

Moss v Sullivan
2023 NY Slip Op 31705(U)
May 19, 2023
Supreme Court, Chemung County
Docket Number: Index No. 2023-5277
Judge: Elizabeth Aherne
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At a Motion Term of the Supreme Court of
the State of New York held in and for the
Sixth Judicial District on the 18th day of
May 2023.

PRESENT: HON. ELIZABETH AHERNE
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: CHEMUNG COUNTY

NANETTE MOSS,

Petitioner,

DECISION AND ORDER

Index No. 2023-5277

-vs-

KEVIN R. SULLIVAN,

Respondent,

and

CHEMUNG COUNTY BOARD OF ELECTIONS,

Nominal Respondent.

APPEARANCES:

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HON. ELIZABETH AHERNE, J.S.C.**BACKGROUND**

On April 24, 2023, Petitioner Nanette Moss (hereinafter “Petitioner”) filed a notice of petition and a verified petition against Kevin R. Sullivan (hereinafter “Respondent”) seeking to invalidate Respondent’s election nomination designating petition and approval as a Republican candidate for the office of 6th District City Councilperson for the City Council for the City of Elmira (NY St Cts Elec Filing [NYSCEF] Doc Nos. 1-9). Petitioner currently holds said office and is seeking re-election. Respondent was served on April 26, 2023; the Chemung County Board of Elections was also noticed and served as a Nominal Respondent on April 26, 2023 (NYSCEF Doc Nos. 12-13). Respondent filed a verified answer/objections in point of law/motion to dismiss and memorandum of law on May 11, 2023 (NYSCEF Doc Nos. 15-16).

Presumably after reading Respondent’s answer, which raised the issue of whether the instant proceeding should have been initiated via order to show cause rather than notice of petition, Petitioner then proceeded to file an order to show cause with the same pleadings on May 12, 2023 (NYSCEF Doc Nos. 20-30). Petitioner was able to effect service of the order to show cause as directed on the Chemung County Board of Elections but requested an amended order to show cause to permit service on Respondent’s counsel after finding an inability to serve Respondent personally on May 16, 2023, which was permitted and served on Respondent (NYSCEF Doc Nos. 31-43). Respondent filed an amended answer/objections in point of law/motion to dismiss and an additional memorandum on May 17, 2023 (NYSCEF Doc Nos. 44-45).

A hearing was held on May 18, 2023, at which both parties presented oral argument with additional points of law. Respondent also presented two additional exhibits, Exhibit A, an affidavit from Respondent and Exhibit B, an affidavit from Nicholas Paluszkiewicz, Sr. (NYSCEF Doc No. 46). Neither party wished any additional time to provide any additional written submissions or an additional hearing for witness testimony.

DISCUSSION

Election Law § 16-102 (1) provides “the nomination or designation of any candidate for any public office ...by reason of a petition for an opportunity to ballot having been filed...may be contested in a proceeding instituted in the supreme court by any aggrieved candidate.” Petitioner

is contesting the nomination of Respondent and has identified two principal arguments why Respondent's election nomination designation petition is defective and void, to wit: (1) insufficient valid signatures and (2) an unexplained alteration in the witness statement section of Sheet 1. Respondent disputes the validity of said alleged defects and moves to dismiss for lack of jurisdiction.

1. Jurisdictional Defenses

Respondent moves for dismissal of Petitioner's petition on the basis that it does not procedurally comply with Section 16-116 of the Election Law which provides:

A special proceeding under the foregoing provisions of this article shall be heard upon a verified petition and such oral or written proof as may be offered, and upon such notice to such officers, persons or committees as the court or justice shall direct, and shall be summarily determined.

Respondent contends that it is a requirement that this special proceeding must be initiated via an order to show cause. Petitioner disagrees and argues that initiation via notice of petition was proper, but Petitioner did file a supplementary order to show cause in attempt to remedy any potential defect. Third Department precedent has provided guidance in these matters and provides that Election Law § 16–116 contemplates the use of an order to show cause to commence a proceeding, but it does not explicitly require it (see Wallace v Bujanow, 176 AD3d 1307, 1308 [2019]). The emphasis is placed on, whether it be an order to show cause or a notice of petition, whether there is an opportunity for the court to have discretion to determine the method of service (id.). Here, the notice of petition was of a format that permitted this Court to reasonably specify a particular method of service if it wished and a generous reading of the notice of petition is that service was specified in accordance with CPLR § 403. This Court declines to dismiss the petition based upon a lack of jurisdiction due to a failure to initiate the proceeding with an order to show cause but does find other jurisdictional defects as detailed infra.

Respondent next argues that the Petitioner's failure to timely serve Respondents mandates dismissal of the petition. Election Law § 16–102 (2) provides the relevant statute of limitations:

A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later.

Additionally, petitioners are required to complete service on all parties within the same time period and actual delivery must occur no later than the last day upon which the proceeding may be commenced, no matter what the notice of petition or order to show cause may require with respect to service (see Facticeau v Clinton Cnty. Bd. of Elections, 197 AD3d 840, 842 [2021]). In the instant matter, the final ruling from the Chemung County Board of Elections was issued on April 19, 2023, and included a directive to the Petitioner that any appeal must be filed in the Supreme Court by April 24, 2023, three business days thereafter and fourteen days after the designating petitions filing deadline, April 10, 2023. Respondents were served on April 26, 2023 (NYSCEF Doc Nos. 12 & 13). As service was not properly completed within the statutory period before the expiration of the statute of limitations, the proceeding was not timely commenced (see Sauberman v Weinstock, 183 AD3d 1107 [2020]). Though the matter will be dismissed for a failure to properly serve the Respondents prior to the expiration of the statute of limitations, the Court will address the remaining issues for expediency in the event of an appeal.

