Section 16-113 of the Election Law, and related sections of law; declaring Petitioner the lawfully elected candidate in this election.

-----X
TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petitioner, by his/her attorney, respectfully shows:

1. Petitioner RON SMITH is a voter in and an independent candidate for the public office of Supervisor for the Town of Alden on November 8, 2011. RON SMITH is the incumbent Supervisor. RON SMITH's name did not appear on the ballot for the general election, however, he earned the plurality of votes by-write-in votes.

2. The subject Supervisor of Town of Alden position, County of Erie,

State of New York, consists of part of Erie County, State of New York.

3. Petitioner has standing under Sections 16-100, 16-102, 16-106, 16-112 and 16-113 to bring this proceeding. Respondent's actions are related to Election Law 16-106(2), the canvass of returns by a county Board of Canvassers.

4. The canvass of ballots pursuant to Election Law 9-206 in the subject election took place at the Erie County Board of Elections on Monday, November 21, 2011 (hereinafter "canvass"). The candidates for the subject election were present.

5. At the canvass, the Board of Elections made a statement of determination (**Exhibit A**) that the Republican, Conservative, and Independence Party nominee Harry F. Milligan won 1089 votes, the Democratic and Working Families Party nominee won 601 votes, and Petitioner RON SMITH won 1077 write-in votes.

6. Pursuant to Election Law Section 16-106(5), a proceeding under . . . subdivision two [must be made] within thirty days after the election or alleged erroneous statement or determination was made." Thus, the statute of limitations in this case expires December 21, 2011 and this action is therefore timely.

7. At the canvass, the Respondent Board of declared void over thirteen (13) ballots in which the voter had written the name RON SMITH or indicated his intent to vote for RON SMITH for Alden Town Supervisor.

8. By declaring over thirteen (13) votes for RON SMITH void, the Respondent Board of Election erred.

9. RON SMITH hereby challenges Respondent's legal determination that over thirteen (13) ballots were legally void, and seeks judicial determination of the validity of the subject write-in votes, Election Law Section 16-106(4).

10. The Respondent Board of Elections in Erie County is responsible for canvassing the returns of the elections from the various municipalities within the said Alden Town Supervisor election and certifying the results of elections for the subject public office, acting in their capacity as the County Boards of Canvassers.

11. A stay is requested so the Candidates can have representatives at the various Boards of Elections for the canvass of machines.

12. This proceeding is commenced pursuant to the provisions of Articles Five, Eight, Nine and Sixteen of the Election Law, which confers authority upon this Court to determine and resolve any disputes arising out of or relating to the canvass of ballots and returns for public office, and to preserve the ballots and machines employed in a general election for a contest relating thereto.

13. This petition is brought to continue to preserve the ballots, review irregular and possibly fraudulent returns from voting machines, preserve the voting machine ballots and determine where Petitioner may have been deprived of votes by malfunctioning or tampered with voting machines, to protect the Petitioner's rights to have this Court review all determinations of the Boards of Elections as is provided for in the Election Law, more fully set the parameters for the re-canvass and canvass of votes, allow for this Court to make adjustments in the canvass as may be necessary, enjoin any certification of election results which would prejudice the rights of the petitioners, and to bar or prevent any procedural defect which might be asserted to defeat this Court's determinations.

14. Moreover, as this is a General Election, an injunction against issuance of a certificate of nomination might be the only remedy available to the Petitioner so as to

allow for the determination of the rightful claimant to the subject public office without resort to an action *quo warranto* by the Attorney General.

15. Subject to the supervision and review of this Court, the Respondent Boards of Elections will be conducting a re-canvass of the results of this election recorded on voting machines.

16. Upon information and belief, the unofficial canvass of the votes cast by machine for the subject public office may be, and often is, incomplete and or inaccurate.

17. Such an occurrence requires the Court ordered testing of the subject voting machine(s) and the subsequent adjustment of the canvass to correct the error in vote totals.

