No. 1-11-0218

FIFTH DIVISION
February 4, 2011

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ZDZISLAWA "ZSA" POPIELARCYZK,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County
	)	
v.	)	No. 10 COEL 17
	)	
THE BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, WILLIAM P. JONES, Hearing Officer, LANGDON D. NEAL, Commissioner	)	Honorable
	)	Alfred J. Paul,
	)	Judge Presiding.
	)	
Respondents-Appellees.	)	

JUDGE EPSTEIN delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Howse concurred.

ORDER

Raymond T. Nice (Respondent) raised objections to the nomination papers of Zdzislawa "Zsa" Popielarcyzk (Petitioner) who was seeking election to the office of Alderman of the 13th Ward of the City of Chicago, State of Illinois. Respondent, the Board of Election

Commissioners of the City of Chicago (the Board), found that Petitioner had an insufficient number of valid signatures on her nominating petitions and that her nomination papers were, therefore, invalid. The circuit court of Cook County affirmed the Board's decision and Petitioner filed this timely appeal. We granted Petitioner's motion for an expedited appeal. We affirm.

BACKGROUND

Petitioner sought to be a candidate for the office of Alderman of the 13th Ward of the City of Chicago, State of Illinois to be voted for at the Municipal General Election on February 22, 2011. On November 30, 2010, Respondent filed objections to the nomination papers. These objections included allegations of invalid signatures, signatures of voters who signed for more than one candidate, and revoked signatures. Responded also asserted that the nomination papers were invalid in their entirety "due to the pattern of fraudulent and misleading circulation of the nominating petitions [where] the Candidate falsely represented to voters that she was circulating on behalf of another candidate, while concealing her name on the petition from the voter as she presented the petition to the voter for signature."

The initial public hearing commenced on December 6, 2010. Petitioner, represented by legal counsel, requested that she file a Motion to Strike the objector's Petition. A briefing schedule was ordered by the hearing officer and a hearing was set for December 11, 2010. Additionally, the hearing officer ordered a Records Examination and directed all parties to appear and be present.

On December 7, 2010, Petitioner filed a "Motion to Strike and Dismiss Objector's Petition." She argued that the objection petition was untimely filed, that the signature

"revocations" were untimely filed because they were not filed on or before the last day for the filing of nomination petitions with the Board. She additionally asserted that the allegation regarding the individuals who had previously signed the nomination petition of another candidate for the same office, were insufficient and constituted "vague, general allegations *** typical of the 'shot-gun' approach to objections based solely on the fact that the affidavits of those individuals did not contain the date on which the affiant signed the previous nominating petition. She also argued that the "pattern of fraud" allegation lacked specificity.

On the same day, December 7, 2010, Respondent filed a "Response to Motion to Dismiss." He asserted that the objector's petition was timely filed, the affidavits were in proper form and that the Petitioner had mischaracterized those affidavits as "revocations," and that the allegation of fraudulent circulation satisfied section 10-8 of the Election Code in that it stated fully the nature of the objections. Respondent also stated in the response that he would be prepared to produce witnesses to support this latter allegation at an evidentiary hearing and would provide Petitioner notice of those witnesses well in advance of the hearing.

On December 9, 2010, Petitioner filed a "Reply in Support of Motion to Dismiss." She conceded that the objection petition was timely filed and did not further advance her claim that the affidavits were "revocations." She reiterated her argument that the allegations of previous signing were insufficient and invoked section 2-615 of the Code of Civil Procedure, asserting that the allegation that certain individuals had previously signed the nominating petition of another candidate failed to set forth sufficient allegations because "[n]ot one voter [was] identified as to when they [*sic*] allegedly signed another candidate's papers or when exactly they

signed this Candidate's nomination." Petitioner also characterized the allegation as a legal conclusion. With regard to the "pattern of fraud" allegation, Petitioner argued again that the allegation was not sufficiently specific and, referred to Federal Rule of Civil Procedure 9(b) for the requirement that "a party must state with particularity the facts and circumstances constituting fraud or mistake." Petitioner also asserted that Respondent admitted the legal insufficiency of his pleading regarding a "pattern of fraud" by stating he would "be prepared to produce witnesses to support his allegation at an evidentiary hearing" and provide Petitioner "notice of those witnesses well in advance of the hearing," and asserted that she was "entitled as a matter of Due Process of Law to know what the facts [were that Respondent was] prepared to prove at the time of hearing, prior to a hearing rather than allowing a 'shot-gun' approach that [Respondent] hopes the witnesses will support his general accusations."

