

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Nomination Petition of	:	
Karen Brown As Democratic	:	
Candidate for Office of	:	No. 546 C.D. 2014
Committee Person	:	Submitted: April 11, 2014
	:	
Appeal of: Karen Brown	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: April 15, 2014

Appellant Karen Brown (Candidate) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), dated March 25, 2014, which granted the petition to set aside the nomination petition of Candidate, filed by Appellees Richard Nelson Pierce and Joseph Zimbello (Objectors). Candidate filed a motion for reconsideration, which the trial court denied by order dated April 1, 2014. Candidate also appeals the trial court's order denying reconsideration. We now affirm both orders.

Objectors filed a petition to set aside Candidate's nomination petition for Democratic candidate for the Office of Ward Executive Committee, Ward 1, Division 4, alleging, in part, that Candidate's *Republican candidacy* for Inspector of Elections *in 2013* disqualified her from a position on the Philadelphia *Democratic Ward, Executive Committee in 2014*, pursuant to Article 3 of Rule 1

of the Rules of the Democratic Party of the City and County of Philadelphia (Party Rules). Article 3 of Rule 1 of the Party Rules provides:

No person shall be qualified for membership in any organization or committee under these rules, who is not a duly qualified elector and registered as a Democrat in the County of Philadelphia immediately prior to his election or appointment to the said committee, or who has within a two-year period actively or inactively supported the candidacy at any general election of any person or persons not on the Democratic ticket.

(Emphasis added.) Objectors took the position that because Candidate was a Republican candidate in 2013, she “actively . . . supported the candidacy at . . . a general election of . . . a person . . . not on the Democratic ticket,” such that she is not qualified to be a member of the Executive Committee. *See* Party Rule 1, Art. 3.

The trial court commenced a hearing on this matter on March 24, 2014, but it promptly continued the hearing so that it could determine whether it had jurisdiction to consider whether the Party Rules disqualified Candidate from being able to appear on the 2014 ballot. The trial court resumed the hearing the next day, having satisfied itself that it had jurisdiction pursuant to *In re Nomination Petitions of Kielstock*, 473 A.2d 713 (Pa. Cmwlth. 1984).¹

During the second day of the hearing, Candidate asserted the affirmative defense that the Party Rules were not in effect pursuant to Section 807 of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, 25 P.S. § 2837, because she contended that a *certified*

¹ The parties do not dispute the jurisdiction of the trial court in this matter.

copy of the Party Rules was not filed with the Philadelphia County Board of Elections (Board of Elections). Section 807 of the Election Code provides, in pertinent part, that “the county committee of each party may make such rules for the government of the party in the county,” but that “[n]o such rules shall be effective until a *certified copy* thereof has been filed in the office of the county board of elections.” (Emphasis added.) In response to Candidate’s counsel’s assertion that “in order for the . . . [Party] Rules to be effective a certified copy has to be filed with the board of elections,” the Honorable Charles Cunningham stated from the bench:

They are. I asked yesterday, and that’s how I obtained a copy of the rules. If you’d like, we could call someone to testify; but it’s my understanding that they’re registered with the board of elections and have been for some time. The copy I was given by one of the staff came off of the computer and was the copy, the version, that was registered as of December of, I think, 2012; but you’re right, the Commonwealth Court case says that they have to be registered.

(Hearing Transcript, dated March 25, 2014, pp. 5-6.)

Immediately following Judge Cunningham’s remarks, Candidate’s counsel moved onto another topic, questioning whether Objectors had standing to raise the issue or whether the Philadelphia Democratic Committee must be joined. The trial court opined that Objectors had standing that that joinder was not required.²

Thereafter, the Court turned to the factual question of whether Candidate “has actively or inactively supported the candidacy of any person or

² Standing is not an issue in this matter.

persons not on the Democratic ticket” during the general elections of 2012 and 2013. (*Id.* at 7-8.) Objectors introduced evidence that Candidate ran as a Republican candidate for judge of elections in the 2013 general election, and Candidate’s counsel agreed to stipulate to that fact. (*Id.* at 8, 11.) Counsel for Candidate then agreed with Judge Cunningham’s remark that, “if she’s running for judge of elections herself as a Republican [in 2013], she is actively or inactively supporting [a] candidacy,” and “according to the [Party R]ules, she can’t be a Democratic committeeman.” (*Id.* at 12.) Counsel for Objectors then moved for the petition to set aside to be granted, and counsel for Candidate responded to the Court that she had no argument in opposition. Judge Cunningham then granted the petition, thereby removing Candidate’s name from the ballot.