18. Petitioner requests leave to and reserves the right to submit further proofs by way of witnesses, affidavits and evidence on the date set by this court for the trial and hearing of this matter, and to amend these pleadings to reflect the facts of the conduct of the subject election and/or facts adduced by the way of further investigation and/or a canvass of the ballots for the election for the subject public office by the Boards of Elections.

19. In the course of the canvass of ballots there may be erroneous determinations made by the Boards of Elections, and such determinations may be sustained by a unanimous vote.

20. In the event there are unanimous votes of the commissioners or inspectors against the objections of the petitioners, the ballot envelopes would be opened, and the ability of this Court to review the objection and the ruling thereon would be

mooted.

21. In the event the Court chooses not to preserve objections which are unanimously rejected by the Board, it is requested, in the alternative that the Court employ the objection preservation method as set forth in O'Keefe v. Gentile, 757 N.Y.S.2d 689 (S.Ct. Kings Co. 2003) and King v. Smith, 308 A.D.2d 556 (Second Dept. 2003)

22. Failure to so preserve objections would irreparably harm your petitioner.

23. In addition, on information and belief, the voting machines cannot scan certain votes that, pursuant to the Rules and Regulations of the New York State Board of Elections, Sec. 6210.13 are considered valid which may result in a discrepancy between a manual audit tall and the voting machine tally. As a result all ballots cast in the Town of Alden Supervisor election may be required to be completely re-canvassed by a voter verifiable record audit (i.e., a recount by hand of the paper ballots) pursuant to Election Law 16-113.

24. Petitioner may request various information to be provided to him by the Boards of Elections. This information is required for Petitioner to have a meaningful participatory role in the canvass of paper ballots. It is requested that this be done without the need for a subpoena.

25. In order to expedite the canvass, an order is requested providing for the production of documents before the canvass of ballots without the need for subpoena.

26. Further, this Court should provide in its order that counsel for petitioner be afforded an opportunity to view all each ballot as it comes up for

consideration.

27. Moreover, without the information requested, this Court and your Petitioner will be unable to see that the mandates of the New York State Constitution, Article II, Section 7, which requires that identification of voters be made by their signatures “in all cases” are followed.

28. This information will allow for the full implementation of Sections 8-302, 8-304, 9-104(1) (d), 9-209 (2) (a) (1) of the Election Law and other sections of the law which codify the Constitution’s mandate of signature verification to establish the identity of all voters. The information requested by your petitioner is needed for the Petitioner to have the ability to participate in the canvass. The Election Law which entitles a candidate to have watchers present who may object to the casting or canvassing of any ballot or the refusal to cast or canvass any ballot, Election Law Section 9-209 (2)(d), to object to the qualifications of any voter, and to have any determination reviewed by the Supreme court, Election Law, Section 16-106.

29. The canvass of ballots may include objections to affidavit and absentee ballots submitted by voters who are not qualified to vote same.

30. The canvass of votes may include challenges to registrations of certain voters, requiring Court intervention to have law enforcement authorities verify registrations as required by the Election Law in an expedited fashion.

31. The failure to enforce the statute, and the inability to adduce the underlying facts would irreparably harm your Petitioner, and prevent a review on the merits of his challenges made on the basis of registration / residency.

32. The State Board of Elections, and all local boards of elections in

this state allow attorneys and those working for attorneys to be present in the polling place as poll watchers, without regard to the individual's place of residence within the state, so that they might participate in any administrative proceedings before the Boards on behalf of the candidate that they represent. Upon information and belief the Election Law fails to address the question of the participation of counsel in proceedings at the canvass and re-canvass of paper ballots. The Election Law merely requires that a poll watcher be a resident of the County.

33. Moreover, any residency requirement for the circulation of petitions has been stricken by the Court of Appeals in LaBrake v. Dukes and McGuire v. Gamache. It is respectfully submitted that this residency requirement is similarly unconstitutional.

34. The court is respectfully requested to direct that attorneys and those working for attorneys be permitted to be present in the Board of Elections Offices which are "polling places" as poll watchers without regard to their residence within the State of New York.

36. Additionally, no rational basis appears for the prevention of attorneys from outside the County from practicing law before the Boards of Election on or after Election Day, constituting an illegal and improper restriction on the practice of a state licensed profession.

37. Such applications have been routinely granted by the Courts of this State.

38. Moreover, Petitioner prays for an order of this court which would prevent any of the Respondent Boards of Elections from preventing the Petitioner or any

of the candidates from having a meaningful participation in the process by way of denial of documentation prior to canvass, and/or the processing of ballots by more teams of inspectors than Petitioner's legal team can accommodate.

39. Upon information and belief, the facts alleged in the paragraphs hereinabove, point to the fact that the final result of this election hinges upon the canvass of the various types of paper ballots mentioned hereinabove, as well as a review of the canvass of the machine cast ballots.

40. As this is a General Election, petitioner has requested that the Board of Elections, acting in its capacity as the County Boards of Canvassers be enjoined from certifying the results of this election until such time as these court proceedings are finally resolved and determined.

41. A restraining order is requested to prevent certification ONLY in the event the proceedings before this Court extend beyond the statutory deadline, or is made prematurely by the Respondent Board.

42. No prior application for the relief requested herein has been made by the Petitioner to any court, excepting, as specified herein, which order(s) do/does not necessarily protect your Petitioner's rights under the law.

43. Petitioner has no other remedy at law other than that applied for herein. Leave is respectfully requested and the Petitioners respectfully reserve the right to amend these pleadings as needed.

44. Leave is respectfully requested and Petitioners respectfully reserve their right to produce evidence in support of this petition by way of testimony, affidavits, and other evidence at the trial or hearing of this matter.

EXHIBIT A

Town of Alden Supervisor (2 Year Term) (Vote for One)	Edward F. Sisson Jr Democratic	Harry F. Milligan Republican	Harry F. Milligan Conservative	Edward F. Sisson Jr Working Families	Harry F. Milligan Independence	Ronald L. Smith Write-In	Other Blank, Void & Scattering	TOTAL
2011	7A	7B	7C	7D	7E			
ALDEN								
1st District	70	129	17	14	9	234	2	
2nd District	48	97	25	21	9	109	1	
3rd District	79	122	40	20	19	157	2	
4th District	71	79	24	19	12	96	3	
5th District	41	86	14	13	8	46		
6th District	53	79	11	10	4	134		
7th District	51	116	31	17	11	171		
8th District	67	112	19	5	16	124		
9th District	2	0	0	0	0	6		
TOTAL	482	820	181	119	88	1077		

Sisson Milligan Smith

482
119

601

820
181

88

1089


1077

45. Leave is respectfully requested and the Petitioners respectfully reserve the right to make further applications to the Court for interim relief as may be needed.

WHEREFORE, Petitioner respectfully requests the relief sought in the annexed Order to Show Cause and such other and further relief as this Court may deem to be just and proper in the premises.

Dated: December 9, 2011
Buffalo, New York

Respectfully submitted:

BY: 

Frank Housh
Attorney for Petitioner
70 Niagara Street
Buffalo, NY 14202
(716) 362-1128
frank@houshlaw.com

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

I, RON SMITH, being duly sworn, depose and say, that the deponent is the
Petitioner in the within action; that deponent has read the foregoing petition and knows the
contents thereof; that the same is true to deponents own knowledge, except as to the matters
therein stated to be alleged on information and belief and that as to those matters deponent
believes it to be true.

Ron Smith

Sworn to before me,
this 9th day of December, 2011

Denise M. Dzierzewski
NOTARY PUBLIC

DENISE M. DZIERZEWSKI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Aug. 17, 20 14