

Matter of Fort v Oneida County Bd. of Elections
2026 NY Slip Op 32039(U)
May 14, 2026
Supreme Court, Oneida County
Docket Number: Index No. CA2026-001606
Judge: Elizabeth Snyder Fortino
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At a Term of the Supreme Court of the State of New York held in and for the County of Oneida at the Oneida County Courthouse at 200 Elizabeth Street, Utica, New York on the 13th day of May, 2026.

PRESENT: HON. ELIZABETH SNYDER FORTINO, J.S.C.

STATE OF NEW YORK
COUNTY OF ONEIDA SUPREME COURT

In the Matter of the Application of
BRIAN T. FORT Candidate for Republican
Committee Member Verona Election District 2,

Petitioner,

v.

**ONEIDA COUNTY BOARD OF ELECTIONS and
ALAN FILEY, OBJECTOR,**

Respondents.

DECISION & ORDER

Index No.: CA2026-001606

Appearances:

Brian T. Fort
Petitioner

Oneida County Board of Elections
Respondent

Alan Filey, Objector
Respondent

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FILED
ONEIDA COUNTY
CLERK #2
2026 MAY 14 PM 3:06

Papers Reviewed:

Order to Show Cause, dated April 24, 2026, filed April 27, 2026 [Motion #1]

Affidavit of Brian T. Fort in support of the Order to Show Cause, dated April 24, 2026, filed April 27, 2026

Memorandum of Law in support of the Order to Show Cause with “Attachments” dated April 25, 2026, filed April 27, 2026

Notice of Motion to Dismiss in Lieu of Answer dated May 4, 2026, filed May 4, 2026 [Motion #2]

Affirmation in Support of the motion to dismiss with Exhibit dated May 4, 2026, filed May 4, 2026, signed by Christopher J. Kalil, Esq.

Amended Petition dated May 5, 2026, filed May 5 2026

Reply Memorandum of Law with Affidavit of Service upon the Oneida County Board of Elections of Amended Petition dated May 11, 2026.

Reply Affirmation with Exhibits to reply memorandum of law dated May 12, 2026, filed May 12, 2026

Verified Answer of Objector dated May 13, 2026, filed May 13, 2026, signed by Scott McNamara, Esq.

ELIZABETH SNYDER FORTINO, JSC:

Background

On April 1, 2026, Petitioner Brian T. Fort filed a designating petition of the Republican Party purporting to designate Petitioner and Daniel Breckenridge as candidates for the Party Position of Member of the Oneida County Republican Committee, Town of Verona, District 2, with the Oneida County Board of Elections (the “Board”). According to Petitioner, a general objection to his petition was filed by Respondent Alan Filey on April 6, 2026 (*see* Fort Affidavit [Apr. 24, 2026]). Specific objections to the designating petition were filed on April 9, 2026, and Petitioner moved to dismiss on April 17, 2026 (*see* Fort Affidavit; Amended Petition). The Board held a hearing on the objections on April 23, 2026.

The Board, after reviewing the designating petition and the objections, and following the April 23 hearing, determined¹ that certain signatures on the designating petition were invalid. As

¹ Although the Board’s determination is undated, the parties agreed during oral argument that the determination was made on April 23, 2026, following the hearing.

a result, 15 signatures in total were considered invalid, leaving 15 valid signatures. Because 17 signatures were required to receive designation, the petition was determined to be invalid.

On April 27, 2026, Petitioner commenced this proceeding by Order to Show Cause, asking this Court to declare that the specific objections filed by Alan Filey should be dismissed and to validate Petitioner's designating petition (*see* Order to Show Cause). The Order to Show Cause was accompanied by a notarized affidavit of Petitioner and a Memorandum of Law (with "Attachments"). The Order to Show Cause and related documents were served on Respondents in the afternoon on April 28, 2026.

On April 30, as evidenced by Exhibit B to the Reply Affirmation dated May 12, 2026, by FedEx Overnight and email, the Board provided Petitioner with notice that, due to Petitioner's failure to file a verified petition along with the Order to Show Cause, the Board was electing to treat Petitioner's papers as a nullity.

