

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

2013 NY Slip Op 31831(U)

August 9, 2013

Supreme Court, New York County

Docket Number: 101062/2013

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
SEAN GARDNER,

Candidate for the Democratic Nomination for the
public office of Council Member for the 8th Council
District,

Petitioner,

INDEX NO. 101062/2013

-against-

MOTION SEQ. NO. 001

BOARD OF ELECTIONS IN THE CITY OF NEW
YORK,

Respondent,

for an order, pursuant to Sections 16-100, 16-102 and 16-116
of the Election Law, declaring valid the designating petition
which designated the petitioner as a candidate for the public
office of Council Member for the 8th Council District,
City of New York, in the Democratic primary election
to be held September 10, 2013.

FILED

AUG 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Reply Affidavits — Exhibits (Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

This matter is a proceeding brought pursuant to Election Law § 16-102, to validate a petition designating the petitioner Sean Gardner (petitioner), as a candidate for election for the public office of Council Member for the 8th Council District, City of New York, in the Democratic Party primary election to be held on September 10, 2013. On July 30, 2013, this Court established that all parties had no jurisdictional issues and referred the matter to Special Referee Phyllis Sambuco (SR Sambuco) for all purposes to Hear and Report. Before the Court

are oral applications made on the record on August 7, 2013 by the petitioner and the respondent the Board of Elections (the Board), to reject and confirm the Report and Recommendation of SR Sambuco, respectively.

Factual and Procedural Background

The facts herein are not in dispute. On July 8, 2013, Gardner filed a Democratic Party designating petition with the Board, as a candidate for election for the public office of Council Member for the 8th Council District, City of New York, in the Democratic Party primary election to be held on September 10, 2013. The petition cover sheet filed with the Board lists 16 volumes to the petition and indicates a total of 4,655 valid signatures for the public office that requires only 450 valid signatures. Pursuant to the Board Rules for Designating Petitions (Board Rules), the petition cover sheet may indicate the name and address of someone to be contacted about any issues regarding the petition cover sheet. The Board Rules permit the legal contact person to be an attorney, the candidate or party or his or her designee for purposes of service and contact (see CPLR §§ 320[a], 2103, 2103[c], and Designating Petition Board Rules, p. 22, 23 and 24 [sample cover sheet and sample amended cover sheet]). Gardner's cover sheet listed Kahadijaha Saeed (Ms. Saeed), as the contact person or agent on his behalf.

In accordance with Rule D-1 of the Board Rules, within forty-eight hours of filing, the Board reviewed Gardner's designating petition cover sheet and determined that the cover sheet was missing information and was therefore deficient. Pursuant to Rule D3 of the Board Rules¹,

¹ Board Rule D3 states as follows: "Notification of a determination of noncompliance shall be given by written notice by depositing such notice on the day of such determination with an overnight delivery service, for overnight delivery, on the next business day after the determination to the candidate or contact person, if designated, at the address stated on the petition. If the candidate files with the Board written authorization, signed by the candidate, for the Board to give notification by facsimile transmission, then the Board may send such notice by facsimile transmission to the number set forth on the signed written authorization and/or by overnight delivery, on the day of the determination."

on July 9, 2013, the Board sent a non-compliance letter notice (NCN letter) to Ms. Saeed by United States Postal Service (USPS) Guaranteed Overnight Express Mail (Overnight Express Mail) with a waiver of the signature requirement. In the letter, the Board alleged that petitioner's designating petition cover sheet failed to comply with "the New York State Board of Elections Regulations, 9 NYCRR § 6215, or [the] Board's Rules for Designating/Opportunity to Ballot Petitions adopted on March 27, 2012." The NCN letter indicated that the "number of volumes [were] omitted from the cover sheet" and the petition cover sheet "omits statements that the petition contains the number of valid signatures required by the Election Law" (see Board's letter, Petitioner's Memorandum of law, exhibit 2). These omissions violate Rule C-2 of the Board's Rules (see also 9 NYCRR § 6215.8). Pursuant to D4 of the Board's Rules, the petitioner had three business days from the date of the letter in which to cure the defects by the filing of an amended cover sheet.² All parties agree that the Board chose the *waiver of signature* requirement option on the USPS Overnight Express Mail Delivery, which indicates that the USPS did not require a receipt signature from the address and that the USPS was *required* to leave the express mail package at Ms. Saeed's address. All parties also agree that on July 10, 2013, the USPS went to Ms. Saeed's address and attempted delivery to an authorized recipient for signature. Upon failure to find someone at the address for a signature, the USPS did not deliver the letter notification as required, but instead returned the Overnight Express Mail Package to the Post Office where it sat until it was returned to the Board on July 29, 2013, and marked "unclaimed" (see SR Sambuco's Report, p. 3, 4).

