

**Masiello v Boes**

2009 NY Slip Op 30551(U)

March 3, 2009

Supreme Court, Nassau County

Docket Number: 3014-09

Judge: William R. LaMarca

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**ORDER AND JUDGMENT**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**JOSEPH A. MASIELLO, Candidate Aggrieved,  
and LOU NEZIRI, Candidate Aggrieved,**

**Motion Sequence #01  
Submitted February 27, 2009  
XXX**

**Petitioners,**

**-against-**

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**JOAN M. BOES, WILLIAM B. WISE, and  
PETER I. CAVALLARO,**

**-and-**

**TED A. BLACH, Village Clerk for the Incorporated  
Village of Westbury, ERNEST J. STRADA,  
STEVEN L. CORTE, and LAWRENCE W. BOES,  
constituting the Action Party Committee to  
Fill Vacancies, and WILLIAM BIAMONTE and  
JOHN A. DEGRACE, Commissioners, constituting  
the Nassau County Board of Elections,**

**Respondents.**

**The following papers were read on this petition:**

<b>Order to Show Cause, Emergency Affirmation and Verified Petition.....</b>	<b>1</b>
<b>Memorandum of Law in Support of Petition.....</b>	<b>2</b>
<b>ACTION Party Verified Answer and Affirmative Defenses.....</b>	<b>3</b>
<b>BOES, WISE and CAVALLARO Verified Answer and Affirmative Defenses.....</b>	<b>4</b>
<b>BLACH Verified Answer, Affirmative Defenses and Affirmation.....</b>	<b>5</b>
<b>BLACH Memorandum of Law in Opposition to Petition.....</b>	<b>6</b>
<b>MASIELLO Reply Affirmation.....</b>	<b>7</b>

<b>Reply Memorandum of Law in Further Support of Petition.....</b>	<b>8</b>
<b>BLACH Sur-Reply Memorandum of Law in Opposition to Petition.....</b>	<b>9</b>
<b>BOES, WISE and CAVALLARO Letter, dated February 27, 2009,</b>	
<b>    Anticipatory re Proceedings.....</b>	<b>10</b>
<b>Petitioner’s Memorandum of Law in Response to Sur-Reply.....</b>	<b>11</b>
<b>ACTION Party Letter, dated February 27, 2009.....</b>	<b>12</b>
<b>Petitioner’s E-mail, dated March 1, 2009.....</b>	<b>13</b>

Petitioners, JOSEPH A. MASIELLO and LOU NEZIRI, Candidates Aggrieved, petition the Court in this proceeding, commenced by order to show cause dated February 20, 2009, for an order declaring invalid and legally insufficient the “acceptances” of the candidates of the ACTION Party, respondents JOAN M. BOES and WILLIAM B. WISE, for the public office of Trustee of the Incorporated Village of Westbury for a four (4) year term, and respondent PETER I. CAVALLARO, for the public office of Mayor of the Incorporated Village of Westbury for a four (4) year term (hereinafter collectively referred to as the “CANDIDATES”). It is petitioners’ position that none of the CANDIDATES filed a proper “certificate “ of acceptance, “acknowledged” as required by Election Law §6-146(1) and, therefore, the acceptances and the nominations are null and void. Petitioners seek an order directing the Village Clerk, respondent TED A. BLACH (hereinafter referred to as the “VILLAGE CLERK”), and/or the Board of Elections of Nassau County, respondents WILLIAM BIAMONTE and JOHN A. DEGRACE, Commissioners (hereinafter referred to as the “BOARD OF ELECTIONS”), to refrain from placing said CANDIDATES on the ballot as the CANDIDATES of the ACTION Party in the General Village Election, to be held on March 18, 2009, declaring the nominations of said CANDIDATES to be legally null and void and reversing any contrary determination of the VILLAGE CLERK or the BOARD OF ELECTIONS. ERNEST J. STRADA, STEVEN L. COTE and LAWRENCE W. BOES, who

constitute the ACTION Party Committee to Fill Vacancies (hereinafter referred to as the "ACTION Party"), are also named herein as respondents.

