

Tischler v New York City Bd. of Elections

2025 NY Slip Op 30531(U)

February 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 502058/25

Judge: Gina Abadi

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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 7th day of February, 2025.

P R E S E N T:

HON. GINA ABADI,
Justice.

-----X
HESHY TISCHLER, as Aggrieved Candidate of the Team Trump Party, an independent body, for the Office of Member of the City Council of New York City, 44th District, and ABRAHAM TISCHLER, as Objector,

Petitioners,

-against-

Index No.: 502058/25

NEW YORK CITY BOARD OF ELECTIONS,

-and-

SIMCHA FELDER, as Candidate of the Simcha Party for the Office of Member of the City Council of New York City, 44th District,

Respondents,

For an Order pursuant to sections 16-100, 16-102 and 16-116 of the Election Law, declaring invalid the nominating petition purporting to nominate the respondent-candidate, Simcha Felder, as a candidate of the Simcha Party, an independent body, for the public office of Member of the City Council of New York City, 44th District, for the special election to be held on the 25th day of March 2025, and to restrain the said board of elections from printing and placing the name of said respondent-candidate upon the official ballots of such special election.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.:

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

Affidavits (Affirmations) Annexed _____

1-5

Opposing Affidavits/Answer (Affirmations) _____

6-10

Affidavits/ Affirmations in Reply _____

13, 18

Other Papers: Specification of Objections _____

11, 12, 17, 18

Upon the foregoing papers and after oral argument conducted on the record before the court on February 3, 2025, the court rules as follows:

Background Facts and Procedural History

On January 2, 2025, Mayor Eric Adams issued a Proclamation of Election directing that a special election be held in the 44th Council District on March 25, 2025, to elect a Council member to serve until December 31, 2025.¹ This was necessary as a result of the resignation of Kalman Yeger from the New York City Council, which was effective December 31, 2024.

Between January 2, 2025 and January 14, 2025, respondent candidate Simcha Felder (respondent) circulated an Independent Nominating Petition under the Simcha Party line for purposes of obtaining the necessary number of signatures for placement on the ballot for the special election.² All of the petition sheets listed respondent's address as 1171 Ocean Parkway, Apartment 5C, Brooklyn, New York (the Ocean Parkway apartment). On January 14, 2025, respondent filed his nominating petition with respondent Board of Elections in the City of New York (the Board). Thereafter, petitioner-objector Abraham Tischler (petitioner-objector) filed with the Board general and specifications of objections challenging various signatures in the nominating petition.

On January 21, 2025, petitioner-aggrieved candidate Heshy Tischler (petitioner-aggrieved candidate or petitioner) and petitioner-objector (collectively, petitioners)

¹ Section 25 (b) (7) of the New York City Charter provides that the nomination of candidates for a special election shall be by independent nominating petitions.

² 450 valid signatures are required for placement on the ballot for this office.

commenced the instant invalidating proceeding pursuant to Election Law § 16-102 by filing on NYSCEF a verified petition and proposed order to show cause seeking an order removing respondent's name from the ballot.³ That same day, the court signed the order to show cause which, in the service provision, directed that the Board be served by delivering a copy of the order to show cause and verified petition "together with the papers upon which it is granted" to the Board at its general office in Manhattan no later than January 21, 2025. The order to show cause further directed that these papers be served on respondent by delivering a copy to a recognized overnight carrier no later than 8:00 pm on January 21, 2025, for delivery to the Ocean Parkway apartment. Finally, the order to show cause also directed that respondent be served by affixing a copy of the order to show cause and verified petition to the inner or outer door of the Ocean Parkway apartment no later than January 21, 2025.⁴

The verified petition alleged that respondent's nominating petition contained fewer than the 450 valid signatures required for placement on the ballot due to various defects in individual signatures as well as defects involving the subscribing witnesses on the petition sheets. In addition, the verified petition alleged, "on information and belief," that the respondent did not reside at the Ocean Parkway apartment as stated on the nominating petition sheets, but instead lived at 1943 Powder Home Road in Toms River, New Jersey.

³ Petitioner-aggrieved candidate also filed a nominating petition with the Board seeking placement on the ballot under the Team Trump party line.

⁴ Election Law § 16-102 (2) provides that invalidating proceedings with respect to an independent nominating petition in a special election be commenced within 7 days of the last day to file the nominating petition. Here, the last day to file nominating petitions was January 14, 2025. Thus, the last day to commence an invalidating proceeding was January 21, 2025.