On March 31, 2014, Candidate filed with the trial court a motion for reconsideration, essentially averring that Judge Cunningham had been misinformed by the Board of Elections regarding the Party Rules. Specifically, Candidate averred that on March 26, 2014, she “sent a written inquiry regarding the status of the [Party] Rules to the Philadelphia Deputy City Commission,” and that “[o]n March 27, 2014, the Deputy City Commissioner confirmed in writing that no such certified copy of the [Party] Rules were on file with the Board of Elections.” (Motion for reconsideration, ¶¶ 9, 11.) “Subsequently, the Acting Supervisor of Elections provided counsel for [Candidate] a copy of the filed [Party R]ules which bear[s] no certification.” (*Id.* at ¶ 11.) Candidate attached copies of the correspondence and the Party Rules to the motion for reconsideration. Candidate argued that the trial court should grant reconsideration because it relied upon misinformation when granting the petition to set aside and was not bound by the Party Rules because they were not “certified.” By order dated April 14, 2014, the

trial court denied Candidate's motion for reconsideration. Candidate then appealed to this Court.

On appeal,³ Candidate argues that the trial court erred in applying Article 3 of Rule 1 of the Party Rules to disqualify her from being a candidate in the 2014, because the copy of the Party Rules on record with the Board of Elections was not a "certified copy," and, therefore, it was not effective pursuant to Section 807 of the Election Code. Candidate also argues that the trial court abused its discretion in denying reconsideration when, following the trial court's order granting the petition to set aside, Candidate presented additional evidence to the Court purportedly establishing that the copy of the Party Rules in the possession of the Board of Elections was not a "certified copy" as required by Section 807 of the Election Code.

To begin, we note that Candidate raised as an *affirmative defense* the contention that the Party Rules were not in effect pursuant to Section 807 of the Election Code, because a certified copy of the Party Rules was not filed with the Board of Elections.⁴ Candidate, as the party asserting the affirmative defense, bore the burden of proof on that issue. *See Baldwin v. Devereux Schools*, 302 Pa. 569,

³ This Court has appellate jurisdiction over the final order of the trial court pursuant to 42 Pa. C.S. § 762(a)(4)(i)(C) and Section 977 of the Election Code, Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 2937. In reviewing the order of the trial court concerning the validity of challenges to a nomination petition, this Court's standard of review is whether the findings of fact are supported by substantial evidence, whether there was an abuse of discretion or whether errors of law were committed." *In re Nomination Petition of Flaherty*, 564 Pa. 671, 678, 770 A.2d 327, 331 (2001).

⁴ In *In re Kielstock*, a single-judge reported opinion of persuasive value, Judge Doyle noted that a contention that party rules are not effective because they were not filed in accordance with Section 807 of the Election Code is "an allegation in the nature of an affirmative defense." *In re Kielstock*, 473 A.2d at 157 n.5.

574, 154 A. 21, 23 (1931). This means that in order to prevail on the affirmative defense, Candidate would have been required to present evidence at the hearing that the copy of the Party Rules was not a certified copy. Immediately following Judge Cunningham's remarks that the Party Rules were certified or "registered," as he put it, Candidate's counsel moved onto the issue of standing. Candidate's counsel took no further action to verify that the copy of the Party Rules on file with the Board of Elections was, in fact, a certified copy. Despite the fact that Candidate's counsel had intended to assert the affirmative defense that the Party Rules were not effective, she did not ask to view the copy of the Party Rules provided to Judge Cunningham to determine if it was a certified copy, she did not ask to have a representative from the Board of Elections testify as to whether the copy of the Party Rules on file was a certified copy, and she did not ask to have the record remain open so that she could ascertain the veracity of the representations made to Judge Cunningham. Despite bearing the burden of proof, Candidate did not appear prepared to present evidence of her own that a certified copy of the Party Rules was not filed with the Election Board.⁵ Under these circumstances, where Candidate neither offers evidence that the copy of the Party Rules filed with the Board of Elections was not a certified copy nor requests additional opportunity

