

Matter of Kazatsker v Gurshumov

2023 NY Slip Op 32056(U)

May 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 513304/23

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 10th day of May, 2023.

P R E S E N T:

HON. PETER P. SWEENEY,
Justice.

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In the matter of the Application of

IGOR KAZATSKER,
Petitioner-Candidate,

-against-

TAISA GURSHUMOV,
Respondent-Objector,

-and-

THE BOARD OF ELECTIONS IN THE CITY
OF NEW YORK,

Respondents,

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____ 1-5, 13-24

Opposing Affidavits (Affirmations) _____ 7-9, 10-12

Affidavits/ Affirmations in Reply _____
Other Papers: Bill of Particulars Petitioner's Exhibits A-C, _____

Respondent-Objector's Exhibits 1-4 _____

Upon the foregoing papers, and after oral argument and hearing held before the court on the record, petitioner-candidate Igor Kazatsker (petitioner) moves for an order granting his petition to validate his designating petition.

On April 10, 2023, petitioner filed a designating petition with respondent Board of Elections in the City of New York (the Board) seeking to have his name placed on the ballot for the party position of Male Member Republican State Committee from the 45th Assembly District in the Republican Party Primary Election to be held on June 27, 2023. After the designating petition was filed, respondent-objector Taisa Gurshumov (respondent-objector) filed general objections on April 13, 2023, and on April 19, 2023, filed specifications of objections with the Board challenging the validity of certain signatures in the designating petition. After their filing, the Board reviewed respondent-objector's specifications of objections and issued a preliminary clerk's report finding that petitioner's designating petition contained 369 valid signatures, which is 131 less than the 500 needed for placement on the ballot for said position. On April 26, 2023, the Board's Commissioners met to consider the clerk's report at which point petitioner's counsel raised the argument that the petitioner had not been properly served with the specifications of objections as required by Election Law § 6-154 (3) (b).¹ In support of this contention, petitioner submitted to the Board a copy of respondent-objector's proof of mailing (a FedEx receipt) and argued that the FedEx package, which contained the specifications of objections, was sent to the wrong address. Specifically, petitioner argued

¹ The court notes that neither respondent-objector nor her counsel was present at the April 26th hearing.

that his correct address (as set forth on petitioner's designating petition) is 1580 East 12th Street, **Apt. 103**, Brooklyn, NY, whereas the FedEx receipt indicated that the specifications of objections were sent to 1580 East 12th Street, **Apt. 130**. Finding that the petitioner had not been properly served, the Board's Commissioners voted to dismiss these specifications of objections.² As a result, it was determined that Kazatsker's name would be placed on the ballot.

Two days later, on April 28, 2023, during a scheduled Board meeting, respondent-objector's counsel requested to be heard on the issue of whether the specifications of objections were properly served on the petitioner.³ Respondent-objector's counsel argued that "new" evidence establishing that the FedEx package was delivered to petitioner's correct address should be considered by the Board. In this regard, respondent-objector proffered a letter from FedEx stating that its staff had made a clerical error in processing the FedEx Priority Overnight Shipment at issue (i.e., incorrectly transcribed **Apt. 130** as opposed to **Apt. 103**), and that FedEx's tracking history indicates that the FedEx package was delivered on April 20, 2023 to apartment **103**, not apartment **130**, and that a person named Svitlana Mullerman signed for said package. Respondent-objector also submitted a copy of a Board voter registration record listing the people who reside at 1580 East 12th Street, Apt. 103, which includes the petitioner as well as Svitlana Mullerman.

² All of this is reflected in the official video of the Board's Commissioners Meeting held on April 26, 2023, the relevant footage of which is available by visiting the website <https://vote.nyc/page/commissioners-meetings>, clicking on the April 26, 2023 meeting, and viewing the footage starting at 2:50:50.

³ The court notes that neither petitioner nor his counsel was present at the April 28th meeting.