According to the Board Rules D3 and D4, the petitioner had until Friday, July 12, 2013 to

² Board Rule D4 states as follows: "A candidate may, within three (3) business days of the date of a determination that the petition does not comply with these Rules, cure the violation of these Rules. Cover sheet deficiencies may be corrected by the filing of an amended cover sheet. Such cure or correction must be received by the Board no later than the third business day following such determination. Such cure or correction will be reviewed by the Board to determine if it is in compliance with the Election Law and these rules."

file an amended petition cover sheet. Ms. Saeed only learned of the NCN letter's existence from the Board after the notice to cure period had expired, and she filed an amended cover sheet with the Board at 1:26 p.m. on Monday, July 15, 2013, the first business day after the notice to cure period had expired. Sometime after the amended cover sheet was filed, the Board ruled to invalidate the designating petition. However, according to the record before SR Sambuco and the Court, the Board did not memorialize any decision to invalidate the petitioner's designating petition pursuant to Board Rule D6.³

On July 24, 2013, petitioner commenced this action by the filing of an Order to Show Cause and Verified Petition seeking to reverse the ruling of the Board and to validate his Democratic Party designating petition seeking to designate the petitioner as a candidate for election for the public office of Council Member for the 8th Council District, City of New York in the Democratic Party primary election to be held on September 10, 2013, and to order the Board to print and place the name of the petitioner upon the official ballots for such Primary Election.

In a Report and Recommendation (the Report) dated August 2, 2013, SR Sambuco recommended that the Court deny the petitioner's Verified Petition to validate the petitioner's designating petition (see SR Sambuco Report). On August 7, 2013, the petitioner moved by oral application before this Court to reject the Referee's Report, and the Board moved to confirm the Report (see Court Transcript dated August 7, 2013).

³ Board Rule D6 states as follows: "Upon expiration of the (3) business days set forth in Rule D4, the Board or a Commissioners Committee established pursuant to Rule D2, shall review the filed attempted cure. If the Board determines that an attempt to cure a defect does not comply with these Rules or the Election Law, the Board shall notify the candidate or candidates named on the petition/cover sheet of its determination and the reasons therefore. The Board shall give written notice of such determination and the fact that the candidate(s) will not appear on the ballot by depositing such notice on the day of such determination with an overnight delivery service, for overnight delivery, on the next business day after the determination to the candidate or contact person, if so designated, at the address stated on the petition, cover sheet and/or amended cover sheet, as applicable."

Petitioner proffers that his Verified Petition designating him as candidate should not be denied. On substantive grounds, petitioner asserts that the original designating petition cover sheet was in its proper legal form and in *substantial compliance* with the Board Rules. He asserts that all sixteen volumes were listed on the cover sheet, and that omitting a statement that the petition contains sixteen volumes and failing to include the statement that the petition contains the number of valid signatures required by the Election Law is *de minimis* and in substantial compliance with the Board's cover sheet rules as required by 9 NYCRR § 6215.6. Moreover, on procedural grounds, petitioner contends that due to an error and oversight by the USPS, the petitioner did not receive actual timely notice from the Board of the cover sheet defects and was not given an opportunity to cure same. Accordingly, petitioner asserts that the amended cover sheet filed on July 15, 2013 should have been ruled to have been in substantial compliance with the Election Law and Rules since it "presented no danger of fraud or confusion to the Board" (see Petitioner's Memorandum in Support, p. 7).