2. Invalid Signatures

Respondent was required to submit thirty-seven (37) valid signatures in his election nomination designation petition; his designation petition included forty (40) signatures. The Chemung County Board of Elections sustained the objection of two of Petitioner's objections and determined that the Respondent's petition had thirty-eight (38) valid signatures. Petitioner continues to challenge the validity of three (3) of the signatures of the thirty-eight (38) signatures deemed valid by the Chemung County Board of Elections. Petitioner argues said three signatures are defective or fraudulent. To establish fraud, Petitioner is tasked with proving, by clear and convincing evidence, that Respondent's designating petition was permeated with fraud or that Respondent participated in fraudulent activity (see Kraham v Rabbitt, 11 AD3d 808, 809 [2004]).

One of the signatures Petitioner alleged to be fraudulent or defective based on the appearance of the signature and perhaps bearing an incorrect address was the signature of Nicholas Paluszkiewicz, Sr. Respondent submitted an affidavit from Mr. Paluszkiewicz confirming that it was his signature on the petition and his correct address. There was no evidence presented to discount said affidavit. Consequently, this signature is deemed valid (see Election Law § 6-134 (5); Jaffee v Kelly, 32 AD3d 485, 485 [2006]).

Another signature disputed by Petitioner was signed 'M. Thomas' as opposed to 'Marcel Thomas' as it is listed on file with the Elections Board. The only evidence presented for this court

to consider in ascertaining whether this signature was fraudulent or defective were images for comparison. Section 6-134 (5) of the Election Law provides, in relevant part:

The use of titles, initials or customary abbreviations of given names by the signers of, or witnesses to, designating petitions...shall not invalidate such signatures or witness statement provided that the identity of the signer or witness as a registered voter can be established by reference to the signature on the petition and that of a person whose name appears in the registration poll ledgers.

In referring to the signature on file with the Elections Board, this Court observes the full name of ‘Marcel Thomas’ in a cursive signature quite similar to the ‘M. Thomas’ signature on the designating petition. Consequently, this signature will not be invalidated (see Henry v Trotto, 872 NYS2d 690 [Sup. Ct.], aff’d, 54 A.D.3d 424 [2008]).

The final signature challenged by the Petitioner is the signature of a Mr. Larry Wright. This Court is provided with images of Mr. Wright’s signature from Petitioner’s own designating petitions in 2018 and 2020 and from his voter registration card to contrast with the image of the signature on Respondent’s designating petition. The signature on Respondent’s designating petition is signed in cursive, was witnessed, matches the name on record, and appears similar to the signature in cursive on record with the Board of Elections. The Court will decline to invalidate the signature based on the evidence before it.

Petitioner did not provide evidence from a handwriting expert or call any of the signatories to testify that it was not their signature, nor did they present any affidavits from any of the signatories to testify that it was not their signature (see Kraham v Rabbitt, 11 AD3d 808, 809 [2004]). This Court finds Petitioner failed to establish by clear and convincing evidence, and finds no evidence, that any signatures were forged or that the designating petition was otherwise permeated with fraud. This Court declines to find that any of the identified signatures are defective or were procured by fraud.

3. Witness Statement Alteration

Petitioner also seeks Respondent’s election nomination designating petition to be declared invalid based upon an alteration in the witness statement section of Sheet 1 of the designation petition. In said section, the number of signatures is indicated to be 19, however, in front of the 19 is a mark or unexplained alteration that is not clearly initialed by the witness, the Respondent. However, the Respondent has provided to this Court an affidavit explaining that he began to write the number 20 and then realized it was incorrect so he crossed it out and initialed it and then wrote

19. Nineteen is the correct number of signatures on the page. As Respondent has provided an affidavit explaining the alteration in the witness statement, there are no grounds to invalidate the witness statement or the signatures on Sheet 1 (see VanSavage v Jones, 120 AD3d 887, 890 [2014]).

CONCLUSION

And the Court having read and reviewed the pleadings delineated in the Background Section herein and having received evidence and oral argument at a hearing on May 18, 2023;

Based upon the foregoing, the Court finds as follows:

- I. It is ORDERED, ADJUDGED, and DECREED that Petitioner's petition is DISMISSED for failure to serve the Respondents in a timely manner prior to the expiration of the statute of limitations; and it is further
- II. ORDERED, ADJUDGED, and DECREED that Petitioner's petition is DENIED for failing to establish the election nomination petition was defective or fraudulent; and it is further
- III. ORDERED, ADJUDGED, and DECREED that the Certificate of Nomination of Kevin R. Sullivan as a Republican candidate for the position of City Councilperson for the 6th District of the City Council, City of Elmira primary election is hereby declared valid; and it is further
- IV. ORDERED, ADJUDGED, and DECREED that the name of Kevin R. Sullivan as a Republican Candidate for the City Councilperson for the 6th District of the City Council, City of Elmira should be permitted to be on the primary election ballot.

This constitutes the Decision and Order of the Court. The filing of this Decision and Order, or transmittal of copies hereof, shall not constitute notice of entry. (see CPLR §5513).



Digitally signed by Elizabeth Aherne, Supreme Court Justice
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ELIZABETH AHERNE
Supreme Court Justice

Dated: May 19, 2023
Ithaca, New York

All papers submitted in connection with this motion and the Decision and Order have been electronically filed with the Chemung County Clerk's Office through the NYSCEF System.