

**Thomas-Barcliff v McDuffie**

2022 NY Slip Op 34636(U)

May 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 511412/22

Judge: Peter P. Sweeney

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At the Special Election Part 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of May, 2022.

P R E S E N T:

HON. PETER P. SWEENEY,  
Justice.

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GAIL E. THOMAS-BARCLIFF, JOHN J. JOYNER JR., MIRIAM B. ROBERTSON, DORENE S. CHRISTMAS, KEVIN T. LAWRENCE, RUBY A. LUZATTO, GINA S. ANDERSON, ROBIN L. FINKELSTEIN, ELIZABETH P. CHAMP, JASON C. ATKINS, MONAE A. PRIOLENAU, LAUREL L. GIRVAN, SHARON SUMPTER, ADREINNE A. UMEH, KRISTIN S. ROCKERMAN, JOANN M. ROSS, THEODORE A. MOORE,

Aggrieved Candidates Petitioners,

Index No. 511412/22

-against-

EDWARD A. MCDUFFIE, JOHN L. BOOKER, OSASOGIE AIRHIAVBERE, REON SEALY, ELEANOR CYRUS, PRINCESS JAMES, PETER DINHOFER, KIM BEST, DENNIS MARSHALL, ANETTE M. ROBINSON, MYCHAEAL WHITE-SAMUEL, REGINALD DREW,

Respondent-Objectors,

-and-

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent.

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The following e-filed papers read herein:

NYSEF Doc. Nos.:

Order to Show Cause/Petition \_\_\_\_\_  
Other papers \_\_\_\_\_

1, 6, 9  
24, 25, 26

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Upon the foregoing papers, and after oral argument held remotely on the record in this proceeding commenced pursuant to Election Law § 16-102 to validate the designating petitions filed by the aggrieved-candidate-petitioners (petitioners) as candidates for Democratic Party Positions of Member of the Kings County Democratic County Committee (KCDCC) from various election districts in Kings County, the court grants the application of respondent-objectors Eleanor Cyrus, Princess James, Peter Best, Dennis Marshall, Anette M. Robinson and Mychael White-Samuel (collectively referred to as respondent-objector movants) to the extent that the petition is dismissed with respect to the claims premised on fraud on the part of the respondent-objector movants. The respondent-objector movants' application is otherwise denied.

In addition, upon a line-by-line review of the respective designating petitions of aggrieved candidate petitioners Jason Atkins and Joann M. Ross, the petition is granted to the extent that it seeks to validate their designating petitions and that the respondent Board of Elections in the City of New York is ordered to place petitioners Jason Atkins and Joann M. Ross on the ballot for the June 28, 2022 Democratic Party primary election for the party positions of Member of the Kings County Democratic County Committee for Election District 11 in the 43rd Assembly District.

According to the petition, respondent-objectors Edward A. MacDuffie and John L. Booker filed specifications of objections relating to the designating petitions naming aggrieved candidate petitioners Gail E. Thomas-Barcliff and Miriam B. Robertson as candidates for member of the KCDCC for Election District 16 in the 55<sup>th</sup> Assembly District; respondent-objectors Osasogie Airhiavbere and Reon Sealy filed specifications

of objections relating to the designating petitions naming aggrieved candidate petitioner John J. Joyner Jr. as a candidate for member of the KCDCC for Election District 19 in the 55<sup>th</sup> Assembly District; respondent-objector Eleanor Cyrus filed specifications of objections relating to the designating petitions naming aggrieved candidate petitioner Dorene S. Christmas as a candidate for member of the KCDCC for Election District 10 in the 57<sup>th</sup> Assembly District; respondent-objector Princess James filed specifications of objections relating to the designating petitions naming aggrieved candidate petitioners Kevin T. Lawrence and Ruby A. Luzzatto as candidates for member of the KCDCC for Election District 41 in the 57<sup>th</sup> Assembly District; respondent-objector Peter Dinhofer filed specifications of objections relating to the designating petitions naming aggrieved candidate petitioners Gina S. Anderson and Robin L. Finkelstein as candidates for member of the KCDCC for Election District 27 in the 42<sup>nd</sup> Assembly District; respondent-objector Kim Best filed specifications of objections relating to the designating petitions naming non-party Rebecca L. Anderson, non-party Elizabeth P. Champ, and aggrieved-candidate petitioner Margarita E. Rodriguez as candidates for member of the KCDCC for Election District 44 in the 56<sup>th</sup> Assembly District; respondent-objector Dennis Marshall filed specifications of objections relating to the designating petitions naming aggrieved candidate petitioners Jason C. Atkins and Joann M. Ross as candidates for member of the KCDCC for Election District 11 in the 43<sup>rd</sup> Assembly District; respondent-objector Annette M. Robinson filed specifications of objections relating to the designating petitions naming aggrieved candidate petitioner Monae A. Priolenau as candidate for member of the KCDCC for Election District 56 in the 56<sup>th</sup> Assembly