Respondent-objector asserted that while FedEx had initially made a clerical error in labeling the envelope with the wrong apartment number (130 instead of 103), the newly submitted evidence established that the envelope was in fact delivered to the correct address and apartment number 103, and that a resident of that apartment signed for same on April 20, 2023. Based upon the new evidence submitted, the Commissioners decided to reconsider the matter and placed it on the Board's May 2, 2023 hearing calendar.⁴

At the May 2nd hearing, counsel for both parties were present. At that time, respondent-objector, relying on the newly submitted evidence, argued that despite a clerical error set forth in FedEx's label and mailing receipt, the package was actually delivered to the correct address (1580 East 12th Street, Apt. 103), and that a person residing in the apartment (Ms. Mullerman) signed for same on April 20, 2023. In opposition, petitioner maintained that service of the specifications of objections was defective in that the FedEx envelope and mailing receipt, both of which bear the 1580 East 12th Street address with the incorrect apartment number (#130 instead of #103), establish that the package was delivered to the wrong address. In support of this contention, petitioner submitted the original FedEx envelope to the Board. In addition, petitioner's counsel stated that the petitioner did not receive a copy of the specifications of objections until April 30, 2023. Upon rehearing the matter, the Commissioners voted to accept the specifications of objections, and then confirmed the clerk's report which

⁴ The relevant portion of the April 28, 2023 Commissioners meeting is available by visiting the website <https://vote.nyc/page/commissioners-meetings>, clicking on the April 28, 2023 meeting, and viewing the footage starting at the 24:25 mark on the video.

determined that petitioner had an insufficient number of valid signatures.⁵ As a result, petitioner's name would not appear on the ballot.⁶

On May 4, 2023, petitioner commenced the within validating proceeding against respondent-objector and the Board pursuant to Election Law § 16-102 by filing a petition and proposed order to show cause with the court. The majority of the petition concerned petitioner's argument that the specifications of objections were improperly served. However, the petition also contained a boilerplate allegation that Ms. Gurshumov was not eligible to serve as an objector as she did not actually reside at the address set forth on her objections. On that same date, the court signed the order to show cause, which made the matter returnable before it on May 8, 2023.

On the return date, the parties appeared before the court at which time petitioner's counsel argued that the Board's determination that respondent-objector's specifications of objections were properly served was arbitrary and capricious, and not in compliance with the provisions of Election Law § 6-154 (3) (b). Petitioner's main argument is that service of the specifications of objections was defective as the FedEx envelope containing the objections was addressed to the wrong apartment (#130) at the 1580 East 12th Street address. In support of this contention, petitioner submitted a copy of the cover

⁵ As previously noted, the preliminary clerk's report found that petitioner's designating petition only contained 369 valid signatures, which is 131 less than the 500 needed for placement on the ballot for said position.

⁶ The relevant portion of the May 2, 2023 Commissioners meeting is available by visiting the website <https://vote.nyc/page/commissioners-meetings>, clicking on the May 2, 2023 meeting, and viewing the footage starting at the 10:15 mark on the video.

sheet for his designating petition filed with the Board, as well as a copy of a petition sheet from same, both of which set forth petitioner's address as 1580 East 12th Street, Apt. 103, Brooklyn. He also submitted a copy of the FedEx envelope which bears the 1580 East 12th Street address but lists apartment 130 instead of 103. Petitioner contends that proper service is not effectuated by actual receipt of the package, but by whether it was properly addressed and placed for mailing with an authorized delivery service. In this regard, petitioner maintains that the service provisions set forth in Election Law § 6-154 (3) (b) are mandatory, and that respondent-objector failed to comply with this provision when she neglected to ensure that the FedEx package was addressed to petitioner's correct address as set forth in his designating petition. In addition, petitioner argues that respondent-objector lacks standing as an objector because she does not reside in the district. Lastly, he argues that the Board had no authority to reopen the proceedings with respect to the service of the specifications of objections after its initial determination on April 26, 2023.

In opposition, respondent-objector argues that service of the specifications of objections was proper. Although the FedEx package listed the wrong apartment number (#130), respondent-objector maintains that the package was in fact delivered to petitioner's correct address and apartment (#103). In support of this contention, respondent-objector submitted a printout of FedEx's "proof-of-delivery" tracking information related to the package at issue,⁷ which indicates that the package was

⁷ The court notes that the tracking number listed on the FedEx envelope (3972 4266 9220) corresponds to the tracking number set forth in the proof-of-delivery document.

delivered to S. Vitlana Mullerman on April 20, 2023. Respondent-objector also submitted a printout from the Board's voter registration database which indicates that Ms. Mullerman resides at the same address that petitioner set forth in his designating petition, 1580 East 12th Street, Apt. **103**. Thus, respondent-objector contends that service was properly effectuated at the correct address in compliance with Election Law § 6-154 (3) (b).

In addition, respondent-objector presented testimony from David Sepiashvili. Mr. Sepiashvili testified that he was the person who tendered the specifications of objections to FedEx for overnight delivery, and that he directed FedEx personnel to deliver the package to the address set forth on the cover sheet for the specifications of objections which listed petitioner's address as 1580 East 12th Street, **Apt. 103**. When questioned by petitioner's counsel regarding whether he had reviewed the mailing label, Mr. Sepiashvili replied that he was never given the opportunity to verify the address. Respondent-objector maintains that the transcription of the incorrect apartment number (#130 instead of #103) on the mailing label was an error on FedEx's part, and in any event, the evidence in the record establishes that the package was in fact delivered to petitioner's correct address on April 20, 2023, in compliance with the Election Law. Respondent-objector further argues that the newly proffered evidence establishing that the FedEx

package was timely delivered at petitioner's correct address was appropriately considered by the Board.⁸

Discussion

As a threshold matter, the court must address the petitioner's argument that the specifications of objections filed by the respondent-objector should be rejected. In this regard, he contends that respondent-objector does not actually reside at the address listed on her specifications of objections and/or that she is not qualified to serve as an objector since she does not reside in the 45th Assembly District. In support of his argument, petitioner initially notes that respondent-objector listed her address on her specifications of objections as 120 Oceana Drive West., Apt 3B., Brooklyn New York, 11235. Petitioner further submits an affidavit by a process server, Tamila Cintron (NYSCEF Doc No. 23). In her affidavit, Ms. Cintron states that on May 6, 2023, at approximately 9:00 p.m., she went to the address listed by the respondent-objector in her specifications of objections in an attempt to serve her with a subpoena duces tecum. Ms. Cintron further avers that, after she knocked on the door to the apartment, a man opened the door at which point she handed him the subpoena. Ms. Cintron claims that after he read the

⁸ As noted above, counsel for the respondent-objector presented a letter from FedEx stating that the error with respect to the apartment number was made by FedEx, and that the package was in fact delivered to the correct apartment number 103 and was signed for by Svitlana Mullerman. While the Board may properly have considered this letter (*see Matter of Anthony Brownell v New York State Justice Ctr. for the Protection of People with Special Needs*, 212 AD3d 998, 1002-1003 [3d Dept 2023]; *Matter of Bracco's Clam & Oyster Bar, Inc. v New York State Liq. Auth.*, 156 AD3d 629, 630-631 [2d Dept 2017]), respondent-objector has failed to demonstrate that this letter may be considered as a business record in the context of this court proceeding (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209-210 [2d Dept 2019]).

subpoena, the man then questioned why the papers were being served at the apartment and stated that “my daughter doesn’t live here.”⁹

In opposition to petitioner’s claim regarding her residency, respondent-objector submits her own affidavit stating that she currently resides at 120 Oceana Drive W., Apt. 3B, Brooklyn N.Y. and has maintained her domicile at this location since 2004. Respondent-objector also submits a copy of her driver’s license, a current bank statement, and current credit card statements, all of which list her address as 120 Oceana Drive W., Apt. 3B, Brooklyn, N.Y. Finally, respondent-objector submits certified copies of her voter registration application and card, both of which list her address as 120 Oceana Drive W., Apt. 3B, Brooklyn, N.Y.¹⁰

It is well-settled that in order to have standing to challenge a designating petition, an objector must reside in the same election district in which the candidate who filed the designating petition resides (Election Law § 6-154 (2); *Lucariello v Niebel*, 72 NY2d 927, 928 [1988]; *Matter of Pirozzolo v Lia*, 142 AD3d 569, 570 [2d Dept 2016] *lv to app den* 27 NY3d 911 [2d Dept 2016]; *Matter of Luthmann v Gulino*, 131 AD3d 636, 637 [2d Dept 2015]). Here, petitioner resides in the 45th Assembly District and it is undisputed that the address listed by respondent-objector in her specifications of objections also lies within the 45th Assembly District. Further, the Board’s voter registration records indicate

⁹ At a court hearing held on May 9, 2023, petitioner attempted to call respondent-objector as a witness. However, respondent-objector was not present in the courtroom at that time since the subpoena that petitioner served upon her directed that she appear in court on May 8, 2023.

¹⁰ Respondent-objector’s affidavit, bank statement, and credit card statements were entered into evidence as Respondent’s Exhibit 1. Respondent-objector’s voter registration application and card were entered into evidence as Respondent’s Exhibit 3.

that respondent-objector resides at the address set forth in her specifications of objections. Under the Election Law, there is a presumption that an individual is a resident of the locality in which he or she is registered to vote and it is the person challenging residence who bears the burden of proffering sufficient evidence to overcome the presumption (*see Matter of Mayer v Whitney*, 132 AD3d 1062, 1064 [3d Dept 2015]; *Matter of Dorman v Scaringe*, 245 AD2d 949, 950 [3d Dept 1997]; Election Law § 5-104 [2]). Petitioner has failed to meet this burden in that he has not presented any admissible evidence demonstrating that respondent-objector does not reside at the address set forth in the specifications of objections and the voter registration records. In particular, the statements in Ms. Cintron's affidavit that she attributes to respondent-objector's father constitute inadmissible hearsay evidence (*Breskin v Moronto*, 172 AD3d 1296, 1297-1296 [2d Dept 2019]; *Santos v ACA Waste Servs., Inc.*, 103 AD3d 788, 789 [2d Dept 2013]). In any event, respondent-objector's own affidavit, voter registration records, driver's license, bank statement, and credit card bills conclusively establish that she does in fact reside at the address set forth in her specifications of objections.

Accordingly, there is no merit to petitioner's argument that respondent-objector lacks standing to serve as an objector due to her residency.

Turning to the issue of whether petitioner was properly served with respondent-objector's specification of objections, the court notes that the Board's political calendar for this year required that, for general objections to a candidate's petition filed on April 13, 2023, the specification of objections were required to be filed by Midnight, April 19,

2023. In light of a recent amendment, Election Law § 6-154 (3) (b) (as amended by L 2022, ch 744, § 1), now provides, as relevant here, that

“No specifications of objections will be considered unless the objector filing the specifications personally delivers or mails by overnight mail a duplicate copy of the specification to each candidate for public office named on the petition or certificate . . . In the case of a petition containing candidates for party positions, service of the specifications shall be made on either the named candidates or the first person named on the petition's committee to fill vacancies. Service shall be made on or before the date of filing of any specifications with the officer or board. Proof of service shall accompany the specifications or be received by the end of two business days following the filing of the specifications, whichever is later.”¹¹

Given this express language, and case law addressing similar prior rules of the State Board of Elections (State Board) and local boards, such service is mandatory and the failure to so serve deprives the Board of jurisdiction to consider objections (*see Matter of Neal v Liscum*, 164 AD3d 1540, 1541-1542 [3d Dept 2018]; *Matter of Young v Thalmann*, 286 AD2d 550, 551 [3d Dept 2001]; *Matter of Moran v Board of Election of City of N.Y.*, 122 AD2d 908, 908-909 [2d Dept 1986]).

Since there is minimal case law addressing compliance with the mailing requirements of Election Law § 6-154 (3) (b), this court finds that cases addressing the mailing component of substitute service under CPLR 308 (2) and (8) provide guidance. These cases hold that, where the mailing itself is proper, the service by mail is complete upon the mailing, regardless of the actual delivery (*see Spangenberg v Chaloupka*, 229

¹¹ This service requirement is repeated by Rules of Board Elections in the City of New York § H (6).

AD2d 482, 483 [2d Dept 1996]; *European Am. Bank v Abramoff*, 201 AD2d 611, 612 [2d Dept 1994]). In addition, these cases hold that a “minor error in the address to which a summons is mailed will not render service of process void where ‘it is virtually certain that the summons will arrive’ at its intended destination” (*Gray-Joseph v Shuhai Liu*, 90 AD3d 988, 989 [2d Dept 2011], quoting *Brownell v Feingold*, 82 AD2d 844, 844 [2d Dept 1981]; see also *Ludmer v Hasan*, 33 AD3d 594, 594 [2d Dept 2006]).

In considering the service at issue here, it is undisputed that the FedEx package was addressed to the correct street address of the petitioner, and that the only error with respect to the address related to the apartment number.¹² At oral argument on the petition, counsel for petitioner conceded that the package was in fact delivered to the address set forth on his designating petition on April 20, 2023, and that Ms. Mullerman, who is also a resident at that address, signed for the package. Thus, by delivering the specifications of objections to the petitioner via overnight mail, respondent-objector complied with Election Law § 6-154 (3) (b). Any minor discrepancy involving the apartment number, which had no effect upon the ability of FedEx to deliver the specifications of objections to the petitioner in a timely manner, did not amount to a jurisdictional defect (see *Gray-Joseph*, 90 AD3d at 989; *Brownell*, 82 AD2d at 844; see also *Ludmer*, 33 AD3d at 594). Accordingly, this court finds that petitioner was properly and timely served pursuant to

¹² The court notes that Election Law § 1-106 (3) (a) provides that any reference to United States Mail in the Election Law includes any delivery service designated by the State Board. Federal Express is one of the delivery services so designated by the State Board (<https://www.elections.ny.gov/NYSBOE/download/law/2019newreqBallotAccessFilingByMail.pdf>).

Election Law § 6-154 (3) (b), despite the discrepancy with respect to the apartment number on the FedEx envelope and mailing receipt.

Lastly, the court rejects petitioner's assertion that the Board had no authority to reopen the proceedings with respect to the service of the specifications after its initial determination on April 26, 2023 (*see Matter of McDonnell v Cohen*, 252 App Div 277, 278 [1st Dept 1937], *affd* 275 NY 644 [1937] and 275 NY 646 [1937]). Contrary to petitioner's contention, the decision in *Matter of Pataki v Hayduk* (87 Misc 2d 1095 [Sup Ct, Westchester County 1976], *affd* 55 AD2d 861 [2d Dept 1976]) is not apposite to the facts herein. In *Matter of Pataki v Hayduk*, the Board had reopened its determination before a court proceeding challenging same had been commenced. Here, however, the Board reconsidered the issue regarding service of the specifications of objections two days after its initial determination, but more importantly, prior to the commencement of a court proceeding by either party (*compare Matter of Morales v Burgos*, 194 AD3d 888, 889 *lv dismissed in part and denied in part*, 36 NY3d 1125 [2d Dept 2021]).

Accordingly, it is hereby

ORDERED that petitioner's validating petition is hereby denied and dismissed.

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

ENTER FORTHWITH



J.S.C.

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