

Matter of Pereira v Peterson
2021 NY Slip Op 31414(U)
April 21, 2021
Supreme Court, Kings County
Docket Number: 508798/21
Judge: Edgar G. Walker
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At the Special Election Part of the Supreme Court of the State of New York, County of Kings, on the 21st day of April, 2021.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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IN THE MATTER OF THE APPLICATION OF
AVERY N. PEREIRA,

Petitioner,

Index No. 508798/21

- against -

TIMOTHY J. PETERSON,
Respondent-Objector,

- and-

NEW YORK CITY BOARD OF ELECTIONS,
Respondent

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The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-9

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

In this special proceeding brought pursuant to Article 16 of the Election Law, petitioner-candidate Avery N. Pereira (petitioner) moves by way of an order to show cause and verified petition, seeking an order: a) declaring valid, proper, sufficient and legally effective the designating petition filed in the office of respondent New York City Board of Elections (the Board), designating

him as a candidate in the June 22, 2021 Republican Party Primary Election (Primary Election) for the Party Position of Male Member of the Republican State Committee from the 51st Assembly District, Kings County; (b) directing, requiring, and commanding the Board to print and place the name of petitioner as a candidate for said Party Position on the official ballots used in the 51st Assembly District at the Primary Election; and (c) enjoining and restraining the Board from printing, issuing, or distributing for use during the Primary Election in the 51st Assembly District any and all official ballots upon which the name of petitioner does not appear as a candidate for the said Party Position.

On March 23, 2021, a designating petition and cover sheet were filed with the Board naming petitioner as a candidate for above stated office. The designating petition was comprised of two volumes, KG2100785 and KG2100786, containing a total of 128 signatures. On March 26, 2021, written general objections to petitioner's designating petition were filed by respondent-objector, Timothy J. Peterson, with the Board. Specifications of objections in support of the general objections were filed with the Board on April 1, 2021. Upon the Board's review of the specific objections, a Clerk's Report was issued which found that petitioner's designating petition contained 62 valid signatures, which is nine less than the 71 valid signatures required to be placed on the ballot for this party position. On April 14, 2021, the Board conducted a hearing on the aforesaid objections and specifications of objections and sustained the Clerk's Report. Thus, the Board determined that petitioner's designating petition was invalid and that his name would not appear on the Primary Election ballot.

On April 15, 2021, petitioner commenced the instant validating proceeding with the submission of an order to show cause and petition verified by the petitioner, as well as his counsel. Petitioner argues that the Board erroneously determined that certain signatures and/or witness

statements were invalid. In support of his petition, he submits a detailed list of each specific objection that he contends the Board erroneously sustained. Specifically, petitioner lists: the petition volume number, sheet number and signatory line, and in some instances the subscribing witness statement, the specification of objection asserted by respondent-objector and an explanation regarding why the Board's ruling was in error.

At the outset, the court rejects petitioner's assertion that the specifications of objections are invalid because respondent-objector listed his apartment number as "1P" when listing his address on the specification of objection, when in fact he resides in apartment "1D." It is clear to the court that respondent-objector in fact listed his apartment as "1D" and not "1P" and, even if he had erroneously listed the wrong apartment number, this would not require invalidation of his specifications of objections (*see Matter of Hennessy v Board of Elections of County of Oneida*, 175 AD3d 1777, 1779 [4th Dept 2019] [holding that an apartment number is not a required component of a residence address for election law purposes]; *Matter of Tully v Ketover*, 10 AD3d 436, 437 [2d Dept 2004]). Additionally, the court rejects petitioner's argument that respondent-objector's specific objection "SWALT" lacks the required specificity. Contrary to petitioner's contention, the court finds that "SWALT" is indeed sufficiently specific to apprise the petitioner of the allegations made against a subscribing witness statement in his designating petition. Moreover, the court notes that Rule H6 of the Board's Rules specifically lists "SWALT" as an acceptable specification of objection abbreviation in relation to giving a candidate notice that there was an uninitialed alteration in the subscribing witness statement.

Oral argument was heard on April 20, 2021, when the parties appeared remotely before the court on the record. Counsel for petitioner argued that petitioner's designating petition should be

validated as petitioner has submitted a sworn affidavit attesting that the uninitialed alterations claimed by respondent-objector were in fact made by the petitioner. Counsel asserted that petitioner's affidavit is sufficient to rehabilitate said signatures and that it was not necessary for petitioner to testify but that he was available to do so if required. In his affidavit, petitioner affirms that he made the corrections or wrote over the dates himself due to the fact that he was collecting signatures in the cold of winter and the ink of the pen he was using did not flow smoothly.