District; respondent-objector Mychael White-Samuel filed specifications of objections relating to the designating petitions naming non-parties Joel B. Philip and Rosemarie B. Philip and aggrieved candidate petitioners Laurel L. Girvan, and Sharon Sumpter as candidates for member of the KCDCC for Election District 50 in the 56<sup>th</sup> Assembly District; and respondent-objector Reginald Drew filed specifications of objections relating to the designating petitions naming non-party James Charles McNamee and aggrieved candidate petitioners Adrienne A. Umeh and Kristin S. Rockerman as candidates for member of the KCDCC for Election District 50 in the 56<sup>th</sup> Assembly District.

Aside from generally alleging that respondent Board of Elections in the City of New York (Board) may make erroneous rulings based on deficient or erroneous specifications filed by the objectors, the petition alleges, upon information and belief, that fraud permeates throughout the objections. The petition alleges that the names of non-party Joseph Henry and respondent-objectors John Booker, Reon Sealy, and Osasogie Airhiavbere were forged on the general objection forms purported to have been signed by them and filed with the Board. In support of this proposition, the aggrieved candidate petitioners have attached affidavits from persons identifying themselves as John Booker, Joseph Henry, Reon Sealy, and Osasogie Airhiavbere in which they state that they never signed the respective general objection forms bearing their names and that they never gave anyone permission to sign their names on the respective forms. The only connections the petition draws between this alleged forgery and other respondent-objectors are the assertion that the same attorney, who is also the Law Chair of the

KCDCC, is listed as the contact person (attorney/contact person) on the purportedly forged general objection forms and the general objection forms filed by the remainder of the respondent-objectors. The petition further alleges, upon information and belief, that the objection forms were prepared at the request and behest of the Chairperson of the KCDCC's executive committee, the Law Chair and the Secretary of the KCDCC.

The court notes that respondent-objectors Edward A. McDuffie, John L. Booker, Osaogie Airhiavbere, and Reon Sealy, did not appear at the initial calendar call of this proceeding held on April 25, 2022, and have not otherwise appeared by submitting an answer, motion, or other form of appearance.

The respondent-objector movants have answered, and contend, in one of their affirmative defenses, that there is lack of subject matter for petitioners to maintain this proceeding because it improperly attempts to validate unrelated designating petitions in different Election Districts in a single proceeding. In making this argument, respondent-objector movants note that a designating petition, even if shared with other office seekers for different offices, is treated as unique to each candidate (*see Matter of Buchanan v Espada*, 88 NY2d 973, 975 [1996]; *Matter of Pecoraro v Mahoney*, 65 NY2d 1026, 1027-1028 [1985]; Election Law § 6-134 [2]; 9 NYCRR part 6215). As such, respondent-objectors movants argue that the designating petition filed with respect to each respondent-candidate is a separate petition, and that, since Election Law § 16-102 (2) only provides for the commencement of a proceeding with respect to "a petition," petitioners have improperly commenced the instant proceeding relating to more than one designating petition.

In the answer, the respondent-candidate movants, as another affirmative defense, assert that petitioners lack personal jurisdiction over the respondent-candidate movants because the order to show cause required petitioners to serve a copy of the respective designating petitions for each candidate and the copies of the respective designating petitions were not served on the respondent-candidate movants.

At oral argument held on the record during the initial calendar call on April 25, 2022, the respondent-objector movants, in addition to arguing that they are entitled to dismissal of the petition on the grounds raised in the answer, orally moved for dismissal of the petition's fraud claims on the ground that they are insufficient because they are not pled with specificity. In a brief submitted on April 27, 2022, respondent-objector movants, for the first time, assert that they are entitled to dismissal of the petition because it is not verified and because petitioners failed to serve the respondent-objector movants with the notice of electronic filing form required by Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb (3).

