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Challenges to Candidates: Residency and Timing

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The most significant election-law-related events revolved around the presidential election. Several months ago we published an article about the ins and outs of the nominating process and the workings of the electoral college ("Electing the President: Rules and Laws," NYLJ, April 18, 2016), yet we would have been hard-pressed to predict that millions of Americans would become so familiar with the process. Think of how many office-cooler discussions of "faithless electors" have occurred in the last several weeks. That said, the electors have met, and, predictably, sufficient numbers have followed the wishes of voters in their respective states to elect Donald Trump president. The post-election recounts, and their inevitable concomitant lawsuits, though interesting, seem now like a sideshow unworthy of too much attention.

The past 12 months remain prologue, however, for the several voting rights cases brought against restrictive laws in North Carolina and Texas, to name but two (see, e.g. "Federal Appeals Court Strikes Down North Carolina Voter ID Requirement," N.Y. Times, July 29, 2016; "Federal Court Rules Texas' ID Law Violates Voting Rights Act," N.Y. Times, July 20, 2016), not to mention the very important gerrymander case from Wisconsin that struck down lines inspired by

excessively partisan interests ("Judges Find Wisconsin Redistricting Unfairly Favored Republicans," N.Y. Times, Nov. 21, 2016).

As the year draws to a close, however, we focus on two cases that are significant to voters and practitioners in New York.

Candidate's Residency

The first significant case involves a candidate's residency, and how it affects his eligibility to run for office. As we discussed in this column previously ("Year-End Round Up on Elections and Voting Rights," Jan. 5, 2015), courts have recently relaxed such eligibility conditions dramatically. In two highly publicized cases in 2014, the First and Second Departments affirmed findings that challengers to a candidate's New York residency had not satisfied their burden of proof even when the candidates had admitted in tax filings that their New York residency was either limited or non-existent; these admissions had been "cured" by retroactive amendments to their filings during or immediately before election lawsuits were brought against them.[1] Similarly, when a candidate was found to have voted outside the jurisdiction in which he was running, a trial court did not find this an impediment to his residency.[2]

The Second Department reiterated this principle in 2015, when it held that voting outside a jurisdiction may be an indicia of non-residency, but can be rebutted by competent evidence.[3] Thus, election law jurisprudence relating to the eligibility of candidates who wished to run for state office had been increasingly liberal in its application.

This year, however, the New York Court of Appeals took a much more restrictive approach. In *Glickman v. Laffin*,[4] the court found that the mere registration to vote in another jurisdiction defeated a candidate's claim to residency in New York. Steven Glickman was running for the state Senate this year, when his candidacy was challenged on the ground that he did not meet the constitutional requirements of residing in the district for one year or in the state for five.

Ultimately, the most significant fact revealed at trial was that he registered to vote in Washington, D.C. As a result, the Supreme Court in Albany County ruled him ineligible. The Appellate Division reversed, but with two dissents, and the Court of Appeals found that he breached his New York residency by his D.C. registration.

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1 *Weiss v. Teachout*, 120 A.D.3d 701 (2d Dept. 2014); *Jones v. Blake*, 120 A.D.3d 415 (1st Dept. 2014).
2 *Carey v. Manning*, Index No. 3343/12 (Sup. Ct. Dutchess Co. 2012).
3 See, e.g., *Meyer v. Whitney*, 132 A.D.3d 1062 (2d Dept. 2015).
4 27 N.Y.3d 810 (2016).

Although he had not voted in Washington, the Court of Appeals found that the capital's law provided that "an elector" in DC "does not claim voting residence or right to vote in any state or territory." There was no evidence that Glickman knew the law, and the record is silent as to what he agreed to or thought when he registered because his registration form was not in evidence. Nevertheless, the high court knocked him off the ballot, and, in so doing, appeared to have obviated inferior courts' prior leniency on this issue.

The upshot after *Glickman*, then, is that candidates may have a very rough row to hoe if there are inconvenient facts in their residential history—reversing the recent trend of liberalizing our election laws.

Ballot

The second case, *Pidot v. Macedo*, 141 A.D.3d 680 (2d Dept. 2016), involved a candidate for U.S. Congress who was declared eligible to run but was, nevertheless, denied a place on the ballot—because the state Supreme Court rendered its decision only four days before the scheduled primary election.

When Congress member Steve Israel (D-N.Y.) declined to run for re-election, the open seat attracted many candidates. On the Republican side, two candidates vied for the nomination, State Senator Jack Martins and reformer Philip Pidot. Martins challenged Pidot's designating petitions, claiming he lacked the sufficient number of signatures to qualify for the ballot. The New York State Board of Elections agreed, and invalidated his candidacy.

Pidot sought relief in state Supreme Court, and after addressing a variety of procedural issues, the trial court overturned the board's ruling, determining that he had enough signatures to appear on the Republican Party primary election ballot.

There was one hitch, however. In that the trial court's ruling was issued at the 11th hour, Martins and Board of Elections personnel said it was impossible to change the ballots or voting machines. In a word, he won his case, but failed to get the relief he needed.

Pidot's counsel asked the court to reschedule the Republican Party primary to include Pidot, but the court declined.

Pidot appealed to the Appellate Division (co-author Jerry Goldfeder represented Pidot on appeal), which affirmed, holding that Pidot's request for a new primary date was tardy. The court noted that this relief was not requested in his original lawsuit that sought to overturn the

board's invalidation of his candidacy—when, of course, Pidot had no reason to believe that a favorable decision was going to be stymied by its timing.[5]

This case presents two lessons, one for the bar, the second for the bench. Attorneys must anticipate any and all potential relief when they commence election lawsuits—even if it is unlikely that a particular remedy will be necessary. And trial courts must keep in mind the very tight schedule of such proceedings. As the Second Department has repeatedly said: "Election Law proceedings are subject to severe time constraints, and they require immediate action."[6]

As 2017 unfolds, we anticipate the continuation of several important voting rights and redistricting cases in the federal courts, as well as, of course, the many ballot access decisions in state court.

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[5] Pidot and several voters also went to federal court seeking a new primary. The U.S. District Court granted the relief, ordering the primary election for Oct. 6. Several weeks later, the Second Circuit reversed. *Martins v. Pidot*, 2016 WL 4973758 (2d Cir. 2016).

[6] *Stavisky v. Lee*, 142 A.D.3d 933 (2d Dept. 2016).