

<b>Matter of Walter v Milner</b>
2008 NY Slip Op 32923(U)
October 28, 2008
Supreme Court, Albany County
Docket Number: 8557-08
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
SUSAN WALTER,

Petitioner,

-against-

**AMENDED  
DECISION and ORDER  
INDEX NO. 8557-08  
RJI NO. 01-08-094759**

CLINTON J. MILNER, JR. And the ALBANY  
COUNTY BOARD OF ELECTIONS,

Respondents.

For a Judgment Pursuant to Article 16 of the Election Law and Article 78 of the Civil Practice Law and Rules Directing Respondent Board of Elections to Certify and Finalize the Westerlo Town Ballot and to place Petitioner's Name Thereon as the Democratic Nominee for the Public Office of Westerlo Town Councilperson, to be Voted for at the General Election to be held on November 4, 2008.

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Supreme Court, Albany County, All Purpose Term, October 21, 2008  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

On October 15, 2008 Petitioner commenced this proceeding, pursuant to Election Law §16-102, for a judgment directing the Albany County Board of Elections to place

petitioner's name on the Westerlo Town Ballot as the Democratic nominee for the office of Westerlo Town Councilperson, for the general election to be held on November 4, 2008.

The Republican Commissioner of the Albany County Board of Elections, John Graziano, opposes the petition with an answer. Because petitioner failed to file a certificate of acceptance of her nomination in accord with Election Law §6-146(1), her petition is dismissed.

On August 26, 2008 a certificate of nomination, nominating petitioner as the Democratic candidate for the office of Westerlo Town Councilperson, was filed with the Albany County Board of Elections (hereinafter "the Board"). Petitioner is not a member of the Democratic Party, and at no time herein did she file a certificate of acceptance of such nomination in accord with Election Law §6-146. At a meeting of the Board's Commissioners, held on September 26, 2008, the Board's Republican Commissioner found the petitioner's certificate of nomination "null and void" due to her failure to file a certificate of acceptance. In opposition, the Board's Democratic Commissioner found the petitioner's certificate of nomination to be valid because no challenge to it had been made. Because both of the Board's Commissioners did not certify petitioner's name for inclusion as the Democratic candidate for the office of Westerlo Town Councilperson, her name is not included on the Ballot. This proceeding seeks to compel the Board to include petitioner's name on the Ballot.

The Appellate Division - Third Department held that the statute of limitations applicable to a judicial challenge based upon the designation of a political party's candidate, where such designated candidate was not a member of the designating party and did not file an acceptance of such designation, was "subject to the 14-day period of limitations established by Election Law §16-102(2)." (Matter of Savago v. Ulster Co. Board of Elections, 220 AD2d 926 [3d Dept.

1995]). Such holding controls the statute of limitations applicable to the case at bar.

Election Law §16-102(2) states, in part, that: “[a] proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later.”

Here, the last day to file petitioner’s certificate of nomination was September 16, 2008 and the last day for petitioner to file an acceptance of such nomination was September 19, 2008. (Election Law §6-158[6 and 7]). The Board’s determination occurred thereafter on September 26, 2008. The later date of fourteen days after the last day for petitioner to file her acceptance of nomination is October 3, 2008. As petitioner did not commence this proceeding until October 15, 2008, it would be time barred pursuant to Election Law §16-102(2) . However, respondent failed to either set forth a statute of limitations affirmative defense in his answer or move to dismiss the petition due to the expiration of the statute of limitations, and accordingly waived such defense. CPLR §3211(e).

Turning to the merits of the petition, Election Law §6-146(1), states in part that if a person is “nominated for a public office... by a party of which he is not a duly enrolled member... such person shall, in a certificate signed and acknowledged by him, and filed as provided in this article, accept the... nomination as a candidate of each such party or independent body other than that of the party of which he is an enrolled member, otherwise such... nomination shall be null and void.” (emphasis added).

Here, petitioner is not a “duly enrolled member” of the Democratic Party, the party whose nomination forms the basis of her petition. It is undisputed that despite Election Law §6-

146(1)'s plain language requiring her to file a certificate of acceptance of the Democratic Party nomination, she failed to do so. At no time has petitioner filed her mandatory certificate of acceptance, which causes her nomination by the Democratic Party to be "null and void".

The cases cited by petitioner, in essence arguing that a condition precedent to the Board declining to certify a nomination is an objection filed or a legal challenge commenced against such nomination, fail to stand for such proposition. In contrast the Getner v. Albany Co. Board of Elections (309 AD2d 962, 963 [3d Dept. 2003]) petitioner, after being nominated as a candidate for a town board position by a party she was not enrolled in, faxed her certificate of acceptance to the Board, which "by a split decision, the Board declined to accept". No objections or legal challenge to petitioner's faxed certificate, made prior to the Board's decision, were necessary for the Appellate Division to agree with the Board in rejecting the certificate of acceptance. In Getner the petitioner incorrectly filed a certificate of acceptance, whereas here, this petitioner has wholly failed to file any certificate of acceptance. Petitioner's non-filing of a certificate of acceptance, in light of the clear statutory mandate expressed in Election Law §6-146(1), cannot be overlooked and does not form the basis for a finding that the Democratic Party certificate of nomination is valid. "The failure to file a timely acceptance certificate has been deemed by the Legislature to be 'a fatal defect'". (Matter of Rhodes v. Salerno, 90 AD2d 587, 588 [3d Dept. 1982][quoting Election Law §1-106(2)]).

To rule otherwise would, in effect, reward non-filing while punishing technically incorrect filings. Such result is inconsistent with both the purpose and the plain language of the Election Law.

Accordingly, the petition is dismissed.

This Decision and Order is being returned to the attorneys for Respondent Graziano. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 28 2008  
Albany, New York



Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated October 15, 2008 and Verified Petition, dated October 15, 2008, with attached Exhibits A and B.
2. Answer, dated October 21, 2008.