Initially, the court finds that the respondent-objector movants are entitled to dismissal of the petition's fraud allegations as against them. Although the allegedly forged general objection forms purportedly signed by John Booker, Joseph Henry, Reon Sealy, and Osasogie Airhiavbere are undoubtedly problematic and might warrant relief relating to their objections, petitioners' conclusory assertions - which are based almost entirely on information and belief, the source of which is not disclosed (*see Matter of Graham v Umame*, 254 AD2d 359, 359 [2d Dept 1998]; *see also Avilo Automotive Group v Leontiev*, 194 AD3d 537, 539 [1st Dept 2021]) - are insufficient to warrant an inference

that there was any fraudulent conduct on the part of the respondent-objector movants and thus fails to satisfy the specificity requirements of CPLR 3016 (b) (*see Matter of Robinson v Edwards*, 54 AD3d 682, 683 [2d Dept 2008]; *Matter of Waugh v Nowicki*, 10 AD3d 437, 438 [2d Dept 2004], *lv denied* 3 NY3d 603 [2004]; *Matter of O'Toole v D'Apice*, 112 AD2d 1078, 1078 [2d Dept 1985], *lv denied* 65 NY2d 607 [1985]). To the extent that the lack of specificity in the complaint may be made up by a bill of particulars or other means (*see Gale v Animal Med. Ctr.*, 108 AD3d 497, 499 [2d Dept 2013]; *see also Matter of Thomas v Eugene*, 41 Misc 3d 418, 421 [Sup Ct, Kings County 2013]; *Matter of Hayon v Carrion*, 41 Misc 3d 356, 359-360 [Sup Ct, Kings County 2013]), petitioners are barred from doing so now because of their failure to provide any such material by the time of the April 25, 2021 calendar call as required by the court part rules (*see Matter of Wooten v Barron*, 242 AD2d 351, 352 [2d Dept 1997]; *Matter of Rivera v Ortiz*, 207 AD2d 516, 516-517 [2d Dept 1994]).

The court, however, rejects respondent-objector movants' argument that the failure to serve the respective designating petitions with the order to show cause and petition constitutes a jurisdictional defect. The order to show cause does state that it was granted, in part, upon the original designating petition and the service provision of the order requires "service of a copy of this order together with the papers upon which it be granted be made upon" upon respondent-objectors. The designating petition, however, was not among the documents submitted to the court for consideration with the order to show cause. Moreover, the order to show cause directs that the Board "shall" make available and allow copying of the designating petitions and other documents relating to

the designation of the petitioners as candidates. In addition, the court notes that the original designating petition filed with the Board is a document that, except pursuant to court order, must be preserved in the custody or supervision of the Board (Election Law § 3-220 [6], [6-a]). Under these circumstances, it is evident that the designating petition was not a paper on which the order to show cause was granted, and service was complete as made (*see Matter of Previdi v Matthews*, 185 AD2d 962, 963 [2d Dept 1992]; *see also Matter of McKinney v Relin*, 197 AD2d 839, 839-840 [4th Dept 1993], *lv dismissed* 82 NY2d 748 [1993]).

The court now turns to respondent-objector movants' arguments that the petition improperly addresses claims relating to multiple designating petitions. An Election Law § 16-102 proceeding is a special proceeding under the CPLR that is governed by the party joinder requirements of CPLR 1002 (2) (*see Matter of Atwood v Pridgen*, 142 AD3d 1278, 1279 [4th Dept 2016], *lv denied* 28 NY3d 945 [2016]; *see also* Election Law § 16-116; CPLR 103 [b], 105 [b], 401). CPLR 1002 (2) allows for joinder of persons as defendants in a single action where the claims arise "out of the same transaction, occurrence, or series of transactions or occurrences . . . if any common question of law or fact would arise" (CPLR 1002; *Matter of Atwood*, 142 AD2d at 1279). Based on this standard, in *Matter of Atwood*, the Appellate Division, Fourth Department held that two respondent-candidates were appropriately joined as respondents in a single Election Law article 16 special proceeding (*Matter of Atwood*, 142 AD3d at 1279).

*Matter of Buchanan* and *Matter of Pecoraro*, the Court of Appeals decisions relied upon by the respondent-objector movants, do not hold to the contrary. Rather, in *Matter*

of *Buchanan*, the Court simply held that a shared petition is deemed unique to each candidate and that the other candidates on the petition are not necessary parties to a challenge to a candidate on a shared petition (*Matter of Buchanan*, 88 NY2d at 975), while in *Matter of Pecoraro*, the court held that, since each candidate's designating petition on a joint petition is for a separate office, each cover sheet must identify the signatures supporting the individual candidates (*Matter of Pecoraro*, 65 NY2d at 1027-1028). Neither decision addresses whether more than one candidate may be joined as a respondent. In the absence of any contrary rule from the Court of Appeals, the Second Department or the other departments of the Appellate Division, this court is bound by the holding in *Matter of Atwood* (see *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664-665 [2d Dept 1984]).