The Board thereafter filed a Motion to Dismiss on May 4, 2026, arguing that this proceeding should be dismissed as jurisdictionally defective pursuant to Election Law § 16-116, CPLR 3211(a)(2), and CPLR 304. On May 5, 2026, Petitioner filed an Amended Petition.

Oral argument was held on the Order to Show Cause and Motion to Dismiss on May 13, 2026.

Arguments

Petitioner contends that the Court should declare his designating petition valid because the objector selected an option of FedEx service requiring signature at delivery, which is both not one of the methods of service required by Election Law § 6-154 and resulted in Petitioner never being served with the specific objections (Petitioner was not at home on the three occasions that delivery was attempted). Therefore, Petitioner argues, service of the specific objections was not timely, and the Board should not have held a hearing.

Respondent Board argues that this Court should not review Petitioner's contention because the Court is without jurisdiction to do so. The Board argues that Election Law § 16-116 requires a special proceeding to be brought by verified petition, and that absent a verified petition, dismissal is required. The Board also argues that, to the extent that Petitioner filed an affidavit with the Order to Show Cause, it may not be treated as a verified petition.

In reply, Petitioner argues that the Board did not act with due diligence to inform him of the defect to the Order to Show Cause and therefore waived its jurisdictional argument. The Board disputes Petitioner's due diligence argument, noting that it informed Petitioner of the defect on April 30, and even if it had acted within 24 hours to inform Petitioner, the within which to file a verified petition would have expired.

Legal Analysis

Election Law § 16-102 states that “the nomination or designation of any candidate for any public office . . . may be contested in a proceeding instituted in the supreme court by any aggrieved candidate.” “Proceeding” under the Election Law is a “special proceeding,” and hence, a party may seek relief only in the form and to the extent the Election Law (article 16) expressly permits (*see Matter of Breitenstein v Turco*, 254 AD2d 566, 567 [3d Dept 1998]).

Section 16-116 of the Election Law requires that such a special proceeding be “heard upon a verified petition.” The New York State Court of Appeals has strictly construed this requirement, holding that “[t]o find an unverified petition nonetheless acceptable to institute the special proceeding would not serve practical purposes or advance the policy behind section 16-116 of the Election Law” (*Matter of Goodman v Hayduk*, 45 NY2d 804, 806 [1978]). Accordingly, the requirement that a petition be verified is jurisdictional² in nature and cannot be cured by amendment (*see Id.*). Even where a petitioner filed a verification the following day, the subsequent filing was considered “insufficient” by the Appellate Division, Fourth Department to cure the jurisdictional defect (*see Matter of Demarco v Monroe County Bd. of Elections*, 176 AD3d 1645 [4th Dept 2019] [“although petitioner filed the verification the following day, that subsequent filing was insufficient to cure the jurisdictional defect”]; *see also Matter of Niebauer v Bd. of Elections in City of New York*, 76 AD3d 660, 660 [2d Dept 2010]; *Matter of Frisa v McCarthy*, 298 AD2d 457, 458 [2d Dept 2002]; *Matter of Frisa v O’Grady*, 297 AD2d 394, 395 [2d Dept 2002]; *Matter of O’Connell v Ryan*, 112 AD2d 1100 [3d Dept 1985]; *Matter of Polenz v Marcantonio*, 67 Misc 3d 1207[A] [Sup Ct, Suffolk County 2020] [“a special proceeding under Article 16 of the Election Law is to be heard upon a verified petition and . . . failure to verify that pleading deprives the court of jurisdiction, an infirmity that cannot be cured by an amendment after the statute of limitations has passed and requires dismissal of the petition upon a timely motion by an opponent”]).

