

**Matter of McMillan v Commissioners of Elections of
the City of NY**

2013 NY Slip Op 32249(U)

September 23, 2013

Sup Ct, New York County

Docket Number: 101243/13

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
**JAMES EARL MCMILLAN, III a/k/a JIMMY
MCMILLAN,**

Petitioners,

INDEX NO. 101243/13

-against-

MOTION SEQ. NO. 001

COMMISSIONERS OF ELECTIONS OF THE
CITY OF NEW YORK, BOARD OF ELECTION
IN THE CITY OF NEW YORK,

FILED

SEP 25 2013

Respondents.

COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo) _____

Reply Affidavits — Exhibits (Memo) _____

Cross-Motion: Yes No

Motion Sequences 001 and 002 are hereby consolidated for purposes of disposition.

James Earl McMillan, III a/k/a Jimmy McMillan (petitioner), brought this proceeding pursuant to Election Law § 16-102(1), to validate his independent nominating petition from the Rent is 2 Damn High Party as a candidate for the public office of Mayor of the City of New York, for the General Election to be held on November 5, 2013 (motion sequence 001). Also before the Court is a motion by Commissioners of Elections of the City of New York and the Board of Elections in the City of New York (Board) (collectively, respondents) to dismiss the proceeding, pursuant to CPLR 3211(a)(2), for lack of subject matter jurisdiction (motion sequence 002).

BACKGROUND AND FACTS

On August 20, 2013, petitioner filed an independent nominating petition from the Rent is 2 Damn High Party as a candidate for the public office of Mayor of the City of New York, for the

General Election to be held on November 5, 2013. The independent party nominating petition cover sheet indicated that the petition contained fifteen volumes, with volume numbers: NY1301485, NY1301486, NY1301487, NY1301488, NY 1301489, NY1301490, NY1301491, NY1301492, NY1301493, NY1301298, KG1301549, KG1301550, KG1301551, KG1301565 and KG1301566. The cover sheet indicates that "the petition contains the number, or in excess of the number, of valid signatures required by the Election Law" (Order to Show Cause [OSC], exhibit 1). The cover sheet also indicates the name, address, and phone number of the petitioner as the contact person to correct any cover sheet deficiencies (*id.*; petitioner's one in evidence). The Board did not receive any General Objections within three days, as required by the Board Rules, or subsequent legal objections to petitioner's independent nominating petition.

By letter dated August 23, 2013, the Board sent a notice of non-compliance letter (NCN Letter) by United States Postal Service (USPS) Guaranteed Overnight Express Mail, to the petitioner. The NCN Letter stated that the petitioner's independent nominating petition "failed to comply with the New York State Board of Elections Regulations, 9 NYCRR § 6215 of the Board Rules. . . adopted on June 3, 2013" because (1) the "[c]andidate claims [petition] volumes which was never filed"; and (2) "[c]andidate claims entirety of Volume Identification Number NY1301298 but does not appear on every page" (OSC, exhibit 2). The NCN Letter also indicated that "[t]his defect may be cured within (3) business days of the date of this letter by the filing of an amended cover sheet. . . Failure to amend the cover sheet within the three (3) day period shall be a *FATAL DEFECT*" (*id.*; see also petitioner's two in evidence).

On August 26, 2013, the petitioner timely filed an amended independent party nominating petition cover sheet. The amended petition cover sheet indicated that the petition is comprised of thirteen volumes, with volume numbers: NY1301485, NY1301486, NY1301487, NY1301488, NY 1301498, NY1301490, NY1301491, NY1301492, NY1301493, KG1301550, KG1301551, KG1301565 and KG1301566 (OSC, exhibit 3). The thirteen volumes comprise a

total of 10,253¹ valid signatures for the public office that requires only 3,750 valid signatures (*id.*). The amended cover sheet also states under the list of petition identification numbers, that “[c]andidate does not claim [volumes] NY1301298, KG1301549” (*id.*; petitioner’s three in evidence).

At a public hearing on September 3, 2013, the Board invalidated petitioner’s independent nominating petition. The Board mailed correspondence to petitioner that same day, dated September 3, 2013, by first class mail notifying him of their determination. The correspondence stated that the Board found, pursuant to a meeting of the Commissioners, that the amended cover sheet was not in substantial compliance with the Board’s Rules governing same, and invalidated it on the grounds that it “claims petition volumes on which the candidate does not appear” (OSC, exhibit 4; Petitioner’s four in evidence).