In reaching its conclusion that joinder of more than one candidate as a respondent may be allowed under CPLR 1002, the court in *Matter of Atwood* has impliedly rejected the respondent-objector movants' argument that the use of the singular "a petition" in Election Law § 16-102 (2) limits an Election Law article 16 challenge to a single petition. To the extent that *Matter of Atwood* cannot be read as addressing the issue, the argument must be rejected based on rules of statutory construction. Namely, general principles of statutory construction provide that a statute's use of the singular is deemed to include the plural unless a contrary intent is otherwise shown (General Construction Law §§ 35, 110; see also *People v Alston*, 88 NY2d 519, 526 [1996]; *People v Reed*, 265 AD2d 56, 61 [2d Dept 2000], *lv denied* 95 NY2d 832 [2000], 95 NY2d 838 [2000], and 95 NY2d 859 [2000]). In this respect, CPLR 1002 (2) and 1003 provide mechanisms for regulating the

joinder of respondents in Election Law special proceedings. In addition, there is nothing in the general purpose of Election Law article 16 or the context of the language of Election Law § 16-102 (2) suggesting that a challenge must be limited to a single petition because of the special nature of Election Law special proceedings. As such, there is no discernable reason to find a statutory intent to limit section 16-102 (2) to the singular (General Construction Law § 110).<sup>1</sup> Thus, the use of the singular in section 16-102 (2) does not constitute a limit on the number of designating petitions that may be challenged in a single Election Law proceeding and the fact that this proceeding addresses multiple petitions is not a jurisdictional defect with this action that would require dismissal (*see Matter of Atwood*, 142 AD3d at 1279; CPLR 1002; CPLR 1003 [CPLR 1003 provides that misjoinder is not grounds for dismissal and allows for severance of misjoined claims]).<sup>2</sup>

Accordingly, the propriety of the joinder of the claims here turns on whether they properly joined under CPLR 1002 (2). Having dismissed the fraud claims as against the respondent-objector movants, the facts, as apparent from the petition and the other papers

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<sup>1</sup> Although there is a paucity of case law addressing the issue of joinder of multiple candidate respondents in a single proceeding, such joinder is a routine practice (*see e.g. Matter of Potter v Dudek*, 68 NY2d 154, 161-162 [1986]; *Matter of Pecoraro*, 65 NY2d at 1027; *Matter of Eaton v Rosenberg*, 109 AD3d 770, 771 [2d Dept 2013]; *Matter of Dadey v Hunter*, 109 AD3d 1078, 1079 [4th Dept 2013]; *Matter of LeBron v Clyne*, 65 AD3d 801, 801-802 [3d Dept 2009]; *Matter of Grumbach v Orange County Bd. of Elections*, 43 AD3d 477, 477 [2d Dept 2007]). Indeed, the court notes that counsel for the respondent candidates is the attorney for the petitioners in *Matter of Ortel, et al. v Hanna, et al*, Index No. 511206/22, who likewise challenge the designating petitions of candidates for the party positions of Male and Female Members of the Democratic State Committee from the 64<sup>th</sup> Assembly District in a single special proceeding.

<sup>2</sup> Contrary to the contentions of the respondent-candidate objectors, the fact that this action perhaps should have been commenced as separate actions under separate index numbers does not present a jurisdictional issue, since it is the filing of the petition that is of jurisdictional import, not the payment of the filing fee for the index number (*see MacLeod v County of Nassau*, 75 AD3d 57, 63-65 [2d Dept 2010]; *see also Grskovic v Holmes*, 111 AD3d 234, 240-243 [2d Dept 2013]; *cf. Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 328 [2011]).

before the court, suggests that petitioners' claims against the individual respondent-objector movants involve different candidates running for the party position of County Committee member in different election districts and, as such, severance of such claims for purposes of any line by line review to be conducted might have been required (*see* CPLR 1003). However, the need for such severance is now moot as petitioners indicate they only intend to move forward with a line-by-line review relating to the claims of petitioners Atkins and Ross regarding the specifications of objections filed by respondent-objector movant Marshall. Atkins and Ross candidacies are for the party positions of member of the KCDCC for the Election District 11 in the 43<sup>rd</sup> Assembly District based on two shared petition volumes (KG0870 and KG0871), and Marshall's specifications of objections before the Board were presumably the same for each candidate. Atkins and Ross' claims are thus properly joined under CPLR 1002 under the current index number (*see Matter of Atwood*, 142 AD3d at 1279).