The various answers of the respondents contain affirmative defenses asserting, in essence that this proceeding is untimely and without subject-matter jurisdiction under Election Law §16-102 (2) , which requires that the proceeding "must have been instituted within seven (7) days after the last day to file the petition for such village election". It is conceded by all parties that the last day to file Independent Nominating Petitions was February 10, 2009. Respondents argue that the last day to file the instant proceeding was February 17, 2009 and, therefore, the instant proceeding, commenced on February 20, 2009, is untimely. The ACTION Party and the CANDIDATES also assert, *inter alia*, that the petitioners lack standing to bring this petition because they have failed to fulfill a condition precedent by timely filing written objections and specifications of the objections to the acceptances of the nominations, pursuant to Election Law §6-154(2), and that service of the petitions was not calculated to give timely notice to the necessary parties. The COUNTY CLERK alleges that the petitioners are estopped from commencing a proceeding by virtue of their participation in the drawing of lots regarding the lines on the ballot assigned to the independent parties and, together with the CANDIDATES, asserts that the controlling statute with respect to independent party nominations in the Village of Westbury elections is Election Law §15-108(8)(b), which prescribes the procedures for Village Elections and does not require that an acceptance be acknowledged. It is the CANDIDATES position that they have complied with all statutory requirements under Election Law §15-108(8)(b) and that Election Law §6-146(1), which requires that acceptances be acknowledged, is not applicable to the Village Election.

The Court notes that upon oral argument, in open Court on February 27, 2009, the BOARD OF ELECTIONS' motion to be dismissed from the case was granted by the Court, on consent of all parties, it appearing that the matter concerned a Village Election which the BOARD OF ELECTIONS had not been asked to take over or run (See, Election Law, §15-104[ c ]). Additionally, counsel for the ACTION Party withdrew its Third Affirmative Defense with respect to the timeliness of service and acknowledged that nail and mail service had been made in accordance with the directions of the initiating order to show cause. The ACTION Party's motion for dismissal of the action against the Committee to Fill Vacancies, on the ground that it was not a necessary party, that no relief was sought against it, that it played no role in the designation of any of the CANDIDATES and was only there in case a nomination was declined or a candidate was disqualified, was reserved by the Court for determination. The petition is determined as follows:

**As to Timeliness**

As to the issue of standing and the failure to file prior objections, it is the judgment of the Court that statutory and case law clearly provide authority for commencing the instant judicial proceeding without filing prior objections. Election Law §15-138, with respect to Village Elections, provides as follows:

The Supreme Court or any justice thereof within the judicial district and the County Court or any judge thereof within the county, in which the village is located, shall have summary jurisdiction to determine any question arising and make such order as justice may require, in respect to village elections and registration therefore.

As summarized in 50 NY Jur2d *Elections*, §819 (Database updated February 2009):

The statutory requirement that objections be filed with the Board of Elections is not applicable to candidates, and an aggrieved candidate may institute a summary proceeding contesting a designation or nomination without having

filed such objections

Appellate Courts have found that determining the validity of a candidates nomination is a justiciable controversy that may be addressed despite the absence of any prior filing of objections. *See, McDonald v Heffernan*, 196 Misc 465, 92 NYS2d 382 (Kings Co.), *aff'd* 275 AD 1054, 92 NYS2d 426 (2<sup>nd</sup> Dept.), 300 NY 488, 88 NE 722 (C.A. 1949); *Flowers v Wells*, 57 AD2d 636, 394 NYS2d 33 (2<sup>nd</sup> Dept. 1977); *Magee v Camp*, 253 AD2d 573, 677 NYS2d 192 (3<sup>rd</sup> Dept. 1998); *cf.*, *Baird v Ness*, 109 AD2d 975, 492 NYS2d 473 (3<sup>rd</sup> Dept. 1985).

Therefore, turning to the timeliness of the proceeding herein, Article 16 of the Election Law, the statute with respect to judicial oversight of elections in Election Law §16-102 (2), clearly directs that, in a village election, the proceeding to challenge a nomination “shall be instituted within seven (7) days after the last day to file the petition for such village election”. In the case at bar, the last day to file a nominating petition for said village election was February 10, 2009, and therefore, respondents contend that the last date to file the instant proceeding was February 17, 2009, not February 20 as argued by petitioners herein. Counsel for petitioners asserts that the applicable statute of limitations under Election Law §16-102 should only run from the date upon which the petitioners were aggrieved, citing *Gdanski v Rockland Board of Elections*, 97 AD2d 744, 468 NYS2d 53 (2<sup>nd</sup> Dept. 1983) and its progeny. Petitioners claim that, since the time to file certificates of acceptance did not expire until February 13, 2009, at 5:00 P.M., three (3) days after the last day to file nominating petitions, petitioners did not know until that time whether or not a proper acceptance, with an acknowledgment, would be filed and, therefore, they were