The Herein Proceeding

On September 6, 2013, petitioner filed and timely commenced this special proceeding by OSC to validate his independent nominating petition, pursuant to Election Law §16-102(1), on the last day to commence such a proceeding. Petitioner filed the unsigned OSC with the Clerk of the Court, along with an Affidavit of petitioner in support, which incorporated various exhibits, and an attorney’s affirmation in support, which referenced and incorporated the same exhibits. Pursuant to the OSC, the parties appeared before the Court on Monday, September 9, 2013, the next business day after the OSC was brought by the petitioner. The respondents requested additional time to review petitioner’s submissions and such request was granted. The matter was adjourned until September 11, 2013.

On September 11, 2013, respondents served in Court a demand for a Bill of Particulars

¹ The Court, with the consent and assistance of counsel for both parties counted the number of signatures in the nominating petition. All parties agree that the thirteen volumes contain 10,253 signatures.

(BP), as well as a motion to dismiss the petition, pursuant to CPLR 3211(a)(2), on the basis that the Court lacks subject matter jurisdiction over the proceeding as the petitioner failed to file a verified petition with his application, as required by Election Law §16-116. The matter was then adjourned until September 16, 2013, for petitioner to review respondents' motion to dismiss and submit papers in opposition. On September 13, 2013, petitioner served the Court with his Verified BP and his opposition to respondents' motion.

Subsequently, on September 16, 2013, the Court held a hearing on the record, wherein it took testimony from the petitioner as well as heard oral argument on the matters pending before the Court. The following documents were entered into evidence during the hearing: (1) petitioner's independent nominating petition cover sheet, filed on August 20, 2013; (2) the Board's NCN Letter dated August 23, 2013; (3) petitioner's independent nominating petition amended cover sheet, filed on August 26, 2013; (4) the Board's determination invalidating the petitioner's amended cover sheet, which was time-stamped "NOT VALID CURE" on September 3, 2013; (5) the Board's determination letter, dated September 3, 2013, sent to the petitioner on that same date by first class mail, which invalidated the amended cover sheet; (6) Computer Generated Board Ledger Book (public record); and (7) thirteen volumes of the petitioner's independent nominating petition.

DISCUSSION

Respondent's Motion to Dismiss

In support of their motion to dismiss, respondents allege, *inter alia*, that the Court lacks subject matter jurisdiction over the proceeding as the petitioner violated Election Law § 16-116, by failing to file a verified petition with his application. Respondents also proffer that the Appellate Division, First Department's decision in *Flacks v Bd. of Elections in City of New York* is misplaced, and therefore is not applicable here (109 AD3d 423, 2013 NY Slip Op 05713 [1st Dept 2013], *lv denied* 2013 NY Slip Op 82589 [2013] [table; text at 2013 WL 4437179, 2013 NY

LEXIS1788 (2013))].

In opposition, petitioner maintains that respondents' motion must be denied and his petition granted on the basis that his affidavit in support of his application, filed on September 6, 2013, which incorporates exhibits, contains sufficient information to be construed as a verified petition. In addition, petitioner alleges, *inter alia*, that the amended cover sheet contained a scrivener's error that petitioner transposed a "98" instead of an "89" for volume NY1301489, among the thirteen volume numbers listed on the amended cover sheet. Petitioner maintains that the facts here are nearly identical to the facts and issues that the Appellate Division, First Department decided on August 14, 2013, in *Flacks* (109 AD3d 423, 2013 NY Slip Op 05713 [1st Dept 2013], *lv denied* 2013 N.Y. Slip Op 82589 [Ct App, 2013] [table; text at 2013 WL 4437179, 2013 NY LEXIS1788 (2013)], *supra*). Petitioner proffers that he, like the petitioner in *Flacks*, made a transcription error in listing a volume number in his amended petition cover sheet, yet the ledger kept by the Board of Elections showed the correct signature volumes (see Petitioner's Opposition to Board's Motion to Dismiss).

The Court, in reviewing the OSC, specifically petitioner's affidavit in support which incorporates and references various exhibits, finds that said papers are sufficient to satisfy the requirements of a verified petition (see CPLR 403[d]; *Lev v Lader*, 115 AD2d 522, 522 [2d Dept 1985] ["Special term did not abuse its discretion in construing petitioner's order to show cause and accompanying papers as a petition... [i]n determining the sufficiency of a petition, the court may consider the affidavits submitted therewith in order to facilitate the swift adjudication intended to be achieved by way of a special proceeding]).

