

**Matter of Estrella v Board of Elections in the City of
N.Y.**

2011 NY Slip Op 32215(U)

August 12, 2011

Supreme Court, New York County

Docket Number: 108483/2011

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
JOHN ESTRELLA,**

Petitioner,

INDEX NO. 108483/2011

-against-

MOTION SEQ. NO. 001

**BOARD OF ELECTIONS IN THE CITY OF
NEW YORK,**

Respondent.

FILED

AUG 12 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

For an order, pursuant to Article 16 of the Election Law to declare the validity of a designating petition purporting to designate the said Respondent John Estrella, a candidate for the party position of Male District Leader for the 68th Assembly District, New York State in the Democratic Primary Election to be held on September 13, 2011.

The following papers, numbered 1 to 3 were read on this motion by respondent for an order dismissing the validating petition of John Estrella, a candidate for the party position of Male District Leader for the 68th Assembly District, Part C, in the City and State of New York.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits (Memo) _____

2,3

Reply Affidavits — Exhibits (Memo) _____

Cross-Motion: Yes No

On July 13, 2011, the petitioner filed a designating petition with the respondent Board of Elections in the City of New York (Board) purporting to designate him as a candidate for the party position of Male District Leader for the 68th Assembly District, Part C, New York County, in the City and State of New York. The Board, after due process and consistent with Board Rules, disqualified the designating petition because there was a cover sheet error. The 2011 Board Rules for Designating Petitions allows three business days for the petitioner to cure the defective cover sheet. Consistent with the 2011 Board Rules, on Thursday, July 14, 2011, the Board sent a defect and cure notice by United States Postal Service (USPS) Overnight Express

Mail to the petitioner's address on the designating petition (see Kitzinger affidavit, exhibit D, USPS Tracking # EV 506423947 US). The Board waived the USPS signature requirement so the postal package could be left without a signature. The USPS attempted to deliver the notice on Friday, July 15, 2011, but it was returned marked "undeliverable as addressed." USPS made no attempt to deliver the notice on Monday, July 18, 2011. On Tuesday, July 19, 2011 and Wednesday, July 20, 2011, the USPS attempted delivery and left a notice for the petitioner (see Kitzinger affidavit, exhibit E; USPS.com, Track and Confirm delivery record; see also petitioner's exhibit 1, United States Postal Service Notice, dated July 20, 2011, tracking # EV 506423947 US). Nonetheless petitioner failed to claim the notice (see Kitzinger affidavit, exhibit E; USPS.com, Track and Confirm delivery record on July 30, 2011, the notice was "unclaimed"). The petitioner failed to respond to the Board's notification and therefore failed to correct the designating petition cover sheet error. The Board subsequently invalidated the designating petition on July 20, 2011, after the three-day correction period.

The petitioner, *pro se*, filed an order to show cause (OSC) and verified petition ("validating proceeding") pursuant to Election Law 16-102 on July 22, 2011, seeking to reverse the Board's decision and validate his designating petition. The petitioner's OSC provided Justice Gishe with only first class mail¹ as an option for service, which she granted to be completed on or before July 22, 2011. The case was returnable and called before this Court, designated as the Special Election Part for New York County, on August 1, 2011.

The petitioner, represented by counsel, filed one handwritten affidavit of service. The handwritten affidavit of service (Court exhibit one) is not sworn to and omits the terms "being sworn, I am not a party to this action, am over 18 years of age and reside at [insert server's

¹The Court notes that in Election Cases it is common for petitioners to seek other forms of alternative service pursuant to CPLR 308, such as personal service, service by mail, service by mail and mail or service by suitable age and discretion. In this case petitioner requested only one form of service, which was service by mail.

address]." In addition, in the affidavit signed by the petitioner, he admits that he served the OSC on July 22, 2011 by USPS Express Mail and not first class mail, as required by the OSC. The Board opposed the petitioner's validating proceeding and submitted papers in opposition to the verified petition on merits, to the Court and petitioner (see affidavit of Steven Richman, Counsel to the Board, in opposition; see also supporting affirmation by Assistant Corporation Counsel Stephen Kitzinger). The Board also moved on the record to dismiss the matter for petitioner's lack of personal jurisdiction as follows: (1) claiming that petitioner's service violates CPLR 2103(a) because a party to a proceeding cannot effect service; and (2) the petitioner did not serve the validating proceeding in accordance with the terms of the OSC. The OSC required service by first class mail and petitioner effected service by USPS Overnight Express Mail.

The matter was adjourned to August 3, 2011, at the request of the petitioner's counsel, so that he had an opportunity to consider the Board's papers in opposition to the petition and the dismissal motion. On August 2, 2011, the Board served petitioner's counsel with its written opposition, which contested service and jurisdiction (see Kitzinger letter dated August 2, 2011.)