It is undisputed that no verified petition was filed at the time of the filing of the Order to Show Cause on April 27, 2026. Although Plaintiff made reference during oral argument to the fact that Petitioner’s affidavit filed in support of the Order to Show Cause was sworn to, CPLR 3021 provides that an affidavit of verification “must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.” Petitioner’s affidavit contains no language resembling this. The affirmation does not even affirm under penalties of perjury that the statements contained therein are true (*see Matter of Sweet v Fonvil*, 227 AD3d 849, 851 [2d Dept 2024]). Such an affidavit could not be considered verified even under the narrow set of cases in

² The Court declines Petitioner’s invitation to review the merits and find that the Board should not have held a hearing or rendered its determination before determining whether this Court has jurisdiction (*see Reply Memorandum of Law*). A Court is without power to render a judgment or order where it lacks jurisdiction (*see e.g., Royal Zenith Corp. v Continental Ins. Co.*, 63 NY2d 975, 977 [1984] [referring to personal jurisdiction]; *Bank United, FSB v Verbitsky*, 167 AD3d 833, 834 [2d Dept 2018]; *Hartloff v Hartloff*, 296 AD2d 849 [4th Dept 2002]; *Ainsworth v Ainsworth*, 239 AD 258, 250-260 [4th Dept 1933]).

which courts have retained jurisdiction by finding that the relevant affidavits were the functional equivalent of a verification (*cf. Matter of Francois v Rockland Cnty. Bd. of Elections*, 205 AD3d 847, 848 [2d Dept 2022], citing *Matter of Levine v Suffolk Cnty. Dep't of Soc. Servs.*, 164 AD3d 1446, 1447 [2d Dept 2018]).

As Petitioner admits, the Order to Show Cause was not served on Respondent until the afternoon of April 28, 2026. According to Election Law § 16-102(2), a proceeding with respect to a petition shall be commenced within three business days after the board with whom a petition was filed makes a determination of invalidity with respect to such petition. The Board made its determination on April 23, 2026, making the last day to commence a proceeding April 28, 2026, the day that Respondent was served with the Order to Show Cause.

Although Petitioner filed the “Amended Petition,” including verification, on May 5, 2026, the statute of limitations had run by that time. The Court cannot at a later date allow for correction of the error as once the statute of limitations has run, the jurisdictional defect cannot be cured (*see Matter of Atwood v Pridgen*, 142 AD3d 1278, 1278 [4th Dept 2016]; *Foley v Grasso*, 114 AD2d 585, 585 [3d Dept 1985]; *Matter of O’Connell v Ryan*, 112 AD2d 1100, 1100-1101 [3d Dept 1985]).

Petitioner argues that the Court should ignore this jurisdictional infirmity because Respondent Board did not act with due diligence in informing him of the defect in his pleading (*see Reply Memorandum of Law*, citing *Matter of Lentlie v Egan*, 94 AD2d 839 [3d Dept 1983] [holding that argument regarding deficiency of verification was deemed waived after no notice was provided of the alleged defect]; *see also CPLR 3022*). Respondent Board notified Petitioner on April 30, less than 48 hours after service, of the lack of verification and its attendant intent to treat Petitioner’s papers as a nullity. Although due diligence has been interpreted as “immediately” and within 24 hours (*Matter of Ladore v Mayor & Bd. of Trustees of Vil. of Port Chester*, 70 AD2d 603, 604 [2d Dept 1979]), the Court of Appeals has stated that it has “never specified a uniform time period by which to measure due diligence” (*Lepkowski v State of New York*, 1 NY3d 201, 210 [2003]; *see also Rodriguez v Westchester County Bd. of Elections*, 47 Misc 3d 956, 958 [Sup Ct, Westchester County 2015]). Given the short timeframes at play in Election Law cases, due diligence is especially necessary. But in this case, the Board quickly acted to inform Petitioner of the defect within less than 48 hours, and, in any event, 24-hour notice would not have provided Petitioner an opportunity to cure his defect because service was completed on the last day of the statute of limitations. Under these circumstances, the Court does not find that the Board failed to exercise due diligence.

After careful consideration of the papers identified at the outset of this Decision and Order, along with the arguments of counsel made on May 13, 2026, it is hereby

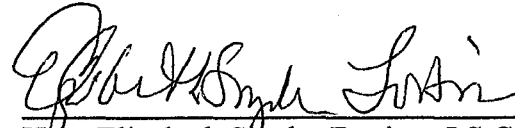
ORDERED that the motion to dismiss (Motion #2) is **GRANTED**; and it is further

ORDERED that the Order to Show Cause (Motion #1) is **DISMISSED**.

This constitutes the Decision and Order of the Court.

ENTER:

Dated: May 14, 2026
Utica, New York



Hon. Elizabeth Snyder Fortino, J.S.C.