At an IAS Term, Special Election Part 1 of the Supreme Court of the State of New York, held in and for the County of Kings, on the 29th day of May, 2020.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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BRADY AARONS,

PETITIONER,

-AGAINST- Index No. 507128/20

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

RESPONDENT.

- -X

The following papers numbered 1 to 5 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	

Other Papers

Petitioner Brady Aarons brings the instant validating proceeding pursuant to Article 16 of the Election Law seeking an order directing the respondent Board of Elections in the City of New York (the Board) to place him on the ballot in the June 23, 2020 Democratic Party primary for the office of Member of Assembly from the 50th Assembly District. Upon the foregoing papers, and after oral argument on the record, the court rules as follows.

In or about February 2020, petitioner circulated a designating petition seeking placement on the ballot in the June 23, 2020 Democratic Party primary election. The petition itself identified the office for which petitioner was seeking placement on the ballot as "50th District Assembly Representative." On March 20, 2020, petitioner filed the petition, which contained some 300 signatures, with the Board. According to the Board, on April 15, 2020, it mailed a letter to petitioner at the address listed on his petition - 146 Broadway, Brooklyn NY

11211 - stating that his petition contained a prima facie defect and that he would be given an opportunity to present evidence and/or argument as to why the designating petition was not invalid. However, petitioner avers that he never received this letter. In this regard, the court notes that, at oral argument, it was revealed that petitioner lives in one of several apartments in the building located at 146 Broadway, and the address listed by petitioner on his petition did not state his apartment number.

On April 22, 2020, the Board's Commissioners met at a duly noticed meeting to rule on a variety of issues regarding the June 23, 2020 primary, including prima facie defects. The meeting was open to the public and could also be viewed over the internet via a live stream that was subsequently archived on the Board's website. At that meeting, the Board adopted the preliminary findings of its staff regarding the prima facie defect in petitioner's designating petition, and ruled petitioner off the ballot. Specifically, the Board found that the petition failed to properly identify the office for which petitioner was running. On April 22, 2020, the Board mailed petitioner a letter to the address listed on his designating petition notifying petitioner of its determination. However, petitioner never received this letter. In fact, on May 8, 2020, the letter was returned to the

Board by the postal service with the notation: "Return to sender. No such number. Unable to forward."

According to petitioner, after he filed his designating petition, he periodically checked the unofficial website "Ballotpedia" in order to verify that he remained on the ballot. Petitioner states that this website continued to list him on the ballot up until May 18, 2020, and that when he checked the site on that date, he discovered for the first time that he had been removed from the ballot. The court notes that during oral argument on the motions, the Board stated that petitioner could have contacted it any point after his removal from the ballot and asked for an updated candidate's ledger which would have shown that he had been removed from the ballot. Further, the final candidates list was posted on the Board's official website on May 15, 2020. In any event, on May 18, 2020, petitioner did contact the Board whereupon a Board staff member emailed him a copy of the April 22, 2020 letter notifying him that he had been removed from the ballot.

On May 20, 2020, at 6:55 p.m., petitioner electronically filed the instant validating petition, proposed order to show cause, and RJI with the court. In the "Nature of Judicial Intervention" section of the RJI, petitioner did not check

the box for "order to show cause," but instead checked the box for "other" and wrote in "special proceeding, Election Law." This caused a delay in the transmission of the papers from the Ex Parte Part to the Special Election Part. The record reveals that this Part did not receive the petition and unsigned order to show cause until late in the day on Friday, May 22, 2020. On Tuesday, May 26, 2020, the court signed the order to show cause and set the matter down for a May 28, 2020 return date via Skype.[1] The order to show cause provided for same day service on the Board via email, which was effectuated by petitioner. Petitioner now moves for an order granting his validating petition and the Board moves for an order dismissing the petition.

In support of his motion, petitioner maintains that his designation of the office that he was seeking on his petition sheets as "50th District Assembly Representative" as opposed to Member of Assembly from the 50th Assembly District had no potential to confuse or deceive the voters who signed the petition, or the Board. Accordingly, petitioner maintains that the Board erred in removing him from the ballot based on his purported failure to correctly identify the office for which he was running. Petitioner further agues that, although based upon

[1]The courts were closed on Monday, May 25, 2020 for the Memorial Day holiday.

a strict interpretation of the statute of limitations, the instant proceeding is untimely, under the circumstances of this case, the court should not strictly construe the statute. In support of this argument, petitioner points to the case of *Pell v Coveney* (37 NY2d 494 [1975]) and its progeny, which hold that, where the Board removes a candidate from the ballot after the statute of limitations has expired, or otherwise fails to notify a candidate that he or she has been removed from the ballot until after the statute of limitations has expired, the candidate will not be time-barred from commencing a validating proceeding so long as he or she promptly commences upon being notified. Here, petitioner maintains that he did not receive notice that he was removed from the ballot until May 18, 2020, and he promptly commenced the instant validating proceeding on May 20, 2020.