A petition in a special proceeding "must notify the opponent of the nature of the claim and frame the issues" (see CPLR 3013 ["Statements in a pleading must be sufficiently particular to give the court and parties notice of the transactions, occurrences. . . intended to be proved and the material elements of each cause of action or defense"]).

Petitioner's properly sworn affidavit² references and incorporates the independent nominating petition cover sheet, the August 23, 2013 NCN Letter, the amended cover sheet and the September 3, 2013 Board notification letter.³ Further, petitioner's affidavit even includes the phrase that "[n]o previous application has been made to this or any other court for the relief sought herein" (OSC, Affidavit in Support). Additionally, the application also includes an attorney affirmation, which references and incorporates the same four exhibits as petitioner's affidavit. The Court finds that the petitioner's affidavit, read in conjunction with the exhibits and attorney affirmation, which incorporated the same information as contained in the affidavit, qualifies as a verified petition, in satisfaction of CPLR 403, and to the extent that the affidavit does not bear the title of petition, it does not violate any substantial right of the respondents and the defect may be disregarded as a mere irregularity (see CPLR §§ 2001, 103[c]). Moreover, the OSC and papers attached thereto give respondents adequate notice of the claim and relief requested (see *Lev*, 115 AD2d at 522 ["When read together, the petitioner's order to show cause and the moving papers in support thereof notify [respondents] with sufficient particularity of the transactions petitioner intends to prove, as well as the elements of his claim, as required by CPLR 3013"]; see also *Matter of Guarneri v Town of Oyster Bay*, 224 AD2d 695 [2d Dept 1996] [Respondent not prejudiced by court designating petitioner's order to show cause and accompanied documents a 'petition' where petitioner failed to do so, since petitioner's documents provided adequate notice of the claim and of the relief requested]; see e.g. *Matter of Page v Ceresia*, 265 AD2d 730 [3d Dept 1999] [Court upheld the denial of respondent's motion to dismiss petitioner's Election Law §16-102 petition commenced by the filing of an order to show cause and affirmation verified by petitioner's attorney, which was brought on

² The Board does not contest that the affidavit was properly sworn by the petitioner.

³ These original items were produced by the Board at the hearing on September 16, 2013 and were deemed marked into evidence as petitioners one through four in evidence.

jurisdictional grounds for failure to commence the proceeding upon a verified petition pursuant to Election Law §16-116]). In the light of the foregoing, the Court finds that respondents' motion to dismiss pursuant to CPLR 3211(a)(2) is denied on the grounds that petitioner's OSC, and application brought pursuant to Election Law § 16-102(1); does not violate Election Law § 16-116.

Application to Validate the Independent Nominating Petition

It's undisputed that petitioner made one scrivener's error on his amended cover sheet. When copying the volume numbers from the cover sheet to the amended cover sheet, petitioner transposed a "98" instead of an "89" for volume NY1301489 (OSC, exhibit 3). During the September 16, 2013 hearing, petitioner testified on the record as to the following amendments that he made to the amended petition cover sheet, which was timely filed with the Board. Petitioner stated that when writing in the amended cover sheet he was rushing, as it was the last day to amend the petition cover sheet, and he had used the sample cover sheet provided by the Board. He stated that there was such a small space on the sample cover sheet that it was difficult to write in the volume numbers.

The Court finds that petitioner testified truthfully to the facts set forth in the chart created by the Court below, and his testimony is supported by the documents placed into evidence:

ORIGINAL COVER SHEET VOLUMES LISTED	AMENDED COVER SHEET VOLUMES LISTED	TESTIMONY BY PETITIONER REGARDING THE FACE OF THE COVER SHEET
NY1301485	NY1301485	SAME VOLUME
NY1301486	NY1301486	SAME VOLUME
NY1301487	NY1301487	SAME VOLUME
NY1301488	NY1301488	SAME VOLUME

