



Sare v Rockland

1           THE CLERK:   Good afternoon, everyone.

2           This is Case Number 10 on the calendar:   In the  
3           matter of Diane Sare v Rockland County Board of  
4           Elections.   037390/2024.

5           Counsel.

6           ATTORNEY FOLDENAUER:   Good afternoon, Your  
7           Honor.

8           Aaron Foldenauer - that's A-A-R-O-N,  
9           F-O-L-D-E-N-A-U-E-R - 30 Wall Street, 8th Floor, New  
10          York, New York 10005, for petitioner.

11          Good afternoon.

12          THE COURT:   Good afternoon.

13          ATTORNEY FEIDEN:   Hello.   Good afternoon.

14          Larraine Feiden, Assistant Rockland County  
15          Attorney, for the respondents, Rockland County Board  
16          of Elections.   Standing to go my left is our summer  
17          associate, Eli Leon Greene.

18          THE COURT:   Okay.   Good afternoon.

19          You guys can sit if you'd like.

20          All right.   So, I brought you in because we  
21          have this Order to Show Cause that was filed by the  
22          defense looking for dismissal of the action.

23          I wanted to set down a rather expedited motion  
24          schedule here, briefing schedule, if we could,  
25          please.

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1 And I also had a question, because I know,  
2 Ms. Feiden, when we were here on May 22nd, you  
3 pointed out that the only surviving petitioner in  
4 the case now is Smart Legislation; that the other  
5 petitioners had withdrawn from the action. And so  
6 you had indicated at that time that you thought that  
7 there might jurisdictional defects now with Smart  
8 Legislation being the sole surviving petitioner in  
9 this case. And I didn't see any reference to that  
10 in the motion. So I didn't know if you guys were  
11 choosing just to go a different direction with your  
12 arguments.

13 ATTORNEY FEIDEN: Oh, no, no, no. We did  
14 address that in our Memo of Law. And also,  
15 yesterday morning - I hope the Court was able to see  
16 it - the State Board of Election submitted an  
17 affirmation with exhibits basically, you know,  
18 briefing that point, which is that a proceeding --

19 THE COURT: I'm just saying your motion on its  
20 face does not request that relief. So the Court  
21 can't consider that relief unless you're  
22 specifically requesting it in your motion papers.

23 ATTORNEY FEIDEN: Well, Judge, our motion  
24 papers are brought pursuant to CPLR 3211 (a)(7),  
25 (a)(10) --

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1           THE COURT:   Right.

2           ATTORNEY FEIDEN:   -- 3020(a), 7804 (f), CPLR  
3   404 (a), and Election Law 9-208 (4)(a).

4           THE COURT:   No, I'm aware. We took a look at  
5   all those sections. I mean, I'm just trying to --  
6   where in the motions papers do you make the  
7   reference, the statutory reference to any  
8   jurisdictional or standing argument? I didn't see  
9   that. I just didn't. I surprised because, when I  
10   read the papers, I was expecting to see that  
11   somewhere given what you raised on the record.

12          ATTORNEY FEIDEN:   Yeah, no, no, no. I  
13   understand what you're -- I understand the question.

14          We are -- our Motion to Dismiss -- our  
15   affirmative defenses did not include standing. That  
16   was -- you know, things have changed since the  
17   individual petitioners dropped out.

18          THE COURT:   Right.

19          ATTORNEY FEIDEN:   So now there's the standing  
20   argument in addition to all our -- all of our other  
21   arguments. And that was also raised, like I said,  
22   in the brief -- in the affirmation that was  
23   submitted yesterday by the State Board of Elections.

24          THE COURT:   So, which CPLR section that you're  
25   seeking dismissal under relates to the standing or

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1 jurisdictional issue, because I wasn't able to quite  
2 figure it out?

3 ATTORNEY FEIDEN: Well -- well, definitely  
4 failure to state a cause of action. I mean, they  
5 can't state a cause of action if they're not  
6 qualified to be a petitioner in a case, under the  
7 Election Law.

8 THE COURT: Right.

9 ATTORNEY FEIDEN: And also under Special  
10 Proceeding pursuant to CPLR 78.

11 THE COURT: Can you just point that out, where  
12 that is in your papers? Perhaps I missed it, but I  
13 didn't see it there.