On December 11, 2010, a hearing commenced on the motion to dismiss. No court reporter was present during the hearing, or during any of the proceedings below. Thus, the record before us contains no transcripts of proceedings. During the hearing, according to the record, specifically the "Hearing Officer's Findings and Recommendations," Petitioner argued three issues:

> "(a) With respect to Paragraph 10 of the Objector's Petition and with respect to the "previously signed" affidavits, any such Affidavits must be filed no later than the date Nomination Papers are to be filed;
>
> (b) Said Affidavits must contain the dates of signing within the affidavits; and
>
> (c) With respect to Objector's Paragraph 14, allegations of pattern of fraud, said

paragraph lacks the specificity of pleading fraud."

Respondent argued that the affidavits were not affidavits of "revocation" but were, instead, affidavits that affiants "previously signed" another candidate's petitions before they signed [Petitioner's] and, therefore, these affidavits did not have to be filed before the Nomination Papers. Respondent also argued that the affidavits did not have to contain the dates of signing petition sheets. Finally, Respondent argued that the pleading of a pattern of fraud was specific enough.

The hearing officer denied the motion to dismiss in its entirety and concluded: the affidavits were not "revocations" and were timely filed; Petitioner failed to establish legal authority for the proposition that the affidavits must contain "signing dates"; and the petition pleaded "pattern of fraud" with sufficient specificity.

The matter was continued until December 16, 2010 for an analysis of the Record Examination and for the evidentiary hearing on the Objector's Petition filed by Respondent.

The Records Examination was completed on December 11, 2010. On December 12, 2010, Respondent filed a Rule 8 Motion and Witness List. On December 14, 2010, Petitioner filed a motion *in limine* seeking to bar the introduction of the affidavits and a Rule 237 Request to Produce at time of hearing.

Petitioner had submitted 462 purportedly valid signatures. As a result of objections sustained based on the records examination, 145 signatures were deemed invalid, which left 317 remaining prior to the hearing.

A conference of counsel for the parties was held prior to the hearing. Respondent

withdrew a total of 57 affidavits out of a total of 219 affidavits, leaving 162 affidavits. Additionally, Petitioner agreed that 33 "revocation" affidavits be admitted.

A hearing was held on Petitioner's motion *in limine* in which she sought to bar the introduction of the affidavits arguing that they were legally deficient because they did not state that the facts contained therein were based upon personal knowledge. Petitioner also argued that the Board's invalidation of 52 petition sheets for lack of genuineness, whose signers were also presented as affiants in the affidavits by Respondent constituted perjury. She contended that these 52 petition sheets tainted the entirety of affidavits. Among other things, the hearing officer found that the facts contained in the affidavits were "manifestly limited to the personal knowledge of the affiant" and "the fact that a Board examiner simply found a petition signature invalid because it was not genuine [did] not in itself establish the existence of perjury in the context of affidavits asserting that the affiant signed the petition." The hearing officer concluded that, without additional evidence, *People v. Mason*, 160 Il. App. 3d 463 ((1978), cited by Petitioner, did not apply. The hearing officer denied the motion *in limine*.

The hearing on the Objector's Petition commenced. Having removed a total of 57 affidavits, Respondent presented the remaining original affidavits of 162 individuals who stated that they signed the other candidate's nominating petition before they signed Petitioner's nominating petition. This group exhibit was admitted over Petitioner's objection. Respondent also offered the original affidavits of 33 individuals who had revoked their petition signatures on Petitioner's nominating petition, and these were admitted without objection.

Respondent rested his case. Petitioner did not offer any testimony or documentary

evidence.

The hearing officer deemed invalid 162 signatures because the petition signers had previously signed for another candidate for the same office, and also deemed invalid 33 signatures because the petition signers had filed proper revocations. Based upon the evidence presented, the hearing officer found that Petitioner's nomination papers contained only 122 valid signatures, which was less than the 217 minimum number of valid signatures required by law to be placed upon the official ballot as a candidate for election to the office of Alderman of the 13th Ward of the City of Chicago, and that Petitioner's Nomination Papers should be found invalid.

