

Matter of Bystroff v New York State Bd. of Elections
2025 NY Slip Op 35276(U)
October 27, 2025
Supreme Court, Albany County
Docket Number: Index No. 908095-25
Judge: Richard Mott
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

DECISION/ORDER

In the Matter of the Application of
CHRISTOPHER BYSTROFF, voter,
Plaintiff/Petitioner,

Index #: 908095-25

For a Judgment Pursuant to
Article 78 of the Civil Practice Law and Rules

-against-

Richard Mott, J.S.C.

NEW YORK STATE BOARD OF ELECTIONS,
PETER S. KOSINSKI, HENRY T. BERGER,
ANTHONY J. CASALE, ESSMA BANUOLA, and
MICHAEL L. JOHNSON,
Defendants/Respondents.

Motion Return Date: September 19, 2025 (Motion seq. #s 2, 3)

APPEARANCES:

Plaintiff/Petitioner: Christopher Bystroff, Plaintiff/Petitioner *pro se*
35 Pinewoods Avenue
Troy, NY 12180

Defendants/Respondents: Kevin G. Murphy, Esq.
Brian L. Quail, Esq.
Attorneys for Defendants/Respondents, New York State
Board of Elections, Peter S. Kosinski, Henry T. Berger,
Anthony J. Casale, and Essma Bagnuola
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207

Jessica A. Norgrove, Esq.
James Barron, Esq.
Associate Counsel
New York State Division of Election Law Enforcement
Attorneys for Defendant/Respondent, Michael L. Johnson
40 North Pearl Street, Suite 10D
Albany, NY 12207

Mott, J.

Petitioner, Christopher Bystroff, brings this hybrid Article 78/Declaratory Judgment action, seeking judicial review of a final decision of Defendant/Respondent, Michael L. Johnson, Chief Enforcement Counsel of the New York State Board of Elections, Division of Election Law Enforcement, dated April 10, 2025. The individual Defendants/Respondents are each members of the New York State Board of Elections.

Bystroff had submitted correspondence to the Division of Election Law Enforcement, in which he asserted there were violations of several provisions of law with regard to Rensselaer County's post-election 3% random audit which took place on November 19, 2024. Johnson determined that no violations of law had occurred.

His Article 78 petition seeks relief of vacating the April 10, 2025, decision of the New York State Board of Elections; compelling an investigation into the alleged violations of Election Law; conducting a complete public hand count audit of all verifiable voting records in the State with public observation and public posting of the results; ordering the ballots be resealed immediately pending the audit; and resolve the conflict of laws regarding the use of automated audit tools.

Bystroff's action for a declaratory judgment alleges that a substantial possibility exists that the winner of the election as reflected in the voting machine tally could change if a voter verifiable record audit of additional voting machines or systems, or of all voting machines or systems applicable to such election were conducted and seeks a judgment directing Respondents to conduct a manual audit of the verifiable audit records, pursuant to Election Law §§ 9-211 and 16-113.

Defendants/Respondents move, pre-answer, to dismiss on various grounds, including violation of the applicable statute of limitations, lack of capacity; lack of standing; failure to

name a necessary party; laches; and failure to state a cause of action upon which relief may be granted. Bystroff opposes.

BACKGROUND

Bystroff, a resident of Troy, NY, is a registered voter who observed Rensselaer County's 3% random audit of votes which followed the November 2024 election. By letter dated February 4, 2025, Bystroff claims to have observed violations of the New York State Board of Elections' "Audit Procedure for 6210.18" (hereinafter "AP 6210.18"), issued by the Elections Operations Unit.

DEFENDANTS/RESPONDENTS' CONTENTIONS

Respondents point out that AP 6210.18 is neither law nor regulation but is simply a compilation of recommended best audit practices. Respondents explain that, in 2010, New York changed from mechanical lever voting machines to optical scanning machines with voter-verifiable records. The legislation enacted to effectuate this change is the Election Reform and Modernization Act of 2005 (L. 2005, Ch. 181), referred to as "ERMA". ERMA requires that voting machines "retain all paper ballots cast or produce and retain a voter verified permanent paper record" which "shall allow a manual audit and shall be preserved in accordance with the provisions" of New York State Election Law. Election Law § 7-202(1)(j).