NY13014 89	NY 13014 98	Scrivener's error transposed "98" instead of "89"
NY1301490	NY1301490	SAME VOLUME
NY1301491	NY1301491	SAME VOLUME
NY1301492	NY1301492	SAME VOLUME
NY1301493	NY1301493	SAME VOLUME
NY1301298	STATES CANDIDATE DOES NOT CLAIM NY1301298	DISCLAIMED VOLUME
KG1301549,	STATES CANDIDATE DOES NOT CLAIM NY1301549	DISCLAIMED VOLUME
KG1301550	KG1301550	SAME VOLUME
KG1301551	KG1301551	SAME VOLUME
KG1301565	KG1301565	SAME VOLUME
KG1301566	KG1301566	SAME VOLUME

The Court finds that the error made by petitioner was unintentional, and made while rushing to complete the amended cover sheet within the small space allotted on the Board's sample cover sheet. The amended cover sheet otherwise correctly identified twelve of the thirteen volumes which, without considering the 864 signatures⁴ contained in the one misidentified volume, contain exactly 9,389 signatures, which greatly exceeds the 3,750 valid signatures otherwise required to qualify the candidate for the general election ballot for the public office of Mayor. This is analogous to *Flacks*, insofar as "[t]here is no claim that the 'mistake' defrauded or misled the public or was used for any improper purpose. In fact, the original cover sheet correctly identified these volumes, notwithstanding other errors that required amendment. Additionally, the ledger maintained by the Board of Elections correctly

⁴ The Court, with the consent and assistance of counsel for both parties, counted the signatures in each volume of the independent nominating petition.

identified all of the volumes in the petition" (*Flacks*, 109 AD3d at 423).

Accordingly, the Court finds that petitioner's independent nominating petition is valid, that petitioner's amended cover sheet was proper and in substantial compliance with the requirements of the Election Law and New York State Board of Elections Regulations, 9 NYCRR § 6215 of the Board Rules adopted on June 3, 2013, and was not confusing, fraudulent, nor did it have a prejudicial effect on the Board (see *Matter of Krance v Chiamonte*, 87 AD3d 669 [2d Dept 2011]); *Matter of Siems v Lite*, 307 AD2d 1016 [2d Dept 2003]; *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 petitioner seeking election to public office of Mayor of the City of New York, and the drastic disenfranchisement of the right to vote of the 10,253 people who exercised their right to vote by signing an independent nominating petition, and participated in the political electoral process to designate the petitioner as a candidate for public office (see *Staber v Fidler*, 65 NY2d 529 [1985]). Thus, this Court following *Flacks*, must conclude that it was improper for the Board of Elections to conclude that the scrivener's error was a fatal defect, rendering this candidate ineligible for the ballot. As such, the Court finds that petitioner's application to validate his independent nominating petition from the Rent is 2 Damn High Party as a candidate for the public office of Mayor of the City of New York, for the General Election to be held on November 5, 2013 is granted.

CONCLUSION

Accordingly it is,

ORDERED that respondents' motion to dismiss the petitioner's application for lack of subject matter jurisdiction, pursuant to CPLR 3211(a)(2), is denied; and it is further,

ORDERED that petitioner James Earl McMillan, III a/k/a Jimmy McMillan's petition to validate his independent nominating petition from the Rent is 2 Damn High Party as a candidate for the public office of Mayor of the City of New York, for the General Election to be held on November 5, 2013 is granted; and it is further,

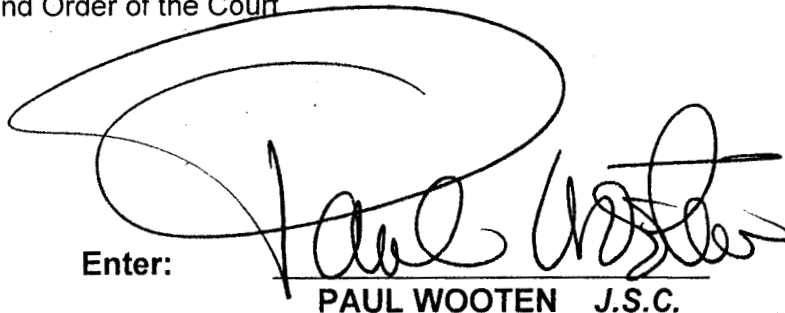
ORDERED that respondent Board of Elections in the City of New York shall print and place the name of the petitioner James Earl McMillan, III a/k/a Jimmy McMillan as said Candidate upon the official ballots of such General Election; and it is further,

ORDERED that the petitioner is directed to serve a copy of this Order with Notice of Entry upon the respondents and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court

Dated: *Sept. 13, 2013*

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST

FILED

SEP 25 2013

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