not aggrieved until February 13, 2009. As the instant proceeding was filed (7) days thereafter, on February 20, 2009, counsel for petitioners argues that the petition is timely. Indeed, he claims that, since a proper acceptance could have been filed by simply dropping it in the mail the afternoon of Friday the 13th, and because it was Presidents weekend, it would not have arrived at the VILLAGE CLERK until Tuesday, February 17. It is petitioner's position that filing the proceeding only three (3) days thereafter was timely as petitioners acted with due diligence.

An analysis of *Gdanski* reveals that Second Department determined that, where a candidate was nominated by a prohibited method (convention), but declined the nomination, it was not until a Certificate Filling Vacancy after Declination was thereafter filed on behalf of a second candidate that the petitioners were aggrieved, and the time to commence an action would begin to run. In this Court's view, the facts in *Gdanski* are readily distinguishable from the facts at bar, and moreover, the acceptances challenged herein were filed on February 12, 2009, two (2) days after the nominating petition and, pursuant to a Freedom of Information Law (FOIL) request, petitioners had the very acceptances in their possession on February 17, 2009, the last day to file a judicial challenge as directed by Election Law §6-102 (2). The Court declines to extend the time to institute the proceeding under the alleged *Gdanski* doctrine, until seven (7) days after the time that petitioners knew they were aggrieved, as the statute expressly directs that a proceeding be instituted within seven (7) days from the last date to file nominating petitions and, under the facts of this case, the Court finds no basis to deviate from said prescription. *See, Baird v Ness, supra; see also, Bruno v Rettaliata, 122 AD2d 976, 506 NYS2d 124 (3<sup>rd</sup>*

Dept. 1986). Accordingly, the petition, filed on February 20, 2009, is untimely and is dismissed.

### **As to an Acknowledgment**

Given the dismissal of the petition as untimely, the Court need not reach the issue of whether Election Law §6-146(1), which requires an acknowledged certificate of acceptance, applies to Election Law §15-108 (8)(b), which governs the form of acceptances in Village Elections. However, given the legislative history of the Election Law, which in 1972 was amended to carve out a special section governing Village Elections and which did not contain a requirement that acceptances for nominations be notarized, the Court notes in passing that it cannot conclude that the Legislature intended that Election Law §6-146(1) applied to Village Elections. Indeed, the Legislature amended Election Law §15-108 (8)(b) in 1994, but chose not to add the requirement that a certificate of acceptance be acknowledged. Thus the distinction between procedures followed in a general election with regard to a certificate of acceptance and those followed in a Village Elections remained unchanged and provides, as follows:

A certificate of acceptance or declination of an independent nomination for an office to be filled at the time of a general or special village election shall be filed not later than three days after the last date to file the petition which made such independent nomination.

The Court is not persuaded by petitioners contentions that, because Election Law §6-146(1) should be applied to Election Law §6-210 (2)(b) and (3)(b), that portion of the Election Law that deals with Village Elections for Villages that have opted for Board of Elections oversight, the same should be applied to Village Elections under Election Law §15-108 (8)(b) where the Village remains in control. It appears to the Court that the

inconsistency in Article 6 and Article 15 preclude the imposition of the need for an acknowledgment on acceptances in the Village Election. See, Election Law §15-100. It is the Courts view that inserting the need for an “acknowledged” acceptance or declination into Election Law § 15-108(8)(b), if warranted, is better left to the legislature and is not a judicial function.

Finally, after a careful reading of the submissions herein, it is the judgment of the Court that the ACTION Party’s motion to dismiss the action against it is granted. The Court finds that the Committee to Fill Vacancies is not a necessary party and therefore, the action is dismissed against ERNEST J. STRADA, STEVEN L. COTE and LAWRENCE W. BOES, who constitute said Committee.

The Court has considered the remaining contentions of the parties and finds them to be without merit. Based on the foregoing, it is therefore

**ORDERED and ADJUDGED** that the petition which seeks to declare the acceptances of the ACTION Party CANDIDATES invalid and legally insufficient is dismissed as untimely.

This constitutes the order and judgment of the Court.

Dated: March 3, 2009

  
WILLIAM R. LaMARCA, J.S.C.

**ENTERED**

MAR 05 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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