Petitioners allege that this constitutes a fatal defect inasmuch as the individuals who signed the nominating petition were fraudulently deceived into believing that respondent resided within the 44th Council District.⁵

On January 31, 2025, respondent filed a verified answer and affirmative defenses. The first affirmative defense alleges that the invalidating petition is defective inasmuch as petitioners failed to serve respondent with a “Mandatory Notice of E-Filed Case” (E-File Notice) as required under Uniform Rule § 202.5-bb(b)(3). The second affirmative defense alleges that the invalidating petition is defective because petitioners did not serve respondent with a copy of the Request for Judicial Intervention (RJI) as required by the order to show cause. The third affirmative defense alleges that the invalidating petition is defective since it was not properly verified. In particular, respondent points out that petitioners’ counsel’s verification states that “I have read the foregoing *answer* and it is true to my own knowledge” ([emphasis added]). The fourth affirmative defense alleges that the specification of objections filed with the Board were not in compliance with the Board’s guidelines. The fifth affirmative defense alleges that the court lacks subject matter jurisdiction since petitioners failed to serve respondent within the statute of limitations.⁶ The sixth affirmative defense alleges that the court lacks jurisdiction due to improper service and failure of the objector to comply with a condition precedent. Finally, the seventh affirmative defense alleges that petitioner-objector lacks standing.

⁵ The court notes that the Ocean Parkway apartment is within the 44th Council District.

⁶ Although the answer contains a challenge to the timeliness of the service, petitioners submitted no proof that service of the petition and order to show cause was untimely.

In addition to the answer, respondent filed his own affirmation and the affirmation of his wife, Elana Felder, as well as other evidence all of which purportedly demonstrated that he did in fact reside at the Ocean Parkway apartment which is discussed below.

On January 31, 2025, petitioner-aggrieved candidate filed with the court specifications of objections challenging various signatures in the nominating petition. Also on that same date, petitioners filed a corrected verification for the invalidating petition.

On February 3, 2025, the parties appeared before the court for oral argument on the order to show cause and the allegations set forth in the verified petition as well as the affirmative defenses raised in the verified answer. On that same date, petitioner-aggrieved candidate filed specifications of objections directly with the court challenging the validity of various signatures in the nominating petition. While some of these objections were the same as those previously filed with the Board by petitioner-objector, some were raised for the first time on a de-novo basis. After hearing oral argument, the court reserved decision on the residency issue and the verification and service issues raised by respondent in his affirmative defenses. Further, the court directed that a line-by-line review of the specifications of objections filed by petitioners be conducted at the Board beginning at 10:00 am on February 5, 2025.

On February 4, 2025, the Board's Commissioners met with regards to the specifications of objections filed by petitioner-objector against respondent's nominating petition. At that meeting, the Board determined that the specifications of objections were

defective and ruled respondent on the ballot.⁷ Thus, the pending line-by-line review of the specifications of objections would be conducted on a de-novo basis.

On February 5, 2025, the parties appeared at the Board at which point court appointed special referees conducted a line-by-line review of the specifications of objections. On February 6, 2025, petitioner-aggrieved candidate conceded that respondent had a sufficient number of valid signatures for placement on the ballot. Accordingly, the line-by-line review was terminated.

Threshold Issues

Addressing respondent's affirmative defenses, petitioners' failure to serve the RJI with the petition and order to show cause is not a ground for dismissal as the failure to serve the RJI is non-jurisdictional in nature (*see Matter of Lord v Brandon*, 264 AD2d 456, 457 [2d Dept 1999]; *see also Matter of Buonocore v Village of S. Nyack*, 238 AD2d 336, 338 [2d Dept 1997]). Regarding the failure to serve the E-File Notice, the notice requirement of Uniform Rules for Trial Cts (22 NYCRR) § 202.5-bb (3) is inapplicable in this election law proceeding which is not a mandatory electronic filing case (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-bb [a] [2]). Even if applicable, the failure to serve the E-File Notice is not a jurisdictional defect with the commencement of the action (*see* CPLR § 304; CPLR § 2001; *see also Matter of Buonocore*, 238 AD2d at 338), and, as respondent has not shown that he was prejudiced by the lack of such notice, the failure may be ignored (*see* CPLR § 2001; *Matter of 44 Lexington Assoc, LLC v Supreme Sec. Sys.*,

⁷ Thus, petitioner-objector lost his standing in this matter.

Ltd., 139 AD3d 517, 518 [1st Dept 2016]; *see also Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 55 [2d Dept 2014]).

Finally, with respect to the verification, that assertion is not a basis for denying the petition, as the respondent did not timely raise the issue of the impropriety of the 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]). Even if the issue was properly preserved, this court finds that the reference in the verification to the “answer” is clearly a typographical error that may be ignored. and, in any event, petitioners, prior to the return date of the petition, promptly submitted a corrected verification that properly refers to the document at issue as the petition (*see Ordentlich v State of New York*, 173 AD3d 885, 886 [2d Dept 2019]; CPLR § 2001]).