In support of its motion to dismiss the validating proceeding, the Board raises several arguments. First, the Board maintains the petitioner's description of the office that he was seeking on his designating petition was inadequate. In particular, the Board notes that there is no office of "representative" of the 50th Assembly District and merely stating "50th District Assembly" could cause confusion as there are Democratic Party positions for the 50th Assembly District. The Board further maintains that this proceeding is clearly untimely under

Election Law § 16-102 (2) as the statute of limitations expired on April 27, 2020, three business days after the Board rendered its final ruling of invalidity.

As a final matter, the Board argues that, even if the validating petition was meritorious and timely commenced, the proceeding must still be dismissed inasmuch the ballots have already been printed, ballot scanners and ballot marking devices are already being tested, early voting starts in just over two weeks, military and overseas ballots have already been distributed, and the distribution of absentee ballots is already underway. Thus, the Board contends that it is simply too late to alter the ballot and have the election conducted in a manner that complies with all state and federal laws. In support of this argument, the Board has submitted a detailed affidavit from its Director of Electronic Voting Systems, John Naudus. According to Mr. Naudus, it is too late to prepare the election day ballots with an additional candidate name, and any addition to the ballot at this point would make it impossible for the Board to conduct the June 23, 2020 primary election using machine scannable ballots and ballot marking devices.

Under Election Law § 16-102 (2), proceedings to validate a designating petition must be commenced within 14 days after the last day to file petitions, or three business days after the Board has made a determination of invalidity, whichever date is later. Here, petitioner commenced the instant proceeding on May 20, 2020, over six weeks after April 3, 2020 (14 days after the last day to file petitions) and over three weeks after April 27, 2020 (three business days after the Board's determination of invalidity). Thus, assuming without deciding that petitioner was improperly removed from the ballot by the Board, the instant proceeding is jurisdictionally defective inasmuch as it was commenced after the statute of limitations expired (*Matter of Ciotti v. Westchester County Bd. of Elections*, 109 AD3d 988, 989 [2013]; *Matter of Haight v Knapp*, 88 AD3d 921, 923 [2011]). In making this determination, the court finds no merit to petitioner's argument that *Pell* (37 NY2d at 494) and its progeny allowed for him to commence this proceeding within three days of May 18, 2020, when he first learned that he had been removed for the ballot. *Pell* is readily distinguishable from the instant matter inasmuch as in that case, the candidate was removed from the ballot by the Board after the statute of limitations had expired, thereby rendering it impossible for the candidate to timely commence a validating proceeding under

the statute of limitations as it existed at that time. Here, petitioner was removed from the ballot by the Board on April 22, 2020, and had until April 27, 2020 to timely commence. In *Matter of Bestry v Mahoney* (154 AD3d 889 [1989], *lv denied* 74 NY2d 609 [1989]), the court declined to adopt a strict application of the time period to commence where the Board provided "late notice" that it had removed the candidate from the ballot. Here, the Board mailed notice of its determination as required under Election Law §6-154 (3) on the same day it made the determination. While it is unfortunate that petitioner never received this notice, this was the result of his failure to provide his apartment number in his petition. Finally, in *Matter of Powers v New York State Bd. of Elections* (122 AD2d 970 [1986], *lv dismissed* 68 NY2d 806 [1986), the court found that the commencement of a validating proceeding two days after the candidate received a letter from the Board notifying him that he had been removed from the ballot was not untimely. Here, the candidate never received the letter sent by the Board because his petition did not contain his complete address. Further, petitioner was less than diligent in checking on his status. Specifically, as noted above, rather than check directly with the Board, petitioner relied upon an unofficial website of unknown reliability.

The court further finds that, even if petitioner was correct in his contention that the statute of limitations did not begin to run until he discovered, on May 18, 2020, that he had been removed from the ballot, this proceeding would still be untimely. It is well-settled that, in Election Law Article 16 proceedings, "the petitioner must effectuate 'actual delivery of the instrument of notice not later than the last day on which the proceeding maybe commenced'" (*Matter of Angletti v Morreale*, 131 AD3d 808, 811 [2015], quoting *Matter of Yellico v Ringer*, 185 AD2d 965, 966 [1992]). Here, petitioner admits that he learned that he had been removed from the ballot on May 18, 2020. However, the Board was not served with the order to show cause and petition until May 26, 2020, five business days after petitioner received notice. Inasmuch as Election Law § 16-102 (2) requires commencement within three business days of a finding of invalidity (or, as petitioner argues, of being notified of removal), the service upon the Board five business days after receiving notice was untimely.

As a final matter, based upon the proof filed by the Board, including Mr. Naudus's affidavit, the court finds that, assuming for the sake of argument that the instant validating petition is meritorious and was timely commenced, the petition must still dismissed. In particular, at this late date, it would be

impossible to offer meaningful relief in accordance with the Election Law (*Matter of Hunter v Orange County Bd. of Elections*, 11 NY3d 813 [2008]; *Matter of Semple v Laine*, 121 AD3d 798 [2014]; *Matter of King v Board of Elections in City of N.Y.*, 65 AD3d 1060 [2009]).

Accordingly, it is hereby ORDERED that the instant validating petition is denied and dismissed.

This constitutes the final decision, order, and judgment of the court.

E N T E R F O R T H W I T H

J. S. C.