14 ATTORNEY FEIDEN: So, in -- well, in our Order  
15 to Show Cause and also in --

16 THE COURT: Yeah, in your supportive documents.

17 ATTORNEY FEIDEN: Well, I'm saying in  
18 Ms. Giblin's affirmation, and in my affirmation, the  
19 first line is setting forth those sections.

20 THE COURT: No, I understand that you cite the  
21 sections, Ms. Feiden. I'm wondering where  
22 substantively in your papers you make an argument  
23 that Smart legislation is not an appropriate party  
24 to bring this litigation, because I didn't see that  
25 there.

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1           ATTORNEY FEIDEN: Well, I do say that they --  
2 the petitioner was not verified.

3           THE COURT: Right. That's a completely  
4 separate issue.

5           ATTORNEY FEIDEN: Yes. But also goes to  
6 jurisdictional defect, fatal jurisdictional defect.

7           THE COURT: That's an easily curable defect.  
8 That's not -- that would not be the basis for a  
9 dispositive dismissal from my research on other  
10 cases.

11          ATTORNEY FEIDEN: No, I understand what you're  
12 saying. I'm going to rely on the State's  
13 affirmation, because I don't think it's specifically  
14 in my affirmation.

15          THE COURT: Well, the State isn't a party here.

16          ATTORNEY FEIDEN: I don't want to cut you off,  
17 but that's another jurisdictional defect that the  
18 State has to be a party.

19          THE COURT: I know that you raised that, but  
20 I'm saying I can't rely on a non-party's affirmation  
21 to make arguments in connection with your Motion To  
22 Dismiss. So, if you're trying to make that  
23 argument, you would need to re-consider your papers  
24 here, because it's not fleshed out there at all.

25          ATTORNEY FEIDEN: I understand. And I will

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1 gladly do that, you know, at Your Honor's request.

2 THE COURT: Well, I'm not requesting. I'm  
3 simply pointing out that you had identified back in  
4 May that that was going to be the basis of your  
5 motion. So, when I got the motion, and I was  
6 reading through it, I didn't see that basis  
7 articulated or spelled out. So, I was -- I had a  
8 question about that.

9 ATTORNEY FEIDEN: I understand completely. And  
10 I will flesh it out at your pointing it out.

11 THE COURT: Okay. So with that being said, so,  
12 are you planning on amending your papers then?

13 ATTORNEY FEIDEN: Yes.

14 THE COURT: Okay. So then -- and that's what I  
15 was getting to, because that's going to bear on our  
16 setting the schedule, right?

17 So, how long will you need to amend your Order  
18 to Show Cause?

19 ATTORNEY FEIDEN: A week.

20 THE COURT: Sure. So, we're at the 11th. So,  
21 can you file that by July 18th?

22 ATTORNEY FEIDEN: Yes.

23 THE COURT: And how long would you need to file  
24 opposing papers, counsel?

25 ATTORNEY FOLDENAUER: I'm just looking at a

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1 calendar, because that puts us in mid-August.

2 THE COURT: Well, they're filing July 18th. I  
3 typically allow about 30 days for opposition papers.  
4 So, that would put you, yeah, right around -- we do  
5 submissions on Fridays. So, that would put you at  
6 August 15th, but I don't know what your  
7 summer-vacation schedule is. So, if you are going  
8 to be away during some of those weeks, I can enlarge  
9 the time a little bit.

10 ATTORNEY FOLDENAUER: Yes, let's enlarge the  
11 time a little bit.

12 THE COURT: How little bit?

13 ATTORNEY FOLDENAUER: Can we say the 29th?

14 THE COURT: Sure. The 29th.

15 And then is two weeks going to be enough for a  
16 reply, because replies are usually pretty quick?

17 ATTORNEY FEIDEN: Yes.

18 THE COURT: So, opposition by the 29th. Do you  
19 anticipate any cross applications? Probably not,  
20 right?

21 ATTORNEY FOLDENAUER: I don't think so.

22 THE COURT: I can't imagine, but I just figured  
23 I'd double check.

24 ATTORNEY FOLDENAUER: Right.

25 THE COURT: All right. So if not, then we'll



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1 have Ms. Feiden submit her reply by September 12th.  
2 And that will start our 60-day clock for issuing a  
3 written decision in connection with that motion.  
4 Okay?

5 And depending on the outcome of the motion,  
6 because obviously if I grant the motion, it's  
7 dispositive. The case is over. If I don't grant  
8 the motion, then I'll put a date for you to come  
9 back to court in the motion. Okay? But discovery  
10 is not stayed. Continue while all this process  
11 unfolds.

12 ATTORNEY FEIDEN: There are objections to  
13 discovery, Your Honor --

14 THE COURT: Okay.

15 ATTORNEY FEIDEN: -- that were also set forth  
16 in the State, who's not a party's affirmation, that  
17 specifically what's being requested are the actual  
18 ballots which are protected pursuant to statute and  
19 can only be released by legislation.

20 THE COURT: So, I'm assured you put that all in  
21 writing to your adversary, right?

22 ATTORNEY FEIDEN: I will, yes.

23 THE COURT: Yeah. And just assert that. And  
24 then you can -- if you disagree, then there will  
25 have to be motion practice on that.

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1           ATTORNEY FOLDENAUER: All right. This is the  
2 first I'm hearing of it now.

3           THE COURT: Okay. She'll put that in writing  
4 to you, the specific basis of the objection, or if  
5 you're seeking some kind of a protective order,  
6 maybe. I'm not sure. But she'll put that in  
7 writing to you.

8           If you can do that, please, within the next two  
9 weeks. Upload it to NYSCEF. And that way your  
10 adversary will be served. And then let me know if  
11 you two are continuing to have disagreement once you  
12 receive the letter.

13          ATTORNEY FOLDENAUER: I'm sorry. Her letter's  
14 due in two weeks?

15          THE COURT: Yes, just with respect to any  
16 objections to the discovery requests.

17          ATTORNEY FOLDENAUER: Okay.

18          THE COURT: All right. Anything further for  
19 today?

20          ATTORNEY FEIDEN: No, that's it, I think.

21          ATTORNEY FOLDENAUER: I don't think so, Your  
22 Honor.

23          THE COURT: Okay. Wonderful. Look forward to  
24 reading the papers, Everyone. Thank you.

25          ATTORNEY FOLDENAUER: Did we have a hearing

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1 date schedule or is that --

2 THE COURT: No, that wouldn't happen until I  
3 decide the motion.

4 ATTORNEY FOLDENAUER: So, that September date  
5 we set --

6 THE COURT: That's not a hearing. That was  
7 just a Status Conference to find out the status of  
8 discovery. We are nowhere near a hearing on this.

9 ATTORNEY FOLDENAUER: All right. So, is that  
10 conference still on, that Status Conference?

11 THE COURT: No, I'm going to vacate that date  
12 actually, because it doesn't make any sense to bring  
13 the case back in until I decide the motion papers.  
14 If I need oral argument on the motion papers, I will  
15 let you know. If when we read them, if we have  
16 questions and we want to have you flesh out your  
17 arguments more, we'll upload a notice to you  
18 scheduling it just for oral argument on the motion  
19 itself. But for right now, we're going to vacate  
20 the 22nd of September.

21 ATTORNEY FOLDENAUER: Okay. And if there's an  
22 issue with her discovery objections that are to be  
23 filed in two weeks, then we let you know?

24 THE COURT: Yeah. Yeah. Upload a letter to  
25 NYSCEF. And if we need to get involved, we'll

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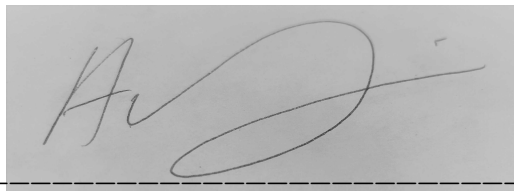
1 either have an attorney's-only conference to see if  
2 we can resolve the issue. If we can't do it that  
3 way, then we'll invite you guys to make additional  
4 applications.

5 ATTORNEY FOLDENAUER: May I may approach the  
6 court reporter.

7  
8 oOo

9  
10 REPORTER'S CERTIFICATION

11 I, AMBER MALKIE FINER, do hereby certify that  
12 the foregoing is a true and accurate transcript.

13  
14  
15  
16  


17 AMBER MALKIE FINER  
18 Senior Court Reporter  
19  
20  
21  
22  
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