The court also finds that the objector-respondent movants are not entitled to dismissal of the petition on the ground that it is not verified. Section 16-116 of the Election Law requires that a special proceeding commenced under article 16 of the Election Law be "heard upon a verified petition" (*see Matter of Goodman v Hayduk*, 45 NY2d 804, 806 [1978]; *Matter of Niebauer v Board of Elections in the City of N.Y.*, 76 AD3d 660, 660 [2010]; *see also* CPLR 3021).<sup>3</sup> Under the particular circumstances of this

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<sup>3</sup> The court notes that petitioners have an argument that the petition is properly verified in any event. Although the petition that was electronically filed has blank spaces above the attorney signature line and on the attorney verification page, an electronically filed document is deemed signed "if it is electronically filed under the User ID and password of that person" (Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [e] [1] [iii]). As it appears that it was the attorney for petitioners who filed the petition electronically, the attorney would be deemed to have

case, however, dismissal of the instant proceeding is not warranted. Namely, the respondent-objector movants did not raise the issue of the impropriety of the verification of the petition in their answer filed on April 24, 2022, or at the initial return date of the petition on April 25, 2022, and only raised it as an issue in their memorandum of law that was not submitted until April 27, 2022. As such, the respondent-objector movants failed to give notice with due diligence as to the alleged lack of verification (*see* CPLR 3022; *Matter of Lee v Orange County Bd. of Elections*, 164 AD3d 717, 718 [2d Dept 2018]; *Matter of Master v Pohanka*, 44 AD3d 1050, 1052 [2d Dept 2007]; *Matter of Ladore v Mayor & Bd. of Trustees of Vil. of Port Chester*, 70 AD2d 603, 604 [2d Dept 1979]). Moreover, the respondent-objector movants have made no allegation that a substantial right of theirs would be prejudiced by the allegedly defective verification (*see Matter of Lee*, 164 AD3d at 718; *Matter of Master*, 44 AD3d at 1052; *Matter of Rose v Smith*, 220 AD2d 922, 923 [3d Dept 1995]).

Finally, respondent-objector movants argue in their memorandum of law that the proceeding was improperly commenced because respondents failed to serve a notice that the action was subject to electronic filing as is required by Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb (3). This issue, which was not raised in respondent-objector movants' answer or at the argument on the record on the return date, is improperly raised for the first time in the memorandum of law (*see U.S. Bank N.A. v*

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signed the relevant pages of the petition and verification based on the court rule. Further, an attorney may verify a petition in an Election Law proceeding if the attorney has an office in a county other than the one in which the petitioners reside (*see Matter of Tenneriello v Board of Elections of City of N.Y.*, 63 NY2d 700, 701 [1984]; CPLR 3020 [d] [3]).

*Crockett*, 201 AD3d 767, 768 [2d Dept 2022]). In any event, the notice requirement of section 202.5-bb (3), which applies in mandatory electronic filing cases, is inapplicable in this election law proceeding that is not a mandatory electronic filing case (see Uniform Rules for Trial Cts [22 NYCRR] § 202.5-bb [a] [2]). Even were the rule applicable, the failure to serve the notice is not a jurisdictional defect with the commencement of the action (see CPLR 304; CPLR 2001; *Matter of Facticeau v Clinton County Bd. of Elections*, 197 AD3d 840, 842 [3d Dept 2021]) and respondent-objector movants were clearly not prejudiced by the failure to provide the notice as they were able to promptly electronically file an answer (*Matter of 44 Lexington Assoc., LLC v Supreme Sec. Sys., Ltd.*, 139 AD3d 517, 518 [1st Dept 2016]). The court thus finds that the failure to provide notice that the proceeding was an electronic proceeding, to the extent required, may be ignored (CPLR 2001; *Matter of 44 Lexington Assoc., LLC*, 139 AD3d at 518; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 55 [2d Dept 2014]).

The court now turns to the merits of petitioners' application to validate the designating petitions supporting the candidacies of petitioners Atkins and Ross for the party positions of Member of the KCDCC for Election District 11 in the 43<sup>rd</sup> Assembly District. After conducting a line-by-line review of the specification of objections that respondent-objector Marshall filed with the Board challenging the designating petitions, the special referee of this court found that petitioners Atkins and Ross had a total of 51 valid signatures, which is seven more than the 44 valid signatures required to be placed

on the ballot for said positions. The court notes that there were no exceptions to the special referee's findings.

Accordingly, it is hereby

**ORDERED** that petitioners' validating petition is granted to the extent that it seeks to validate the designating petitions of petitioners Atkins and Ross; and it is further

**ORDERED** that the Board place petitioners Jason Atkins and Joann M. Ross on the ballot for the June 28, 2022 Democratic Party primary election for the party positions of Member of the Kings County Democratic County Committee for Election District 11 in the 43<sup>rd</sup> Assembly District.

This constitutes the decision and final order of the court.

ENTER



J.S.C.

HON. PETER P. SWEENEY, J.S.C.

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