No opposition was submitted to the court from respondent-objector. At oral argument, self represented respondent-objector asserted that he had not received all of the documents related to this matter. However, he admitted that he was currently staying in Florida. While it is unclear which exact documents respondent-objector claimed not to be in possession of, petitioner submitted proof of service establishing that respondent-objector had in fact been timely served with the instant validating proceeding, in accordance with the order to show cause, at the address listed in the specification of objections he filed with the Board. Additionally, the court notes that this case was electronically filed and all of the documents related to this matter were available for viewing on the publicly accessible New York State Courts Electronic Filing (NYSCEF) website.

Respondent-objector then orally requested that this matter be adjourned. In response, the court inquired as to the reason for such request. In particular, the court asked if respondent-objector had witnesses who would testify that petitioner was not in fact the person that had made the alterations at issue. He responded that he did not have any such evidence to present to the court. The court, therefore, declined to adjourn the matter. In this regard, the court notes that “[e]lection Law proceedings are subject to severe time constraints, and . . . require immediate action” (*Matter of Alfieri v Bravo*, 172 AD3d 1360, 1363 [2d Dept 2019], quoting *Matter of Master v Pohanka*, 44

AD3d 1050, 1052 [2d Dept 2007]; *see Matter of Fonvil v Alexandre*, 87 AD3d 640, 641 [2d Dept 2011] [holding that the Supreme Court providently exercised its discretion in denying the petitioner's application for an adjournment given the severe time constraints of Election Law proceedings]; *Matter of Tenneriello v Board of Elections in City of N.Y.*, 104 AD2d 467, 468 [2d Dept 1984]). Respondent-objector further objected to the submission of petitioner's affidavit in lieu of his testimony. Accordingly, petitioner was sworn in before the court.

Prior to questioning petitioner, his counsel admitted four exhibits into evidence; Exhibit 1-petitioner's designating petition volume KG 21000785; Exhibit 2-petitioner's designating petition volume KG2100786; Exhibit 3- the Board of Elections Specification Worksheets, and Exhibit 4-the Board of Elections Designating and Opportunity to Ballot Petition Rules. Counsel asked petitioner if he had copies of his designating petitions in front of him and petitioner affirmed that he did. Counsel directed petitioner to each of the separate objections raised to his designating petition. Specifically, counsel referred petitioner to the volume, sheet number and signatory line at issue, and in several instances, to the subscribing witness statement at the bottom of the sheet that had been objected to. In each instance, petitioner testified that he had collected and witnessed each of the signatures on the page, that he had personally filled in all of the information in the subscribing witness statements and had personally traced over the numbers that he had originally written in the date column that were objected to as alterations. He further testified that on certain days on which he collected signatures the weather was cold and windy and, as a result, he experienced problems with the ink flowing from the pen that he used.

“While alterations to a witness statement that are unexplained and uninitialed will ordinarily result in the invalidation of the petition page even where the alterations result in the provision of

correct information, the underlying signatures need not be nullified where an explanation is provided by affidavit or testimony” (*Matter of Oberman v Romanowski*, 65 AD3d 992, 993 [2d Dept 2009]; see *Matter of VanSavage v Jones*, 120 AD3d 887, 890 [3d Dept 2014] [where an affidavit was submitted explaining uninitialed alterations the court held that these otherwise valid signature should be counted]; *Matter of Rosmarin v Belcastro*, 44 AD3d 1055, 1055 [2d Dept 2007]; *Matter of Curley v Zacek*, 22 AD3d 954, 957 [3d Dept 2005] app den 5 NY3d 714 [where “three subscribing witnesses at issue testified that he or she carried the relevant page of the petition, collected the signatures appearing thereon and credibly explained the reason for the uninitialed alteration” the court upheld the validation by the Supreme Court of the signatures at issue]).

Here, petitioner submitted a detailed affidavit, as well as testifying under oath on the record, explaining that he was the one who made the alterations on several of the subscribing witness statements, and to various dates he placed in the date column next to signatures he had witnessed. The court finds that petitioner has credibly and sufficiently explained the alterations at issue herein. As such, over 60 signatures that were previously invalidated by the Board are hereby ruled to be valid signatures. In that the Board had determined that petitioner's designating petition needed only nine additional valid signatures to meet to the 71 signature requirement to be placed on the ballot for the party position he is seeking, as a consequence of this court's ruling petitioner has a sufficient number of valid signatures.

Accordingly, the petition to validate is granted, and it is hereby

ORDERED that respondent Board of Elections in the City of New York shall place on the ballot for the aforesaid primary election the name of the candidate Avery N. Pereira for the party

position of Male Member of the Republican State Committee from the 51st Assembly District, Kings County.

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

ENTER FORTHWITH,

A handwritten signature in black ink, appearing to be 'EW', written in a cursive style.

HON. EDGAR G. WALKER, J.S.C.