On December 17, 2010, the hearing officer provided his report and recommended decision to the Board. On December 21, 2010, the Board issued its Findings and Decision, adopting the hearing officer's recommended findings and conclusions of law. The Board found that Petitioner had an insufficient number of valid signatures on her nominating petitions and that Petitioner's nomination papers were invalid.

On December 23, 2010, Petitioner filed an administrative review action in the circuit court of Cook County. After a hearing, the circuit court denied the petition for judicial review and affirmed the Board's decision. This appeal followed.

STANDARD OF REVIEW

This court reviews an electoral board's decision rather than the decision of the circuit court. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212, (2008). The purpose of judicial review of an electoral board's decision is to "provide ' "a remedy against arbitrary or unsupported decisions." ' [Citations.] " *Serwinski v. Board of*

Election Commissioners of the City of Chicago, 156 Ill. App. 3d 257, 259 (1987). " ' "The applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." ' " *Hamm v. Township Officers of Township of Bremen Electoral Bd.*, 389 Ill. App. 3d 827, 831 (2009), quoting *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200, 211 (2008). This court deems an agency's findings and conclusions on questions of fact to be *prima facie* true and correct, and we will not overturn such findings on appeal unless they are against the manifest weight of the evidence. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200, 210 (2008). This standard of review applies to an electoral board's findings of fact. *Druck v. Illinois State Board of Elections*, 387 Ill. App. 3d 144, 149 (2008). A determination is against the manifest weight of the evidence when the opposite conclusion is clearly evident. *Cinkus*, 228 Ill. 2d at 210. In ruling on motions to dismiss pursuant to section 2-615 of the Code of Civil Procedure, our review is *de novo*. *Doe ex rel. Ortega-Piron v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004).

ANALYSIS

Petitioner has not addressed the standard of review. Respondent asserts that, in the instant case, the Board's decision was based on a strictly factual question: whether the candidate had a sufficient number of valid signatures on her nominating petition. He therefore asserts that our standard of review is the manifest weight of the evidence standard.

The first issue raised on appeal by Petitioner is as follows: "The Failure to Grant the Motion to Dismiss was a Denial of Substantive Due Process as well as a Clear Violation of the

Code of Civil Procedure." Our review is *de novo*. *Doe*, 213 Ill. 2d at 23-24.

A motion to dismiss based for failure to state a cause of action under section 2-615 of the Code of Civil Procedure should be granted only if a plaintiff can prove no set of facts to support the cause of action. *Johnson v. Illinois Department of Corrections*, 368 Ill App. 3d 147 (2006). With respect to opposing a motion to dismiss, a plaintiff is not required to prove his or her case; rather, plaintiff need only allege sufficient facts to state all of the elements of the cause of action. *Fox v. Seiden*, 382 Ill. App. 3d 288 (2008). Pleadings are to be liberally construed. *Gilmore v. Stanmar, Inc*., 261 Ill. App. 3d 651, 654 (1994). A pleader need only allege the ultimate facts to be proved. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (2003); *Gilmore*, 261 Ill. App. 3d at 654. A pleader is not required to set out his evidence or the evidentiary facts tending to prove such ultimate facts. *Id.*

Petitioner misapprehends these principles. We conclude that the allegations in the Objector's Petition filed by Respondent were sufficient as a matter of law and her motion to dismiss based on section 2-615 of the Code of Civil Procedure was properly denied. We agree with Respondent that "Petitioner was aware of the exact nature of every challenge to every signature in her petitions from the moment the Objector's Petition was filed on November 30, 2010." Respondent further notes that "[t]he Objector's Petition included a detailed chart [that] indicated the Sheet and Line where a voter signed her petition and the corresponding Sheet and Line where they had previously signed for [the other candidate.]" Respondent also states that "Petitioner's nominating petitions contained all of these signers' residence addresses.

We additionally conclude that section 10-8 of the Election Code, which provides that an

objector's petition must "state fully the nature of the objections." 10 ILCS 5/10-8 (West 2007), was satisfied. The Objector's Petition here informed Petitioner that certain signatures on her petition were being challenged and informed her that the challenge was based on the fact that the signers previously had signed for another candidate for the same office. Respondent notes that "[t]he Objector's Petition told her which signatures were challenged, the name of the signer, and where she could find the signature on the other candidate's petition. We agree that the Board properly concluded that the Objection Petition complied with section 10-8 of the Election Code.