Although the Board’s striking of the specifications of objections requires dismissal of the proceedings on the behalf of the petitioner-objector Abraham Tischler on the ground that he no longer has standing to continue this proceeding (*see Matter of Sgambati v New York City Bd. of Elections*, 224 AD2d 564, 564 [2d Dept 1996]; *Matter of Margolis v Larkin*, 39 AD2d 951, 951-952 [2d Dept 1972], *affd* 30 NY2d 876 [1972]; *see also Matter of Nicolai v Kelleher*, 45 AD3d 960, 963-964 [3d Dept 2007]), such defects do not require dismissal of the petition with respect to the petitioner-aggrieved candidate since an aggrieved candidate is not required to file objections with the Board prior to commencing

a proceeding (see *Matter of Magee v Camp*, 253 AD3d 573, 573 [3d Dept 1998]; Election Law § 16-102 [1]).

Residency Issue

Turning to petitioner's allegations regarding respondent's residency, Election Law § 6-140 (1) (a) requires that independent nominating petitions list the candidate's place of residence. Residence is defined as a place "where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return" (Election Law § 1-104 [22]; see *People v O'Hara*, 96 NY2d 378, 384 [2001]). "As used in the Election Law, the term 'residence' is synonymous with 'domicile'" (*Matter of Willis v Suffolk County Bd. of Elections*, 54 AD3d 436, 437 [2d Dept 2008], citing *Matter of Fernandez v Monegro*, 10 AD3d 429, 430 [2d Dept 2004]). "[A]n individual having two residences may choose one to which she [or he] has 'legitimate, significant and continuing attachments as her [or his] residence for purposes of the Election Law'" (*People v O'Hara*, 96 NY2d at 385, quoting *Matter of Ferguson v McNab*, 60 NY2d 598, 600 [1983]; *Matter of Glickman*, 27 NY3d 810, 816 [2016] [holding that "[a] person is permitted to have more than one residence, but is not permitted to have more than one electoral residence"]; see *Matter of Gashi v Branda*, 216 AD3d 853, 855 [2d Dept 2023]). "The crucial factor in determining whether a particular residence complies with the requirements of the Election Law is that 'the individual must manifest an intent [to reside there], coupled with physical presence, 'without any aura of sham'" (*Matter of Gashi*, quoting *Matter of McArdle*, 142 AD3d at 568 [internal quotation marks omitted]). "Residency is generally a factual question, dependent upon the particular circumstances

presented” (*Matter of Glickman v Laffin*, 27 NY3d at 815 [citation omitted]), and petitioners have the burden of establishing by clear and convincing evidence that the address that respondent listed in the nominating petition was not his residence (*see Matter of Glickman*, 27 NY3d at 815; *Matter of Dilan v Salazar*, 164 AD3d 713, 715 [2d Dept 2018]; *Matter of McArdle v Weis*, 142 AD3d 567, 568 [2d Dept 2016]).

Here, as previously noted, in his petition, petitioner alleges that the respondent did not set forth his “true residence” on his independent nominating petition. In this regard, petitioner maintains that the respondent actually resides at 1943 Powder Home Road, Toms River, New Jersey (the New Jersey address), and that he falsely listed a different address – 1171 Ocean Parkway Apt. 5C, Brooklyn, New York (the Ocean Parkway apartment), which is within the 44th Council District. Petitioner alleges that the New Jersey address is the home of respondent’s son, and that the respondent moved in with him in the Fall of 2024 upon the sale of his prior Brooklyn home. With respect to the Ocean Parkway apartment address listed on the petition, petitioner alleges that the respondent does not reside there. Rather, he maintains that a “single woman unrelated to Respondent Felder” is the actual tenant of said apartment. In support of this contention, petitioner has annexed the affidavit of Tornike Beradze. Mr. Beradze avers that he is the exterminator for the 1171 Ocean Parkway building. He states that on Sunday, January 19, 2025, he was assigned to provide extermination services to Apartment 5C. He claims that when he knocked on the door, a woman speaking limited English answered at which point he entered the apartment and proceeded to provide extermination services. Mr. Beradze noted

that the respondent's name (Felder) did not appear on the tenant directory located in the lobby.

In respondent's affirmation, which is annexed to his verified answer, he avers as follows:

"In actuality, I do own a house in Toms River New Jersey, which is my secondary residence, and which I visit on many Sabbaths and Jewish holidays, and will also be using as a vacation home. My son does not live at that house. However, since selling our house in October, 2024, the primary residence of my wife and myself has been Apartment #5C at 1171 Ocean Parkway in Brooklyn, for which we signed a lease in August, 2024." (NYSCEF Doc No. 7).

In addition, the respondent stated that while the Felder name does not appear on the building's tenant directory, it does appear on the mailbox for the Ocean Parkway apartment address. The affirmation of Elana Felder, respondent's wife, is also annexed to the respondent's answer. In her affirmation, Ms. Felder avers that she was the woman who answered the door for the exterminator on January 19, 2025. She also conceded that their last name is not on the tenant directory in the lobby but noted that the name "Felder" does appear on their mailbox for said residence (NYSCEF Doc No. 8). Respondent has also proffered the following documents, all of which set forth "1171 Ocean Parkway Apt 5C, Brooklyn, New York" as the respondent's address: (1) a signed lease agreement⁸ for the Ocean Parkway apartment, dated August 1, 2024, listing the respondent and his wife as tenants for a 12-month term commencing September 1, 2024 and ending August 31, 2025;

⁸ The court notes that additional New York City required leasehold notices attached to the lease agreement (Window Guards Requirement, Lead Paint Notice, Disclosure of Bed Bug Infestation History and the Annual Notice Regarding Installation of Stove Knob Covers) all set forth the respondent's name and the Ocean Parkway apartment address as well as his signature.

(2) four National Grid monthly bills for service commencing on September 16, 2024 through January 16, 2025; (3) four Con Edison bills for service commencing on September 16, 2024 through January 7, 2025; (4) a United States Postal Service “Official Change-of-Address Confirmation Letter” indicating that the respondent had requested a change of his address to the Ocean Parkway apartment address, commencing in October 2024; and (5) correspondence from the New York City Employee’s Retirement System to respondent confirming that its records had been updated to reflect his new address at the Ocean Parkway apartment. Respondent has also submitted, among other things, a renters’ insurance policy commencing November 5, 2024 through November 5, 2025 for the Ocean Parkway apartment, a moving and storage company invoice, dated October 28, 2024, detailing the items to be delivered to the Ocean Parkway apartment and a furniture store invoice, dated October 15, 2024, for the purchase and delivery of a sofa to the Ocean Parkway apartment.

On the return date of the within proceeding, petitioner-aggrieved candidate failed to file a bill of particulars or offer of proof with respect to the residency allegations; nor did he proffer any additional documentary evidence, or indicate any intention to call witnesses to support any of the residency allegations. No hearing is needed here, as, in the absence of factual issues, an election law proceeding may be summarily determined based on the pleadings, papers, and admissions (*see Matter of Curcio v Kelly*, 193 AD2d 738, 739 [2d Dept 1993]; *see also Matter of Mills v New York State Bd. of Elections*, 207 AD3d 943, 946 [3d Dept 2022]; *Matter of Saadia Safdi Realty, LLC v Press*, 207 AD3d 633, 635 [2d Dept 2022]; *Matter of Gartner v Salerno*, 74 AD2d 958, 959-960 [3d Dept 1980], *lv denied*

49 NY2d 703 [1980] and 49 NY2d 704 [1980]; CPLR § 409 [b]; Election Law §§ 16-100, 16-116).

Here, the burden in this proceeding is not on respondent to establish residence but rather on petitioner to establish by clear and convincing evidence that respondent does not reside at the Ocean Parkway apartment (*Matter of Glickman*, 27 NY3d at 815; *Matter of Weiss v Teachout*, 120 AD3d 701, 702 [2d Dept 2014]). In light of the dearth of documentary evidence submitted by the petitioner, consisting solely of the extermimator's averments, the court finds that petitioner has failed to demonstrate by clear and convincing evidence that the Ocean Parkway apartment was not the respondent's "residence" as that term is defined within the meaning the Election Law (*People v O'Hara*, 96 NY2d at 385; see *Matter of Gashi*, 216 AD3d at 855; *Matter of Weiss*, 120 AD3d at 702; *Matter of Stavisky v Koo*, 54 AD3d 432, 434 [2d Dept 2008]). Accordingly, that branch of the petition seeking to invalidate respondent's independent nominating petition on the basis that he is not a resident of the 44th Council District and that he falsely placed an address on his nominating petition at which he did not reside is denied.

Accordingly, inasmuch as petitioner has conceded that the respondent has a sufficient number of valid signatures for placement on the ballot, it is hereby,

ORDERED that the petition to invalidate respondent's Independent Nominating Petition is denied and dismissed.

This constitutes the decision and final order of the court.

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J.S.C.

12

Hon. Gina Abadi
JSC