The Board asserts that SR Sambuco was correct in recommending that the petition to validate be denied because the act of depositing the NCN letter with the USPS completed its obligation to notify petitioner of the determination of noncompliance under both 9 NYCRR § 6215 and the Board of Elections rules for Designating/ Opportunity to Ballot Petitions. As such, the Board contends that since petitioner failed to timely file an amended cover sheet, the petition is invalid.

Discussion

A Referee's authority is derived from the order of reference (see CPLR 4311; *Marshall v Pappas*, 143 AD2d 979 [2d Dept 1998]; *Lipton v Lipton*, 128 Misc2d 528, 531, *affd* 119 AD2d 809 [2d Dept 1986]; see also *Feder Corp. v Bozkurtian*, 48 AD2d 701 [2d Dept 1985]). "It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the

issues and resolved matters of credibility" (*Steingart v Hoffman*, 80 AD3d 444, 445 [1st Dept 2011], citing *Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]; see also *Melnitzky v Uribe*, 33 AD3d 373 [1st Dept 2006]; *Kaplan v Einy*, 209 AD2d 248 [1st Dept 1994]; *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1st Dept 1985] lv dismissed sub nom *Walker v Sant'Andrea*, 72 NY2d 954 [1988]). "The Special Referee is considered to be in the best position to determine the issues presented" (*Nager v Panadis*, 238 AD2d at 136).

The Court finds that SR Sambuco clearly defined the issues and resolved matters of credibility in a hearing without a transcript. The Court partially confirms SR Sambuco's Report, in that the Court accepts the facts as stated in the Report, but rejects SR Sambuco's conclusions of law. Specifically, this Court rejects SR Sambuco's finding that the Board's initial July 9, 2013 determination that the petition cover sheet was defective pursuant to 9 NYCRR § 6215.2 and the Board Rules for Designating Petitions was proper. The Court finds that the issue regarding non-compliance is moot due to the fact that the petitioner's amended cover sheet is in substantial compliance with the Board's Rules, and it corrected any possible noncompliance error (see Election Law § 6-134[10] ["The provisions of this section shall be liberally construed, not inconsistent with substantial compliance thereto"]; 9 NYCRR § 6215.6[a] ["Except as specifically set forth herein, these rules shall be liberally construed and technical defects shall be disregarded where there has been substantial compliance and where a strict construction is not required for the prevention of fraud"]). The amended cover sheet, which includes the correct information from the original cover sheets, now also indicates the "number of volumes in the petition on the cover sheet" as well as indicates that "the petition contains the number of valid signatures required by the Election Law." Such new information is not confusing and will not lead to confusion and fraud (see *Matter of Siems v Lite*, 307 AD2d 1016 [2d Dept 2003]).

Thus, this Court finds that petitioner's designating petition is valid because (1) the

candidate was not notified of, and given the opportunity to timely cure, the purported defective cover sheet, as required, by the Board Rules (see *Matter of Pearse v New York City Bd. of Elections*, 10 AD3d 461 [2d Dept 2004]; *Matter of Krance v Chiaramonte*, 87 AD3d 669 [2d Dept 2011]); (2) Petitioner's amended cover sheet, which was filed one business day after the NCN letter notice deadline, was properly filed in *substantial compliance* with the requirements of the Election Law and New York State Board of Elections Regulations, and was not confusing, fraudulent, nor did it have a prejudicial effect on the Board (see *Matter of Krance v Chiaramonte*, 87 AD3d at 669; *Matter of Siems v Lite*, 307 AD2d at 1016; *Matter of Most v Walker*, 297 AD2d 356, 357 [2d Dept 2002]; see also Election Law § 6-134[10] and 9 NYCRR § 6215.6). Moreover, the Court is constrained not to ignore the possible drastic deprivation of the petitioner's Federal Constitutional guarantee of the right to vote exercised by seeking election to public office of the City Council for the 8th Council District and the drastic disenfranchisement of the right to vote of the 4,655 petition signers who are exercising their right to vote by signing a Democratic Party designating petition and participating in the political electoral process to designate the petitioner candidate for public office.