Petitioner additionally argues that the affidavits "gave no factual basis whatever for the *legal conclusion* that they did sign another candidate's nomination papers previously."(Emphasis added.) We disagree. The affidavits do not contain any legal conclusions. The affidavits make a simple factual statement that the affiant signed the nominating petition of another candidate for the office before he or she signed Petitioner's nominating petition. Moreover, this was the only evidence on the issue before the hearing officer because Petitioner did not offer any testimony or documentary evidence whatsoever during the hearing.

We conclude that the denial of Petitioner's Motion to Dismiss was proper and we reject Petitioner's argument that it was "a clear violation of the Code of Civil Procedure." Petitioner's bare assertion that the denial of the motion constituted a "denial of *substantive* due process" is also rejected as meritless. "Substantive due process prohibits pervasive restrictions on a person's life, liberty or property interest [citation], while procedural due process examines the procedures that might deny those rights." *Yoder v. Ferguson*, 381 Ill. App. 3d 353, 380 (2008). In support of her contention that the denial of her motion to dismiss was a denial of *substantive* due process,

Petitioner cites *East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School Dist. No. 189 Financial Oversight Panel*, 178 Ill. 2d 399 (1997), but cites the court's opinion regarding *procedural* due process. She argues that "while due process is flexible and calls for such procedural demands as particular situations demand, the fundamental requirements are notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner." We conclude that Petitioner has forfeited any argument that her substantive due process rights were violated. We also conclude that the Objector's Petition, which adequately informed her of the charges, along with the hearing before the hearing officer, afforded Petitioner procedural due process.

Although not clearly stated by Petitioner, the next issue presented for review is whether the Board's decision that Petitioner's nomination papers were invalid because they had an insufficient number of valid signatures was against the manifest weight of the evidence. We agree with Respondent that this presents a strictly factual question.

Under the Election Code, a voter may sign a nominating petition of one candidate only. *Watkins v. Burke*, 122 Ill. App. 3d 499, 501 (1984); see10 ILCS 5/10-3 (West 2007) ("Each voter signing a nomination paper *** may subscribe to one nomination for such office to be filled, and no more."). Where a voter has signed more than one nominating petitions, "the signature appearing on the petition first signed is valid and all subsequent signatures appearing on the nominating petitions of other parties are invalid." *Watkins*, 122 Ill. App. 3d at 502.

Petitioner contends that the affidavits entered into evidence demonstrate a "pattern of fraud." Citing *Fortas v. Dixon*, 122 Ill. App. 3d 697 (1984) she states that "[t]he issue of 'pattern

of fraud' in the election process has been held sufficient to disqualify a candidate completely because it is said to taint the integrity of the process with fraud and the election board cannot close its eyes to the fact of fraud in the process." In *Fortas*, the objection before the electoral board, as in the instant case, was that certain signatures on the candidate's nominating petitions were invalid. During the hearing, however, evidence was produced that showed that someone other than the person signing the circulator's oath had, in fact, circulated some of the sheets of the petition. *Fortas*, 122 Ill. App. 3d at 700.

As Respondent notes, in *Fortas* and other pattern of fraud cases, "a petition circulator who falsely declares that the signer's signatures are genuine, when in fact some of them are not, can have all of the signatures collected (even the genuine ones) declared invalid." Petitioner now suggests that the pattern of fraud theory applied to petition circulators should be applied to the individual signers themselves. As Respondent notes, no electoral board or court has ever made such an application. Moreover, as Respondent argued before the hearing officer, the finding by the Board during the Records Examination of invalidity due to "not genuine signatures" could be based upon a variety of factors. Petitioner has failed to establish that *Fortas* is applicable to the facts of this case.

In sum, the evidence presented and considered by the Board demonstrates that, as a factual matter, Petitioner failed to submit a sufficient number of valid signatures on her nominating petition. The Board's decision to sustain the Objector's petition filed by Respondent was supported by adequate evidence, and its finding was not against the manifest weight of the evidence. We conclude that the trial court's judgment affirming the Board's decision was

correct.

CONCLUSION

The decision of the Board of Election Commissioners of the City of Chicago that Petitioner's nomination papers were invalid was not against the manifest weight of the evidence. We affirm the decision of the circuit court of Cook County affirming the Board's decision.

Circuit court affirmed; Board decision affirmed.