⁵ In her brief, Candidate improperly appears to attempt to shift the burden of proof to Objectors by stating that "Objector[s] supplied no proof that a certified copy of the [Party] Rules had been filed with the . . . Board of Elections, an unambiguous requirement under the Pennsylvania Election Code." (Appellee's brief at 9.) Candidate continues that the trial court was not authorized to use the Party Rules as a basis for rejecting a nomination petition without a certified copy having been filed with the Board of Elections. Candidate seems to be suggesting that Objectors, in addition to citing to the Party Rules as a basis to disqualify Candidate, were required to establish that a certified copy of the Party Rules was filed with the Board of Elections. As noted above, however, lack of filing of a certified copy is an affirmative defense, and Candidate bore the burden to establish the lack of a proper filing.

to establish lack of certification, we cannot conclude that the trial court erred in concluding that Candidate failed to establish an affirmative defense to Objectors' challenge.

Next, Candidate argues that the trial court abused its discretion in denying reconsideration when, following the trial court's order granting the petition to set aside, Candidate presented additional evidence to the Court purportedly establishing that the copy of the Party Rules in the possession of the Board of Elections was not a "certified copy" as required by Section 807 of the Election Code. Our Pennsylvania Supreme Court has clearly stated that an abuse of discretion is more than an error of judgment. *Mielcuszny v. Rosol*, 317 Pa. 91, 93-94, 176 A. 236 (1934). In *Morrison v. Department of Public Welfare*, 538 Pa. 122, 646 A.2d 565 (1994), our Supreme Court explained that

an abuse of discretion occurs not merely when the trial court reaches a decision contrary to the decision that the appellate court would have reached. Rather, an abuse of discretion occurs "when the course pursued represents not merely an error of judgement, but where the judgement is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will."

Morrison, 538 Pa. at 134-35, 646 A.2d at 571-72 (quoting *Coker v. S.M. Flickinger Co., Inc.*, 533 Pa. 441, 447-48, 625 A.2d 1181, 1185 (1993)).

In her motion for reconsideration, Candidate essentially requested that the trial court grant her a new hearing so that she could introduce what she characterizes as "after-discovered evidence" in the form of correspondence from the Deputy City Commissioner relating to the certification status of the Party Rules Candidate. In order to justify a new hearing based on after-discovered evidence, such evidence (1) must have been discovered after the hearing, (2) could not have

been obtained at the hearing by reasonable diligence, (3) must not be cumulative or merely impeach credibility, and (4) must be likely to compel a different result. *Cudo v. Hallstead Foundry, Inc.*, 517 Pa. 553, 559, 539 A.2d 792, 794 (1988). Here, Candidate does not allege, and the record fails to demonstrate, that she could not have obtained the “after-discovered” evidence at the time of the trial court’s hearing with reasonable diligence.

Moreover, we also note that the correspondence from the Deputy City Commissioner, which Candidate paraphrased as confirming “that no such certified copy of the [Party] Rules were on file with the Board of Elections,” consists of a facsimile containing one hand-written sentence, stating “[t]here has never been a separate cert[ification] for Dem[ocratic] [P]arty [R]ules.” (Motion for reconsideration, ¶ 10 and Ex. 3.) The facsimile also includes a copy of the relevant Party Rule on file with the Board of Elections, along with the front cover of the Party Rules which indicates that it is the “official copy” of the Party Rules. (*Id.* at Ex. 3.) Neither party discusses what is required for a document to be a “certified copy” under Section 807 of the Election Code, and the Deputy City Commissioner does not opine that the copy of the Party Rules is not a certified copy—only that “[t]here has never been a separate cert[ification].” (*Id.*) Thus, the Court is not persuaded that the “after-discovered evidence” is dispositive of the issue of certification status.

For the reasons set forth above, we cannot conclude that the trial court abused its discretion in denying the motion for reconsideration.⁶

P. KEVIN BROBSON, Judge

⁶ We reject Objectors' argument that the trial court lacked jurisdiction to consider a motion for reconsideration, as it is unsupported by the law. As Objectors acknowledge, this Court has never held that, in the context of an election matter, a trial court is unable to grant reconsideration to correct an error before the matter is appealed to this Court, and we decline to do so in this instance.

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ORDER

AND NOW, this 15th day of April, 2014, the orders of the Court of Common Pleas of Philadelphia County are hereby AFFIRMED.

P. KEVIN BROBSON, Judge