ERMA authorizes the New York State Board of Elections to enact regulations relating to the audit provisions. Election Law § 9-211(4). These regulations set forth the operational procedures, maintenance, testing and standards for determining valid votes. 9 NYCRR § 6210 et seq. ERMA requires three separate procedures to be conducted after Election Day: (1) a canvass; (2) a recanvass; and (3) a manual audit. Bystroff's proceeding relates solely to events surrounding the manual audit requirement.

The canvass and recanvass are a count and a recount of the votes. The manual audit is not a method for determining the correct tally of the votes. The manual audit is “designed to assess how the electronic voting system performed on Election Day, using the actual votes cast by voters” to determine that the machines accurately recorded each readable vote properly. See, NYSBOE Audit Procedure for Compliance with 6210.18, § 1.4 (2010) (“Audit Procedures Manual”).

Election Law § 9-211(1) requires that, within 15 days after a general or special election, or 7 days after a primary or village election, the applicable board of elections must “...audit the voter verifiable audit records from three percent of voting machines or systems within the jurisdiction of such board”.

Bystroff attended the November 24, 2024, audit with the consent of the Rensselaer County Board of Elections, but not as a representative of a candidate, political party, or independent body involved in the election. He was there as a spectator, rather than an appointed representative observer or watcher. None of the 2024 candidates has requested the elevated audit Bystroff seeks herein.

Respondents assert that, pursuant to Election Law § 16-113, a proceeding with respect to voter verifiable records seeking to direct an elevated manual audit of such records can only be maintained by “any candidate or his or her agent”. Thus, Bystroff lacks capacity and/or standing. Respondent Johnson adds that Bystroff’s petition asserts a claim upon which relief cannot be granted because his position as Chief Enforcement Counsel lacks the authority to order or direct the elevated audit Bystroff seeks.

Respondents further note that neither CPLR Article 78 proceedings nor declaratory judgment actions may be brought to seek relief as to matters governed by Election Law. When

“irrespective of the label given to the proceeding or the words used to describe the issue, the relief sought by petitioners seeks judicial intervention in the election process...” the mechanism of relief must be provided for by the Election Law”. *Scaringe v Ackerman*, 119 AD2d 327, 328 (3d Dept., 1986). It has long been held that a court’s jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute. *Mansfield v Epstein*, 5 NY2d 70, 74 (1958). Accordingly, dismissal of the petition is required.

Additionally, Respondents note that, because a county board of elections is the body that certifies the results of the election for its county and would be the party required to carry out a court-ordered elevated audit or canvass of the votes, the failure to name the Rensselaer County Board of Elections as a necessary party herein requires dismissal of the proceeding because the statute of limitations has expired.

PLAINTIFF/PETITIONER’S CONTENTIONS

Bystroff contends that the motions to dismiss were untimely filed. He argues that CPLR § 320(a) requires that such motion be made within 20 days of service. As the process server served each of the Defendants/Respondents on August 15, 2025, and checked the box for “personal service” for each Defendant/Respondent, they had to move to dismiss by September 4, 2025. He notes that none of the exceptions listed in CPLR § 320(a) applies which would extend the time to move to 30 days after service.

Bystroff denies that his proceeding is untimely filed, noting that the statute of limitations for an Article 78 proceeding is 120 days, therefore his filing on August 6, 2025, is timely. This proceeding does not challenge a canvas and thus, is not subject to the 30-day statute of limitations for such proceedings.

He denies that he lacks capacity to bring this action because he is old enough and mentally competent. He claims that no challenges against legal capacity have been asserted against him herein. Bystroff claims to have standing, denying that the terms of Election Law § 16-113 require that he be a candidate or an agent of a candidate in order to bring a proceeding to require a manual audit of the voter verifiable records, asserting instead that Respondents' position reflects a misreading of that statute.

Bystroff denies that the Rensselaer County Board of Elections ("RCBOE") is a necessary party, asserting that the relief as described in the petition does not involve the RCBOE "except in trivial ways such as granting investigators access to the ballot vault".

DISCUSSION/TIMELINESS OF THE DEFENDANTS/RESPONDENTS' MOTION

Bystroff is incorrect that none of the exceptions set forth in CPLR § 320(a) applies to extend the time for Defendants/Respondents' motion to dismiss to 30 days. One of the exceptions to the 20-day time limit applies when service is made pursuant to CPLR § 308(2), which is how each of the individual Defendants/Respondents was served.

For each of the individual Defendants/Respondents, the affidavits of service indicate that service was effectuated by means of delivery to Kevin Murphy, Deputy Counsel, at 40 North Pearl Street in Albany. Thus, delivery was made to a person of suitable age and discretion at their actual place of business, pursuant to CPLR § 308(2). Such service requires that an additional copy of the papers be mailed to the person so served at either the person's last known address or their actual place of business within 20 days of delivery. CPLR § 308(2) further requires that the affidavit of service be filed with the clerk of the court within 20 days after the later of the delivery or the mailing. Service is complete 10 days after such filing. Here, the affidavits of

service do not indicate that a mailing occurred¹ and, therefore, service is incomplete. A motion to dismiss is timely pursuant to CPLR § 320(a), if filed within 30 days “after service is complete”. Here, because service is not complete, the motion is timely. See, *Miller Greenberg Mgt. Group, LLC v Couture*, 193 AD3d 1273, 1274-1275 (3d Dept., 2021). To the extent that the motion made on behalf of Defendant/Respondent, NYSBOE, may be untimely, the Court excuses the minor delay pursuant to CPLR § 2004 as there has been no demonstration of prejudice.

DISCUSSION/MOTION TO DISMISS FOR LACK OF CAPACITY

A proceeding to require an elevated audit pursuant to Election Law § 16-113 may only be brought by a candidate or his or her agent. That section, in relevant part, provides:

“The supreme court by a justice within the judicial district, or the county court, by a county judge within his or her county, *in a special proceeding by any candidate or his or her agent*, may direct a manual audit of the voter verifiable audit records applicable to any candidate running for office within such judicial district or county where...”. (Italics added).

Bystroff brings this proceeding as a voter, not as a candidate or agent of a candidate. Capacity to sue is a threshold matter allied with, but conceptually different from, the question of standing. See, *Silver v Pataki*, 96 NY2d 532, 537 (2001). Capacity “concerns a litigant’s power to appear and bring its grievance before the court” and may, in some circumstances, be granted by statute. *Id.*; see also, *Community Bd. 7 of the Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 (1994).

Here, capacity to bring a special proceeding pursuant to Election Law § 16-113 is restricted to candidates for office or their agents. Bystroff, as a voter, lacks capacity to bring this

¹ These individual Defendants/Respondents have not moved for dismissal based upon defective service.

special proceeding. Furthermore, as Bystroff's action for a declaratory judgment seeks relief pursuant to Election Law § 16-113, he lacks capacity for that cause of action as well.

DISCUSSION/MOTION TO DISMISS FOR FAILURE TO NAME NECESSARY PARTY

The Court further agrees with the Defendants/Respondents that the RCBOE is a necessary party as any further auditing of the ballots would be conducted by that board. Failure to name a necessary party may not be cured after the expiration of the relevant statute of limitations. See, *Marin v Board of Elections*, 67 NY2d 634 (1986); *Castracan v Colavita*, 173 AD2d 924 (3d Dept., 1991). Accordingly, the motion to dismiss is granted on this ground as well.

The remaining contentions of the parties have been considered and deemed meritless or rendered academic.

Therefore, it is hereby

ORDERED, that the motions to dismiss made by the Defendants/Respondents are granted and the Petition/Complaint is dismissed.


This shall constitute the Decision/Order of the Court. The Court is e-filing the original of this Decision/Order, relieving the parties of their obligations, pursuant to CPLR § 2220, regarding filing and entry thereof but that does not relieve the parties of their obligations, if any, regarding service of same with notice of entry thereon.



ENTER

Dated: October 27, 2025
Hudson, NY

10/28/2025


Richard Mott, J.S.C.

Papers considered:
(Motion seq. #2)

1. Notice of Motion dated September 11, 2025; Affidavit of Thomas Connolly in Support, dated September 11, 2025, with Exhibit A; and Memorandum of Law in Support.

2. Affidavit of Christopher Bystroff in Opposition, dated September 16, 2025; and Memorandum of Law in Opposition.
3. Affidavits of Service (NYSCEF Doc. #s 9-15).

(Motion seq. #3)

1. Notice of Motion dated September 11, 2025; Affirmation of Jessica Norgrove, Esq., in Support, dated September 11, 2025.
2. Affidavit of Christopher Bystroff in Opposition, dated September 16, 2025; and Memorandum of Law in Opposition.
3. Reply Affirmation of Jessica Norgrove, Esq., dated September 18, 2025; and Reply Memorandum of Law.
4. Affidavits of Service (NYSCEF Doc. #s 9-15).