Normally, service by mail is deemed complete pursuant to CPLR 2103 when, as here, a properly stamped and addressed letter is delivered to the custody of the United States Post Office (see *St. Clare's Hosp. v Allcity Ins. Co.*, 201 AD2d 718, 719 [2d Dept 1994]). CPLR 2103 provides, in relevant part: "Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, *prior to the latest time designated by the overnight delivery service for overnight delivery*" (CPLR 2103[b][6] [emphasis added]). Although CPLR 2103(b)(6) applies to service on attorneys, this section is made applicable to service on parties that appear *pro se* (see CPLR 2103[b][2], [c]; f[1]). A properly completed and duly executed

affidavit attesting to service by mail raises a presumption that a proper mailing, delivery and receipt occurred (see e.g. *Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Northern v Hernandez*, 17 AD3d 285, 286 [1st Dept 2005]; *Flushing Natl. Bank v Rich-Haven Motor Sales*, 123 AD2d 663 [2d Dept 1986]). A party's merely conclusory denial of receipt, which is not substantiated by probative facts, is insufficient to rebut the presumption that delivery and receipt occurred (see e.g. *Kihl v Pfeffer*, 94 NY2d at 122; *Northern v Hernandez*, 17 AD3d at 286). The petitioner does not dispute that the Board enclosed the NCN letter in a properly enclosed USPS Overnight Express Mail package and deposited it with the USPS waiving the signature receipt requirement, which creates a presumption of delivery and thus, service. However, petitioner has submitted undisputed probative facts sufficient to rebut the presumption of delivery because the USPS did not deliver the letter and it was returned to the Board on July 29, 2013 in contravention of the Board's direction to leave the letter at Ms. Saeed's address. Accordingly, petitioner did not receive the NCN letter, and did not receive actual notice of the cover sheet's deficiencies within the cure period.⁴

Based upon the foregoing, petitioner's oral application to reject the Report and Recommendation of SR Sambuco, dated August 2, 2013 is granted. As such, respondents' oral application to confirm the aforementioned Report is denied.

Accordingly it is,

ORDERED that petitioner's oral application to reject the Report and Recommendation of Special Referee Phyllis Sambuco, dated August 2, 2013, is granted; and it is further,

ORDERED that respondent's oral motion to confirm the Report and Recommendation of Special Referee Phyllis Sambuco, dated August 2, 2013, is denied; and it is further,

⁴ At the oral argument on August 7, 2013, the Board made reference to the possibility that the USPS may have left a notice of an Overnight Express Mail package at Ms. Saeed's address on July 10, 2013. However, SR Sambuco's Report is silent to any reference to this alleged notice, and the Board failed to properly raise or produce any witness testimony from the USPS about such notice.

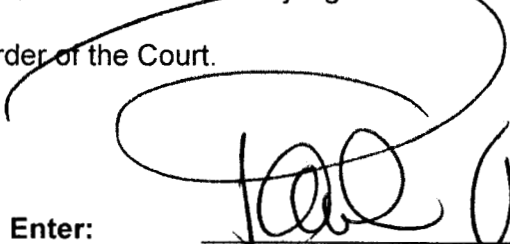
ORDERED that petitioner, Sean Gardner's, application to validate his petition designating him as a candidate for election for the public office of Council Member for the 8th Council District, City of New York, in the Democratic Party primary election to be held on September 10, 2013 is granted, without costs and disbursements; and it is further,

ORDERED that respondent Board of Elections in the City of New York shall print and place the name of the petitioner Sean Gardner as a candidate for election for the public office of Council Member for the 8th Council District, City of New York, in the Democratic Party primary election to be held on September 10, 2013, upon the official ballots for September 10, 2013, primary election; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: August 9, 2013

Enter: 
Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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