On August 3, 2011 petitioner appeared *pro se* and requested time to seek new counsel. This Court granted his request and adjourned the matter until August 9, 2011. The petitioner appeared on August 9, 2011 and stated that he had retained new counsel, but that his new counsel was engaged in a Family Court matter in Westchester County. Petitioner's new counsel stated in a letter to the Court, received by fax on August 9, 2011, that his first available dates to appear were August 11, 15 and 24, 2011. In addition, the Court reached petitioner's counsel by telephone and he reiterated to the Court that his first available date to appear was August 11, 2011.² In light of this, petitioner requested that this Court grant him another

²Petitioner's new counsel stated in a telephone conversation with the Court, that he was taking the case pro bono, "as a favor" and could not change his schedule for other cases.

adjournment so that he can appear with counsel. The Court informed the petitioner that according to the Rules of the Court, election cases take priority over other civil cases, and that all Election Matters must be concluded by August 12, 2011 in order to meet the Appellate Division, First Department deadline for any appeals. Moreover, the Court noted that this was petitioner's third request to adjourn this matter, so this Court could not accommodate an adjournment to August 11, 2011. Nonetheless, over the objection of the Board, this Court adjourned the matter to the afternoon for the petitioner to further discuss and negotiate with his counsel or give counsel the opportunity to appear.

At the afternoon appearance before this Court on August 9, 2011, the petitioner appeared *pro se*. The petitioner proffered on the record before the Court, for the first time, that he was not alone at the post office when he mailed the OSC on July 22, 2011. However, petitioner proffered no details, names or specificity regarding the service. Moreover, to date the petitioner has not offered any other affidavit of service regarding this matter to the Court.

According to the Rules of the Special Election Matters for New York County, any and all proof of service had to be filed with the Court by 9:30 a.m. on August 1, 2011. Failure to do so is grounds for dismissal. Pursuant to the Rules, the petitioner's submitted affidavit of service is defective on its face. CPLR 2103 (a) provides that "Except where otherwise prescribed by law or order of court, papers may be served by any person not a party" Service of process by the party himself is a jurisdictional defect, rendering the action subject to dismissal (*see Matter of WeIn v. Thomas*, 78 AD2d 611 [1st Dept 1980] *affd* 51 NY2d 8629; *Miller v. Bank of New York (Delaware)*, 226 AD2d 507 [2d Dept 1996]). Election cases are unique, given the limited time frame and nature of the proceedings and service by the party himself creates substantial risks and complications in the litigation, including but not limited to, breach of peace or false affidavits of service, and it should not be encouraged. Thus, the Court finds that in this election matter the service of process by the petitioner himself is not an irregularity that the Court, in its

discretion, should disregard under CPLR 2001 (cf. *Matter of Kandel v. State Div. of Human Rights*, 70 AD2d 817 [1st Dept 1979]). Therefore, the Board's motion to dismiss pursuant to CPLR 3211(a) and CPLR 2103 is granted.

In addition, the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (see *Matter of Hennessey v DiCarlo*, 21 AD3d 505 [2d Dept 2005] *lv denied* 3 NY3d 706 [2005]). The petitioner failed to comply with the terms of service set forth in the order to show cause, which also constitutes a jurisdictional defect (see *Lobo v. Soto*, 73 AD3d 1135 [2d Dept 2010]; *Matter of Burke v. Bezio*, 71 AD3d 1317 [3d Dept 2010]; *Matter of Del Villar v. Vekiarelis*, 59 A.D.3d 642 [2d Dept 2009]; *Matter of Bruno v Ackerson*, 51 AD2d 1051 [2d Dept 1976] *affd* 39 NY2d 718 [1976]). Finally, the petitioner's affidavit of service is not an affidavit at all. It is not sworn to and omits the terms "being sworn, I am not a party to this action, am over 18 years of age and reside at [insert server's address]" and is also defective.

FILED

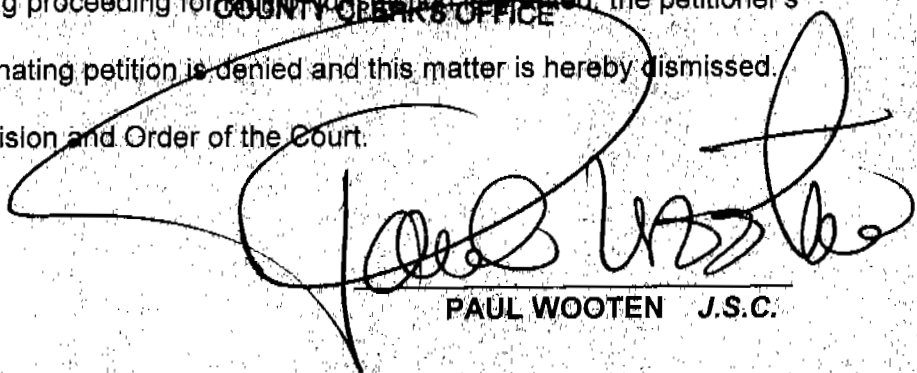
Accordingly, it is hereby,

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ORDERED that respondent Board of Elections in the City of New York's motion to dismiss the petitioner's validating proceeding for lack of jurisdiction is granted; the petitioner's application to validate his designating petition is denied and this matter is hereby dismissed.

NEW YORK
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This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 8-12-11

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE