

**Matter of Novakhov v Board of Elections in the City of
N.Y.**

2024 NY Slip Op 32605(U)

July 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 516078/24

Judge: Peter P. Sweeney

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At the Special Election Part 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 26th day of July, 2024.

P R E S E N T:

HON. PETER P. SWEENEY,

Justice.

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In the Matter of the Application of MICHAEL NOVAKHOV, as candidate of the Republican Party for the Public Office of Member of the New York State Assembly from the 45th Assembly District of New York, Kings County, New York, as a Candidate Aggrieved pursuant to Article 16 of the Election Law of the State of New York; and

DEANNA LEE,

Citizen Objector,

-against-

Index No.: 516078/24

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

-and-

JOEY COHEN-SABAN, as candidate of the Pro-Israel Party for the Public Office of Member of the New York State Assembly from the 45th Assembly District of New York, Kings County, New York as set forth in the Schedule of Respondents Annexed hereto and made a part hereof,

Respondents,

Seeking an order invalidating and declaring null and void said Independent Nominating Petitions filed with the Board of Elections, purporting to designate the within-named candidate of the Pro-Israel Party for the Public Office of Member of the New York State Assembly from the 45th Assembly District of New York, Kings County, New York to be voted upon in the General Election to be held on November 5, 2024 and to Restrain the said Board of Elections from printing and placing the names of said candidate upon the official ballots for said General Election.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1-22, 28-31

Opposing Affidavits/Answer (Affirmations) _____

23-24, 32-33, 36-37

Affidavits/ Affirmations in Reply _____

Other Papers: BP, Amended Exhibit F, Sup. BP, Exceptions

25, 26-27, 34-35

Upon the foregoing papers and upon oral argument conducted on the record on June 17, 2024, June 27, 2024, July 16, 2024 and July 22, 2024, petitioners Michael Novakhov, aggrieved candidate, and Deanna Lee, citizen objector (collectively petitioners) seek an order declaring invalid the independent nominating petition nominating respondent Joey Cohen-Saban (respondent-candidate) as a candidate of the Pro-Israel party for the Public Office of Member of the New York State Assembly from the 45th Assembly District of New York, Kings County, to be voted upon in the November 5, 2024 General Election. Petitioners also move, by way of an order to show cause, for an order requesting the court to consider the de novo specifications of objections to respondent-candidate’s Independent Nominating Petition contained in petitioners’ “Amended Exhibit F” to petitioners’ bill of particulars (Amended Exhibit F or the corrected de novo specifications of objections).

On or about May 28, 2024, an Independent Nominating Petition (Nominating Petition) was filed with the respondent Board of Elections in the City of New York (the Board) nominating the respondent-candidate of the Pro-Israel party for the aforementioned office in the upcoming election. Citizen objector Deanna Lee filed and served general objections and specifications of objections to the Nominating Petition. The Board then reviewed the specifications of objections to the Nominating Petition and prepared the clerk’s report dated June 10, 2024. The clerk’s report indicated that the Nominating

Petition contained 1,056 valid signatures, which is 130 fewer signatures than the 1,186 required for the respondent-candidate's name to be placed on the ballot. On June 11, 2024, the Board's Commissioners confirmed the clerk's report and ruled respondent-candidate off the ballot.

Prior to the Board's determination, the respondent-candidate had timely commenced a proceeding to validate the Nominating Petition (*Cohen-Saban v Lee*, Sup Ct, Kings County index no. 515379/24) and petitioners timely commenced the instant invalidating proceeding.¹ On the morning of June 17, 2024, the initial return date for both the invalidating and validating petitions, petitioners e-filed a bill of particulars on the New York State Courts Electronic Filing system (NYSCEF) that had appended to it as exhibits the specifications of objections initially filed with the Board (Exhibits C1-C3) and an additional 42 specifications of objections (listed as Exhibit F) to be considered by the court for de novo review. At the proceeding held on June 17, 2024, counsel for the respondent-candidate indicated that, as part of the candidate's validating proceeding, he intended to challenge approximately 230 of the Board's "As Specified" rulings, which would thereby limit the scope of the line-by-line review. The court then directed the parties to appear at the Board's Brooklyn office on June 20, 2024, to commence the line-by-line review by court appointed special referees.

¹ In response to the respondent-candidate's validating petition, petitioners filed what purported to be a verified cross-petition to invalidate the nominating petition. However, petitioners subsequently withdrew this purported cross-petition on the record without opposition from respondent-candidate. In this regard, the cross-petition was academic given the fact that petitioners timely commenced an invalidating proceeding.

On the morning of June 20, 2024, respondent-candidate filed his bill of particulars identifying the Board's allegedly erroneous "As Specified" rulings. In addition, the respondent-candidate submitted an affidavit objecting to petitioners' de novo specifications of objections on the ground that they did not correspond to the Nominating Petition sheets and the specification of objections initially filed with the Board.

When the special referees began the line-by-line review of the de novo specifications of objections on the morning of June 20, 2024, it quickly became apparent that petitioners had misidentified the petition sheets to which the objections related and, as such, many of the objections so identified had already been ruled invalid by the Board or repeated objections that had already been provided in the specifications of objections initially filed with the Board. Nevertheless, the special referees did a full review of the de novo specifications of objections but made no rulings in favor of petitioners due to the fact that the specifications listed the incorrect petition sheets. That afternoon, while the line-by-line review relating to the respondent-candidate's challenges to the Board's rulings was still in progress, counsel for petitioners filed on NYSCEF, and handed to the referees and the respondent-candidate's representative who appeared at the line-by-line, Amended Exhibit F which listed the same de novo specifications of objections filed on June 17, 2024, but with the correct corresponding petition sheet numbers. The special referees, however, declined to consider the corrected de novo specifications of objections at that time based upon the long-standing Kings County Special Election Part Rules prohibiting the filing of supplemental specifications of objections after the initial return date.

The special referees thereafter completed the review of the respondent-candidates' challenges to the Board's "As Specified" rulings on June 21, 2024. Petitioners were thereafter granted time to submit a list of "Not As Specified" rulings by the Board that they deemed erroneous and wanted the referees to review. This list was filed on June 25, 2024, and the special referees completed the line-by-line review on June 26, 2024. In this regard, the referees determined that the nominating petition contained 1,160 valid signatures, which is 26 fewer than the 1,186 needed for placement on the ballot.

On June 27, 2024, the parties appeared before the court and oral argument was held regarding respondent-candidate's intention to call as witnesses individual signatories to the Nominating Petition and/or to submit affidavits from such signatories to the petition in an effort to rehabilitate certain signatures that were ruled invalid by the referees. In this regard, during the line-by-line review of the specifications of objections, there were numerous instances where the address listed for individual signatories in the petition differed from the address set forth in the Board's database.² In those instances, in accord with Appellate Division, Second Department authority, the referees ruled the signatures to be valid under circumstances where both addresses were within the 45th Assembly District and the signature in the petition could be matched to the signature(s) contained in the Board's database (*see Matter of Robleto v Gowda*, 183 AD3d 673, 675 [2d Dept 2020]; *Matter of Lee v Orange County Bd. of Elections*, 164 AD3d 717, 718 [2d Dept 2018]; *see also Matter of Kepi v Carr*, 2021 NYLJ LEXIS 914, *31-32, *aff'd* by *Matter of Carr v Kepi*,

² All of these signatures were ruled invalid by the Board based upon the objector's "Not Registered" specification of objections.

198 AD3d 847 [2d Dept 2021], [“a court sitting as the trier of fact ‘may make [its] own comparison of handwriting samples in the absence of expert testimony on the subject’”] quoting *Matter of Trevisani v Karp*, 164 AD3d 1586, 1587 [4th Dept 2018]; *Matter of Felder v Storobin*, 100 AD3d 11, 18 [2d Dept 2012]; *see also* CPLR 4536³).

The affidavits/testimony that respondent-candidate sought to introduce concerned signatures in which both addresses were in the 45th Assembly District but the referees found that the signature contained in the petition did not match the signature(s) contained in the Board’s database. Specifically, respondent-candidate argued that such evidence would demonstrate that these individuals did in fact sign the Nominating Petition. The court then set a schedule whereby respondent-candidate was required to provide petitioners with a list of signatories that he intended to call as witnesses as well as copies of any affidavits of individual signatories that he obtained. Pursuant to the schedule, respondent-candidate was to provide a list of these individuals by July 1, 2024, and copies of the affidavits by July 11, 2024. Thus, petitioners were afforded an opportunity to subpoena any of the individuals identified by respondent candidate prior to the next return date, which was scheduled for July 16, 2024.

Also, at oral argument on June 27, 2024, petitioners raised an objection to the referees’ refusal to consider the corrected de novo specifications of objections set forth in their Amended Exhibit F. In this regard, petitioners maintained that, to the extent that their

³ CPLR 4536 provides that, with respect to the signature, the “[c]omparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted.”

failure to file the corrected de novo specifications of objections until June 20, 2024, violated the Rules of the Election Part, respondent-candidate's failure to file a bill of particulars identifying the Board's rulings which he claimed were erroneous until June 20, 2024 also violated the Rules of the Election Part. Thus, petitioners argued that it would be inequitable to enforce these rules against one party, but not the other. The court then directed petitioners to make a formal motion seeking this relief.

On July 1, 2024, respondent-candidate filed on NYSCEF a list containing the names and addresses of 81 signatories to the petition which he intended to call as witnesses and/or submit affidavits therefrom. On July 11, 2024, respondent-candidate filed 31 affidavits on NYSCEF from individual signatories whose address in the petition and address in the Board's database were both in the 45th Assembly District but their signatures were ruled invalid by the referees due to the inability to match the signatures in the petition to the signature(s) in the Board's database. In this regard, each signatories' affidavit stated that they signed the nominating petition and resided at the address set forth on the petition at the time they signed.⁴ On July 9, 2024, in accord with the court's direction during oral argument on June 27, 2024, petitioners filed on NYSCEF a proposed order to show cause

⁴ Respondent-candidate also submitted an affidavit from Allegra Timsit Arazi, who was the subscribing witness on two of the sheets in the Nominating Petition. In this regard, the Board ruled the signatures on these sheets to be invalid since the subscribing witness's address on the petition did not match the address in the Board's database. However, the referees overruled the Board's "As Specified" ruling regarding this subscribing witness inasmuch as the Board's database contained a change of address form indicating that the subscribing witness moved to the address set forth in the petition prior to witnessing the petition sheets.

and affirmation in support seeking to have the court consider the corrected de novo specifications of objections contained in their Amended Exhibit F.

On July 16, 2024, the parties appeared before the court and respondent-candidate raised exceptions to 20 of the referees' rulings wherein the addresses listed on the petition and in the Board's database were both within the 45th Assembly District but the referees found that the signatures in the petition did not match the signatures in the Board's records. After reviewing these exceptions, the court overruled the referees' determination with respect to eight individual signatories and found these signatures to be valid inasmuch as the signature on the petition matched the signature in the Board's database (respondent exhibit 1 - petition sheet 75, line 4; exhibit 4 - petition sheet 76, line 1; exhibit 7 - petition sheet 138, line 6; exhibit 8 - petition sheet 57, line 1; exhibit 9 - petition sheet 110, line 15; exhibit 11 - petition sheet 83, line 12; exhibit 13 - petition sheet 124, line 5; exhibit 17 - petition sheet 69, line 2). Thus, respondent-candidate gained eight signatures. Additionally, on July 16, 2024, the court signed the proposed order to show cause filed by petitioners seeking to have the court consider the corrected de novo specifications of objections contained in their Amended Exhibit F. The order to show cause made the matter returnable before the court on July 22, 2024. The court further determined that, in order to make a complete record regardless of its determination of petitioners' pending motion, the referees should conduct a provisional line-by-line review of petitioners' corrected specifications of objections. This provisional review was conducted on July 17, 2024 and the referees determined that 39 of the 42 individual signatures challenged in petitioners'

Amended Exhibit F were invalid based upon the fact that the signatories resided outside the 45th Assembly District.

On July 22, 2024, the parties appeared before the court and oral argument was held on petitioners' motion to have the court consider the corrected de novo specifications of objections contained in their Amended Exhibit F. Petitioners also raised objections to some of the affidavits from individual signatories which respondent-candidate had previously filed. These objections were identified in a "list of exceptions" which petitioner filed on NYSCEF prior to oral argument on July 22, 2024. In particular, petitioners alleged that signatures on 10 of the affidavits did not match the individual's signature in the Board's database. Petitioners further alleged that 10 of the affidavits were improperly notarized as no notary license number was provided. Finally, petitioners alleged that all of the signatures witnessed by subscribing witness Allegra Timsit Arazi were invalid inasmuch as she was not registered to vote at the time she witnessed her petition sheets.⁵

On July 24, 2024, the parties appeared before the court and the referees' report was read into the record. In this regard, the referees determined that, based upon their rulings in the line-by-line review, as well as the court's determination on July 16, 2024 that eight of the referees' rulings were erroneous, the Nominating Petition contained 1,168 valid signatures, which is 18 fewer than needed for placement on the ballot. The referees noted that their findings were subject to the court's rulings on the consideration of the corrected

⁵ Petitioners' list of exceptions erroneously claims that Ms. Timsit Arazi witnessed sheet 24 of the nominating petition. Further, no affidavits were actually submitted for several of the sheet/line numbers identified in the list of exceptions.

de novo specifications contained in Amended Exhibit F and the signatures which respondent-candidate sought to rehabilitate with affidavits. The court then orally granted petitioners' motion to allow consideration of the corrected de novo specifications and further granted respondent-candidate's application to overturn 31 of the referees' rulings based upon the affidavits that he submitted, with a written decision and order to follow. In light of the foregoing, a net of eight additional signatures were ruled invalid, thereby resulting in the court's determination that the Nominating Petition contains 1,160 valid signatures, which is 26 fewer than the 1,186 required for placement on the ballot. Thus, petitioners' invalidating petition is granted and respondent-candidate's validating petition is denied.

The court now turns to its reasoning for its consideration of petitioners' corrected de novo specifications of objections. As an initial matter, it is worth noting that no Election Part Rules were published that specifically pertain to independent nominating petitions for the upcoming November 5, 2024 general election. In particular, the Special Election Part rules posted on the Supreme Court, Kings County website (<https://ww2.nycourts.gov/courts/2jd/kings/civil/Special-Election-Part-Rules.shtml>) specifically only apply to challenges to designating petitions filed with respect to the June 25, 2024 primary. In the absence of a reference to any other particular Election Law proceedings, or a suggestion that the rules otherwise generally apply, the court finds that it would be inequitable to deem them applicable to the respective validating and invalidating petitions that address an independent nominating petition for the November 5, 2024 general election.

Furthermore, while it is true that under the published rules relating to the June 25, 2024 primary election, the court would not have considered petitioners' corrected de novo specifications, it is important to consider the purpose underlying the rule prohibiting the filing of supplementary and/or corrected pleadings in proceedings involving designating petitions. Simply stated, the severe time constraints which encumber litigation involving designating petitions would make it impossible for the court to complete its work in a timely manner were it to allow parties to supplement and/or correct their allegations and pleadings after the initial return date. Using the 2024 Primary Election as an example, the Board did not make a final determination regarding the validity/invalidity of challenged designating petitions until April 23, 2024 and the Appellate Division issued an Administrative Order directing that all appeals be perfected by May 1st 2024. This left the court with a little over a week to complete its work, which consisted of approximately 30 proceedings, many of which involved time-consuming line-by-line reviews. Furthermore, before the Legislature moved the Primary Election from September to June, the time constraints inherent in litigation involving designating petitions applied equally to litigation involving independent nominating petitions.

However, when the Legislature moved the Primary Election to June, the time constraints, which justified the strict Election Part rules prohibiting the submission of supplemental and/or corrected pleadings, ceased to exist with respect to proceedings involving nominating petitions. In particular, the Board made a final determination regarding the invalidity of respondent-candidate's nominating petition on June 11, 2024 and the deadline for Election Law proceedings relating to the General Election imposed by

Election Law § 16-102 (4)⁶ is not until October 1, 2024. Under these circumstances, this court can give more consideration to general CPLR principles that allow for flexibility with respect to deadlines, amendments and the correction of mistakes where, as here, the other side is not prejudiced (*see* CPLR 2001, 2004, 3025, 3042).

In addition to the fact that no Election Part Rules were published pertaining to proceedings involving independent nominating petitions and the fact that the rationale justifying the Election Part rules prohibiting the submission of corrected pleadings in proceedings involving designating petitions does not apply here, other factors weigh in favor of allowing for the consideration of petitioners' corrected de novo specifications of objections. Specifically, although petitioners did not file their corrected bill of particulars until the afternoon of June 20, 2024, by the time that the court determined that the referees should conduct the provisional line-by-line with respect to those specifications, respondent-candidate had ample notice of the corrected de novo specifications of objections and has since had an opportunity to address them before the court. Thus, respondent-candidate was not prejudiced by petitioners' three-day delay in filing the corrected de novo specifications of objections. In addition, while the court would be hesitant to allow a party to submit entirely new specifications of objections after the line-by-line review was completed, that is not what occurred here. In particular, the line-by-

⁶ Election Law § 16-102 (4) provides that, "A final order including the resolution of any appeals in any proceeding involving the names of candidates on ballots or voting machines shall be made, if possible, at least five weeks before the day of the election at which such ballots or voting machines are to be used, or if such proceeding is commenced within five weeks of such election, no later than the day following the day on which the case is heard."

line review was ongoing at the time petitioners filed their Amended Exhibit F.⁷ Further, the de novo specifications filed by petitioners on June 17, 2024 were the same as those contained in their Amended Exhibit F except the corrected specifications contained the accurate corresponding petition sheet numbers.

Accordingly, under the circumstances of this case, petitioners' corrected specifications of objections were considered by the court which resulted in an additional 39 signatures being ruled invalid based upon the provisional line-by-line review previously conducted by the referees.

The court next turns to petitioners' contention, raised orally during the proceedings, that respondent-candidate as the petitioner in the validating proceeding, failed to timely specify the Board's individual determinations that he claims improperly invalidated signatures in the Nominating Petition. The general rule is that a validating petition "must specify the individual determinations of a board of elections that the candidate claims were erroneous, including the signatures that the candidate claims were improperly invalidated" (*Matter of Wagner v Elasser*, 194 AD3d 891, 892 [2d Dept 2021], quoting *Matter of Jennings v Board of Elections of City of N.Y.*, 32 AD3d 486, 486 [2d Dept 2006]; see *Matter of Sweet v Fonvil*, 227 AD3d 849, 851 [2d Dept 2024]; *Matter of Sanon v Marte*, 205 AD3d 859, 861 [2d Dept 2022]). However, where, as here, a candidate properly commences a validating proceeding prior to the Board making its determination, the candidate cannot be

⁷ The referees reviewed petitioners' uncorrected de novo specifications of objections on the morning of June 20, 2024, and thereafter reviewed the list of the Board's "As Specified" rulings set forth in respondent-candidate's bill of particulars and completed this review on June 21, 2024. On June 26, 2024, the referees reviewed the list of "Not As Specified" rulings filed by petitioners.

faulted for failing to specify the Board determination being challenged at the time the action is commenced (*see Matter of Sweet*, 227 AD3d at 851; *Matter of Bodkin v Garfinkle*, 21 AD3d 571, 571-572 [2d Dept 2005]). Furthermore, although respondent-candidate's filing of the bill of particulars identifying the Board's alleged erroneous rulings on June 20, 2024 would have been untimely under the Election Part Rules relating to the Primary Election,⁸ those rules do not apply here for the same reasons that they do not apply with respect to petitioners' corrected de novo specifications of objections. Specifically, the Rules only applied to designating petitions filed in connection with the June 2024 Primary Election, as the time constraints underlying the Rules are not present in litigation involving nominating petitions, and petitioners were not prejudiced by any delay in the filing of the bill of particulars. Under the circumstances, there is no basis for precluding review of the signatures identified in respondent-candidate's bill of particulars.

With respect to the signatures which respondent-candidate rehabilitated through the submission of affidavits from individual signatories, there is no merit to petitioners' argument, raised during oral argument, that the court improperly considered these affidavits. An affidavit may be used to confirm the identity of a voter whose signature on the petition does not match the signature on the voter's registration record where the

⁸ The Rules provide in pertinent part that "all proceedings to validate Designating Petitions commenced within 14 days of the last day to file the petition, Petitioners must, within 3 business days after the Board's final determination of invalidity, file with the court a Bill of Particulars which specifically identifies those signatures that are alleged to have been improperly invalidated by the Board." Here the Board made its final determination on June 11, 2024. Thus, if the rules were applicable, respondent-candidate would have been required to file his bill of particulars by June 14, 2024.

veracity of the affidavit is unchallenged and no claim of fraud or forgery is raised (*see Matter of Braunfotel v Feiden*, 172 AD3d 1451, 1452 [2d Dept 2019]; *see also Matter of Sweet v Fonvil*, 82 Misc3d 1240[A], 2024 NY Slip Op 50511[U], *4-7 [Sup Ct, Rockland County 2024], *affd* 227 AD3d 849, 852 [2d Dept 2024], *lv denied* 41 NY3d 906 [2024]; *Matter of Rolands v Baker*, 219 AD3d 1080, 1083 [3d Dept 2023]; *Matter of Maclay v DiPasquale*, 197 AD3d 1502, 1503 [4th Dept 2021]; *Matter of Jaffee v Kelly*, 32 AD3d 485, 485-486 [2d Dept 2006]; *Matter of Gartner v Salerno*, 74 AD2d 958, 959-960 [3d Dept 1980] [Election Law special proceeding may be summarily determined based on affidavits explaining uninitialed alterations in a witness statement in the absence of an issue of fact]; *cf. Matter of Muscarella v Nassau County Bd. of Elections*, 87 AD3d 645, 646 [2d Dept 2011]). Furthermore, petitioners were provided with these affidavits five days before the July 16, 2024 return date and had a full and fair opportunity to subpoena the signatories who signed these affidavits but failed to do so.

Also without merit is petitioners' claim that 10 of the affidavits are defective based upon the notaries' failure to include their license number. In particular, the notaries' license number was provided in all 32 affidavits filed by respondent-candidate. Further, there is no basis for petitioners' claim that the subscribing witness Allegra Tismit Arazi was not registered to vote at the time she obtained the signatures on her petition sheets. The Board's records indicate that Ms. Tismit Arazi has been registered to vote in New York since 2019 and her uncontroverted affidavit states that she moved to the address set forth in the petition prior to her witnessing the petition sheets. As a final matter, the court rejects petitioners' argument that 10 of the affidavits by individual signatories should be rejected because the

signature on the affidavit does not match the signature in the Board's database (*see Matter of Braunfotel*, 172 AD3d at 1452 [holding that an affidavit may be used to confirm the identity of a voter whose signature on the petition does not match the signature in the Board's data base where the veracity of the affidavit is unchallenged and no claim of fraud or forgery is raised]; *see also Matter of Sweet v Fonvil*, 82 Misc3d at 1240[A], *aff'd* 227 AD3d at 852).

Thus, based upon the affidavits submitted by the respondent-candidate, the court overturns the referees' rulings regarding the 31 individual signatories who submitted affidavits attesting that they signed the petition, which results in an additional 31 signatures in the nominating petition being deemed valid. Accordingly, the court's ruling regarding petitioner's corrected de novo specifications of objections, coupled with the court's ruling regarding the affidavits of individual signatories results in a net reduction of eight valid signatures in the nominating petition, leaving 1,160 valid signatures, which is 26 fewer signatures than required for placement on the ballot.

Accordingly, it is hereby,

ORDERED that petitioners' motion for an order allowing the court to consider their Amended Exhibit F is granted, and it is further,

ORDERED that petitioners' petition to invalidate the Independent Nominating
Petition of the respondent-candidate Joey Cohen-Saban is granted.
This constitutes the decision and final order of the court.

ENTER FORTHWITH

P.P.S.

J. S. C.

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

FILED
CLERK
COURT
KINGS COUNTY
NEW YORK
JUL 29 2024